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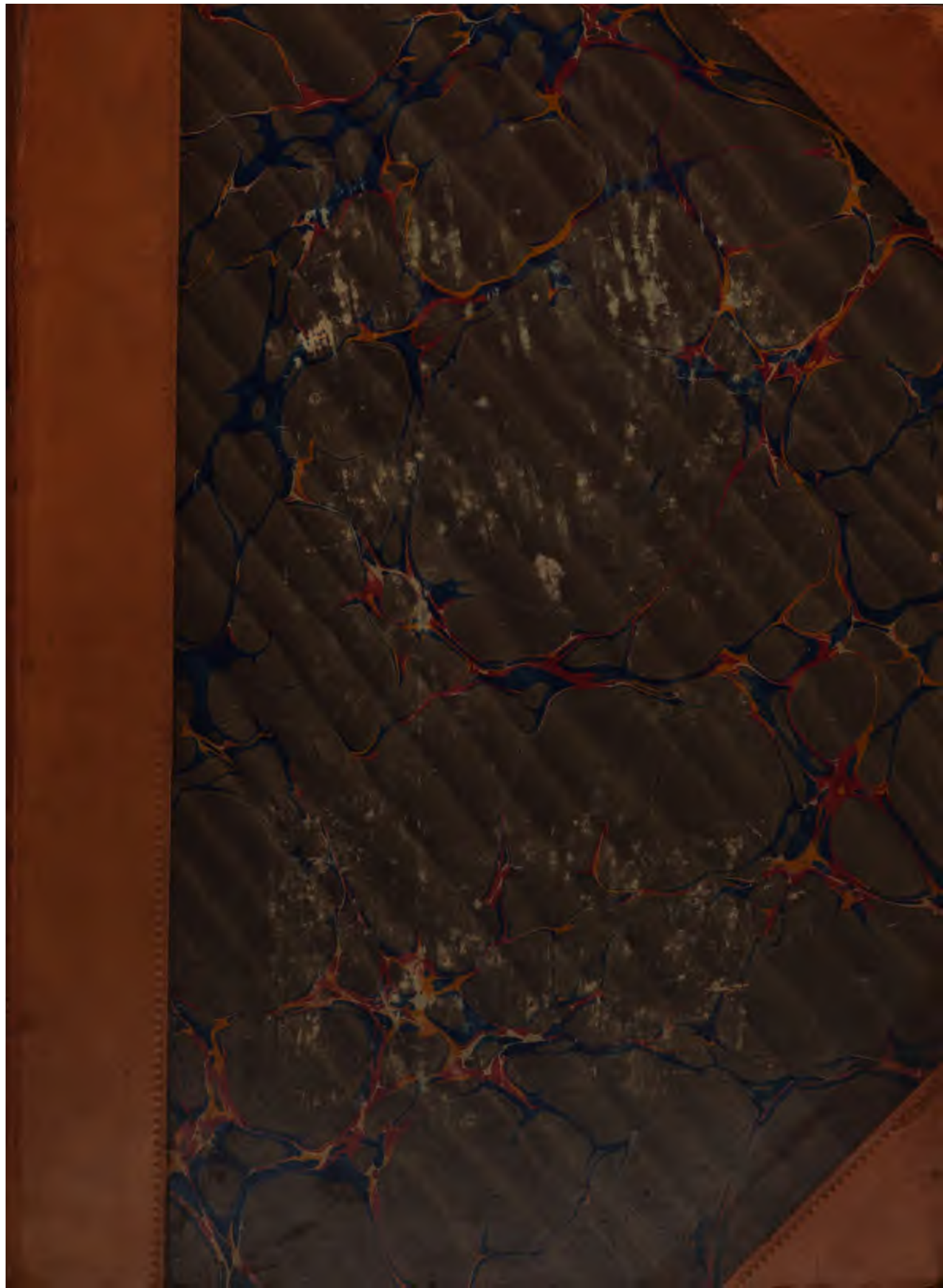
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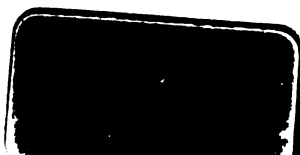
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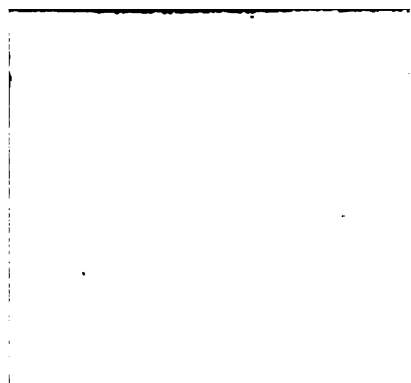
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REPORTS OF CASES

DECIDED IN

THE SUPREME COURTS OF SCOTLAND,

AND IN THE

HOUSE OF LORDS ON APPEAL FROM SCOTLAND,

&c. &c.

HOUSE OF LORDS CASES FROM 9TH FEBRUARY 1841, TO 21ST FEBRUARY 1842.

COURT OF SESSION CASES, &c., FROM 12TH NOVEMBER 1841, TO 12TH NOVEMBER 1842.

BY

(HOUSE OF LORDS, &c.)

W. H. DUNBAR, ESQ., ADVOCATE;

(FIRST DIVISION, &c.)

HENRY BEVERIDGE, ESQ., ADVOCATE;

(SECOND DIVISION, &c.)

JOHN WARDLAW, AND GEO. DINGWALL FORDYCE, ESQRS., ADVOCATES.

BEING

A CONTINUATION OF THE SCOTTISH JURIST.

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ERRATA.

Page 674, 1st col., 9th line from the foot, *for* " declaration," *read* " declarator."

— 675, 1st col., 21st line from the foot, *for* " least unexceptionable," *read* " least exceptionable."



REPORTS OF CASES

DECIDED IN

THE COURT OF SESSION, &c.

12th November 1841.

FIRST DIVISION.—(H. B.)

No. 1.—ANDREW GARLAND, *Petitioner*, v. PETER STEWART and OTHERS, *Respondents*.

Proof—Presumption—Death—Heritable and Moveable—1. *Circumstances in which a sailor, after an absence of thirty-seven years without being heard of, was presumed to be dead.* 2. *A sum of money, with interest, arising from a compulsory sale of the sailor's property under a Statute which expressly provided against any innovation of existing interests, found to be heritable, and allowed to be uplifted by his heir-at-law, on security to repeat in the event of his reappearance.*

In 1802, Joseph Garland, a sailor belonging to Dundee, sailed from that port for the west of England, and in the spring of 1803, under apprehension of impressment for the navy, left his vessel at Beaumaris, and, travelling to Liverpool, embarked for Pictou in America. It was understood that he afterwards went to Portsmouth, in New Hampshire, and hired himself as seaman in an American vessel trading to the West Indies. Nothing has been heard of him since 1804. His age, at present, would be about fifty-eight.

Before leaving Dundee he had succeeded, under his father's settlement, to the *pro indiviso* half of a tenement of houses in that town,—the other half going to his brother, the petitioner. In 1811, this property was sold under an Act of Parliament (51 Geo. III. c. 15, local and personal), obtained by the town-council for improving and widening the street in which it is situated. The Act (§ 7) provides, that in the cases of persons labouring under any legal incapacity, the proceeds of any of their property sold under it, should be employed in paying off land-tax or other burdens affecting it, or failing them, in purchasing other houses and subjects of the like nature, the rights and titles being "devised to the same person or persons, or for their benefit, to the same uses and purposes, and under the same provisions, conditions, and limitations as the houses and other subjects taken and used for the purposes of this Act;" and § 10 enacted,

"That in case any person or persons, to whom any sum or sums of money shall be awarded for the purchase of any house or other subject to be purchased by virtue of this Act, shall refuse to accept the same, or shall not be able to make a good title to the premises, to the satisfaction of the said Magistrates and Town-council; or in case such person or persons, to whom such sum or sums of money shall be so awarded, as aforesaid, cannot be found; or if the person or persons entitled to such lands, houses, or other subjects, be not known or discovered, then, and in every such case, it shall and may be lawful to and for the said Magistrates and Council to order the said sum or sums of money, so awarded as aforesaid, to be paid into the Bank of Scotland, or Royal Bank of Scotland, to the

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credit of the parties interested in the said houses or other subjects" (describing them), "subject to the order, control, and disposition of the Court of Session; which said Court, on the application of any person or persons making claim to such sum or sums of money, or any part thereof, by petition, shall be, and is hereby empowered, in summary way of proceeding, or otherwise, as to the Court shall seem meet, to order the same to be laid out and vested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the respective estate or estates, title or interest, of the person or persons making claim thereunto; and to make such other order in the premises as to the said Court shall seem just and reasonable."

The sum awarded for the property was £800, of which one-half was paid to the petitioner, and the other half consigned, in terms of the Act, for the behoof of Joseph Garland. On the presumption of his death, Andrew Garland presented the present petition for warrant to uplift the consigned money, with the interest which had accrued upon it.

The Court ordered intimation to be made in certain Scotch and English newspapers, and afterwards remitted to Lord Ivory, who ordered special intimation to be made to the petitioner's nearest of kin. These were originally three sisters, Helen, Barbara, and Jean Garland. Helen died in 1797, leaving one daughter, who died soon after. Barbara died unmarried in 1834. Jean died in 1832, leaving children, who, under the special intimation made to them, entered appearance as respondents. A record was accordingly made up, in which

The petitioner *pleaded*—1. Under the provisions of the Statute 51 Geo. III. c. 15, and also at common law, on account of the compulsory nature of the sale of Joseph Garland's property, the price of that property consigned on his account in the Bank of Scotland, remains heritable, and, on the supposition of his death, falls to the petitioner as his heir-at-law. 2. In regard to the interest due upon the principal sum consigned, that also falls to the heir-at-law, the presumption, in the absence of direct evidence of death, being, that Joseph Garland died before the consignment of the money, by which time he had been missing for a period of above seven years. 3. If it is not to be presumed that Joseph Garland died before Whitsunday 1812, in consequence of the probability of his having perished about the time when he was first amissing, then the presumption in favour of life ought to extend to the longest possible period, and therefore to a period subsequent to the death of Jean Garland, on 15th of October 1832, in which case the petitioner would be entitled to the interest of the consigned money, as Joseph's sole survivor and next of kin. 4. At all events, as Barbara

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Garland survived Jean, she was entitled, and the petitioner, as her next of kin, is now entitled to one-half of any interest which may be held to be due to the executors or next of kin of Joseph Garland. 5. The prospect of the respondents succeeding as heirs of Joseph Garland is, in the circumstances, so extremely remote, as not to justify the retention of the money on any plea of the possibility that Joseph Garland may be in life.

The respondents *pleaded*—1. Whether the legal presumption for life has been overcome in the circumstances, is matter for the consideration of the Court; and until it be determined that there is sufficient in the circumstances of this case to presume that Joseph Garland is dead (which the respondents do not admit), there are no *termini habiles* on which this application can be supported to that effect or extent. 2. Supposing it to be held that Joseph Garland is to be presumed dead, the fair inference, in the circumstances, is, that he must have died subsequent to 1812, and prior to 1832, at least there are no circumstances tending to instruct that he is dead, which did not exist in 1832, and the presumption for his death, as at that date, is at least as strong as that he has died since. 3. Supposing Joseph Garland to be presumed dead, the fund in question is to be held moveable, and at all events, the interest thereof must be held as moveable, and the respondents, as representing their mother, who was one of the next of kin of Joseph Garland, are entitled to their proper share of said moveable funds.

The petition, as originally presented, prayed for authority to uplift the money consigned, with or without caution; but the petitioner afterwards put in a note, offering to find unexceptionable caution to repeat the money paid to him, in case Joseph Garland should ever appear to claim it.

The cause was this day advised on minutes of debate.

Lord President.—The only point of consequence appears to me to be, whether, on the presumption of Joseph Garland's death, we can apply it so as to exclude the respondents from claiming a share of the fund. There can be no doubt, I presume, as to the question of heritable and moveable. The price awarded for the house is evidently a *surrogatum*, and must be held to be heritable, both in terms of the Statute, which are very specific, and also at common law. The other point is more difficult; but unless we hold that the death took place at some date between 1812 and 1832, the respondents have no claim.

Lord Gillies.—The puzzling point is to fix the period of the death, and it would be desirable to have all possible light thrown upon it; but unfortunately there is none. My opinion is, that the petitioner is entitled to get all, or the greater part of the money consigned. If not a certainty, there is a very strong probability of the death; and since caution to repeat is offered, I cannot see, in the circumstances, that more is necessary. My own impression is, that the man died before 1812; for on an opposite supposition, his silence seems to me unaccountable. He was aware that a succession had opened to him, but he makes no demand upon it from 1804 to 1812. The presumption is, that he had died before the latter period,—not that he survived it, and died afterwards at some period between 1812 and 1832. In this view, the whole fund belongs to the petitioner, but it seems reasonable, in any view, to allow him to uplift the greater part of the sum on caution,—the remainder lying consigned.

Lord Fullerton.—The case is attended with considerable difficulty. It appears that advertisements have been inserted in newspapers in this country. A better method for ascertaining the fact would have been, to have inserted them in the news-

papers of the country to which he is understood to have gone. In that way certain information might have been obtained, showing both when he died, and where. The essential point now is, who is to get the money? It is true the petitioner offers caution, but the respondents may also offer it, and then the question of preference can only be determined by the presumed period of the death.

Lord Mackenzie.—There are here two questions totally distinct. The first respects the nature of the fund; and I think there can be no doubt that it is heritable. There is nothing in the Act of Parliament to change its nature, and without that, it is clear at common law that it is heritable. The petitioner is therefore entitled to the fund consigned as a *surrogatum*, provided it is shown that an opening has been made for his succession by the death of the proprietor. Is the death then proved, as in a question between the petitioner and the absent party, or rather the Court, as protecting his interest? I rather think it is so proved. After the long lapse of time—the disappearance and total silence—I think the heir is entitled to get possession of the principal on proper security, and with the principal, the rents; for I view the interest as rent. But then comes the question with the executors. Before the succession opened, the rents fell into the estate of the absentee, and form part of the executry, and after it opened, they fell to the heir. It is therefore necessary, in order to decide the competing claims, to fix the time of presumed death. The time of sale is of no consequence. The question is, when did he die? If he died before 1812, the heir takes the whole, both heritage and rents; but on the other hand, if he survived that period, there was a time after the sale when the heir was not in possession, and when, of course, the rent or interest not belonging to him but to the deceased, must go to the heir *in mobilibus*. We must thus determine in some way when the death must be presumed to have taken place. It is certainly difficult to determine this. Nothing has been heard of the man for the long period of thirty-seven years, and we have no account of when or how he died. We hear of no battle, or pestilence, or shipwreck, or accident of any kind. If any light could be thrown on the subject, it would be satisfactory; but if none can be thrown on it, I agree with Lord Gillies, that in fixing the period, we must go back a good long way; for, as he never inquired after his succession, the probability is that he had died soon.

Lord President.—I agree with your Lordships, that the fund, after the sale, belonged to the heir-at-law. The Act of Parliament gives full effect to existing interests, and declares that they were not to be innovated. It is impossible for the respondents to claim the principal, but the question remains as to the interest; and the only way of determining it, is to fix the period at which death must be presumed to have taken place. It may be said that the period, however fixed, must be arbitrary. It is so; but considering the long absence without any communication by correspondence or otherwise, and the fact (for it is a strong circumstance) that this man went out of the way in time of war, and must have been exposed to its vicissitudes, I am inclined to adopt the view of Lord Gillies, that the death must have taken place at an early period, and that the petitioner ought to get the greater part of the money, on giving unexceptionable security.

The Court pronounced the following interlocutor:

"The Lords having advised the application for Andrew Garland, with the revised minutes of debate, Find him entitled in the meanwhile, in the circumstances of the case, to receive out of the fund consigned in the Bank of Scotland, the principal sum of £400, with one-half of the interest due thereon, since the term of Whitsunday 1812, on caution being found before extract to repay the same to the said Joseph Garland in case of his reappearing, or to any one in his right entitled to receive the same; and grant warrant to, authorise and ordain the treasurer of the Bank of Scotland to pay the said sums accordingly; and also grant warrant to, authorise and ordain the Magistrates and Town-council of Dundee, to deliver up to the petitioner the deposit-receipt of the treasurer of the said bank, in order to be given to the said treasurer upon payment, as now authorised: Also, find the respondents entitled to payment, in the meantime, out of the remaining fund, of the expense

incurred by them in this process, on caution, in like manner, to repay the same to Joseph Garland, or to any one in his right entitled to receive it, should the Court so appoint; and remit the account of expenses to the auditor to tax the same and to report, and decern *ad interim*; reserving to the petitioner, and to the respondents, hereafter to apply to the Court in regard to the remaining funds; and appoint the Bank of Scotland to grant a new receipt for the balance of the said fund, to abide the orders of Court."

Petitioner's Authorities.—Bell's Com. Vol. II. pp. 6 and 12. Ersk. B. II. t. 2, § 17, also t. 8, § 23, and t. 12, § 45. Ross, Jan. 23, 1793. Lady Christina Brown, March 6, 1798. Henderson, Dec. 14, 1796. Phillips on Evidence, cap. 20, § 1, p. 468. Lawrie v. Drummond, 18th Feb. 1670; Mor. 12,643. Hay, 19th June 1663; Mor. 5956. French v. Earl of Wemyss; Mor. 12,644. Sands, 7th Dec. 1668; Mor. 12,645. Lord Ashburton, 2d Feb. 1811. Campbell v. Lawson, June 17, 1824, and 1st Feb. 1834. Fettes v. Gordon, 7th July 1825.

Respondents' Authorities.—Burns v. Ogilvie, 2d Jan. 1753; Mor. 11,667, and Elchies' Notes, Vol. II. *voce* Proof, No. 11. Forrester v. Boutcher, 12th Feb. 1760; Mor. 11,674.

Lord Ordinary, Ivory.—Act. Solicitor-General (M'Neill), Christison; William Miller, Agent.—Alt. Cowan; J. S. Ducat, Agent.—B. Clerk.—[H.B.]

12th November 1841.

SECOND DIVISION.—(J.W.)

No. 2.—ALEXANDER DUKE OF HAMILTON, *Objector*,
v. JOHN URQUHART, *Respondent*.

Teinds—Stipend—Augmentation.—An heritor holding a feu-right to his teinds for payment of a certain quantity of meal annually to the titular, or, in his option, to the minister of the parish, had an amount of stipend laid upon his lands equal to the value of the teind-duty.—Held, in providing for a subsequent augmentation, that it must be laid proportionally upon the teinds of the lands of the titular and the heritor, after deducting from the gross amount of those of the heritor the teind-duty payable by him as old stipend.

This is a question in the process of locality of the augmented stipend which, in 1832, the Court modified to the ministers of the parish of Hamilton. The respondent is proprietor of certain lands and teinds in the parish, held of and under the Duke of Hamilton, who is titular of the parish. The words of the redendo for the teinds are—"Paying to us, or at our option to the ministers of Hamilton and their successors," a certain quantity of oatmeal annually. The teind-duty thus payable was liable, according to the established principles of allocation, to be localised upon, *primo loco*, for the stipend of the minister, and was so appropriated by the titular from a very early period. The point raised in the present locality is, whether, in ascertaining the augmented stipend to be allocated upon the teinds of Mr Urquhart's lands, the teind-duty appropriated to the minister is, or is not to be deducted from their gross value.

The Duke of Hamilton submitted, that the deduction ought not to be allowed. Teinds, when in the natural possession of, and drawn by the titular, are considered as free teinds, liable to be allocated, *primo loco*, for the maintenance of the minister. But if the titular confer on the heritor a right to his teinds, the consideration being an annual payment or duty, such duty is also liable to be allocated upon *primo loco*. The teind-duty is not a payment by the heritor out of his teinds, but the consideration which the titular receives for transferring the absolute right to the teinds. If the respondent's proportion of the augmentation

were to be allocated only on his surplus teind, after deducting the teind-duties, his teinds, in that case, would be held blench. The consideration for the right may or may not be the full value at the time. It cannot be assumed, in the present instance, that the duty was the full value of the teinds of the land at the time; and though they should increase twenty-fold in value, the titular would have no claim upon them. Farther, if the titular should stipulate for a sum of money instead of for an annual payment or duty, he is entitled to do with the price what he pleases, and the heritor could not deduct any part of the price, or the interest of it, from the gross amount of his teinds.

On the other hand, the respondent, assuming his rental to be such as to bring out the gross value of his teinds at £50, and assuming the extent of his teind feu-duty, already allocated to the minister, £20,—then, to the extent of the remaining £30, being the amount of the unexhausted teinds in his hands, he could not dispute that he was open to be allocated upon for augmented stipend *pro rata* with the other heritors, in respect of the unexhausted teinds in their hands. Beyond such proportional liability, however, it was considered that he could not be subjected in any payment on account of his teinds, either to the titular or to the minister. The teind-duty is the full equivalent of the teinds; and supposing that no increase in value had taken place, the principle contended for by the Duke would lead to nothing else than making the heritor, after he has paid the full value of his teinds under the name of teind-duty, pay the same amount over again, out of the stock, in name of augmented stipend. In the case of a proper sale of teinds under the Statutes, the titular is not required to allocate the interest of the price; but this is explained by the authorities to proceed on the difference between a forced sale at an undervalue by the Statutes, and a voluntary sale or feu where the full value is presumed to be taken. The principle for which his Grace contends stands ruled against him by a judgment of the Court, pronounced in an action at his own instance, and affirmed in the House of Lords. 15th December 1835; House of Lords, May 12, 1837, Sh. and M'L., II. p. 586.

The Lord Ordinary pronounced the following interlocutor, May 22, 1840:

"Finds that the respondent and sundry other heritors in the parish hold feu-charters of their several lands, and of the teinds thereof, originally granted by the Hamilton family to their predecessors in the seventeenth century: Finds that the said feu-charters contained stipulations, whereby the feuars, respectively, were bound to pay or deliver certain sums or quantities of victual to the superior, or, in his option, to the minister of Hamilton, annually, in name of teind-duties: Finds that these teind-duties were in general appropriated to the minister, and paid by the heritor to him, to account of the old stipend payable at the date of the feu-charters, and that the noble superior's family, as lay proprietors in the parish, paid the balance of the old stipend: Finds that the teind-duties being thus applied, exhausted all further claim on the part of the superior for teinds for the several years in which they were paid: Finds that, when a subsequent augmentation was awarded in 1697, the same was provided for by certain small additions made to the teind-duties of the feuars, which were, in many instances, specified in the renewed charters granted by the Duke's predecessors, while the remainder of the stipend, as thus augmented, continued to be paid by the noble pursuer's predecessors: Finds that augmentations were awarded in or about 1795 and 1814, and that these augmentations were provided for by a final

scheme of locality in 1826, which proceeded on the principle, that the allocations for the old stipends were not to be disturbed, and that the said later augmentations were to be laid proportionally on the teinds of the lands of his Grace, and of the feuars holding right to their teinds (in respect of their several valued rents, as ascertained either by decrees of valuation, or failing these, by schemes of the proven rental), but always after deduction from the said teind of the old stipend laid upon the lands of the said feuars respectively: Finds that the same principle of allocation must be followed in apportioning the augmentation of 1832; and remits the case to the clerk to make up a scheme of locality in conformity with these findings: Finds the respondent, Mr Urquhart, entitled to expenses from his Grace the Duke of Hamilton, and remits the account thereof, when lodged, to the auditor to tax and report."

Against this interlocutor the Duke presented a reclaiming note, praying that it should be recalled, and found,

"that in allocating the stipend upon the respondent's lands and teinds, the teind-duty payable by him must first be allocated as free teind in the titular's hand; that such teind-duty does not form any part of the stipend exigible out of the respondent's teinds; and that the stipend effeiring to his land falls to be allocated upon the teinds rateably with the titular and the other heritors having heritable rights to their teinds, irrespective of said teind-duty, and to remit to the clerk to prepare a locality in conformity with these findings."

The draft of an interlocutor, such as the Duke proposed, was submitted to the Court, and was conceived in the following terms:

"The Lords having heard counsel for the parties, recal the last two findings in the interlocutor reclaimed against, and find that the teind-duties fall to be *primo loco* localled; and that such farther payments of stipend, if any, as may have been made under the former decrees of locality by the respondent and pursuer respectively, are to be continued; and, *quoad* the augmented stipend, find that the same falls to be allocated upon all the heritors having heritable rights to their teinds, in proportion to the real rents of their lands, or decrees of valuation respectively, but without deducting from the augmented stipend so to be allocated the amount of the teind-duties *primo loco* appropriated by the titular in payment of the old stipend; and remit the cause to the Lord Ordinary to give effect to these findings," &c.

At the advising (5th March 1841) it was urged, that the decision in the case of Chesters in 1738, Duke of Douglass v. Elliott, February 1, 1738, supported the principle for which the Duke contended; and a written argument was appointed, chiefly to give parties an opportunity of examining the pleading in that locality, and the principle upon which the allocation of stipend was there made. The particulars of that case are as follows:—The Court modified to the minister of Chesters a stipend of 1200 merks, and 100 merks for communion elements. The old stipend was 900 merks, and consequently the augmentation amounted to 300 merks. The old stipend had been paid to the minister by the Duke of Douglass, while his Grace drew from the lands of Ashtrees 30 merks, and from the lands of Woolie and Wolfhoplie 20 merks of teind-duty. In the process of locality, the Duke of Douglass, as patron, and as such having right to the teinds of the parish, and right also to allocate the stipend, so as to "exem his own lands, as far as the other teinds will go," lodged a scheme of locality of the teinds of the other heritors, which he proposed wholly to exhaust in the first instance, and then to burden the teinds of his own lands merely with what should be necessary to make up the

amount of the modified stipend. To this it was objected by Elliott, that he had an heritable right to his teinds, subject to the burden of 100 merks of teind-duty; that in regard to the old stipend, he was subject only to the extent of his teind-duty; and in regard to the augmentation, it was ultimately found by the Court that it fell "to be allocated upon the teinds of the Duke and William Elliott their land, proportionally to their respective rents." The interlocutor does not state, that from the teinds of the parties there was to be deducted such amount of old stipend as they respectively paid, in allocating upon them their proportional shares of the augmentation; or that as regarded the teinds of William Elliott, deduction was to be made of his teind-duty prior to his proportion of the augmented stipend being calculated; but from an examination of the record, it was admitted by both parties, that in adjusting the several proportions of the augmentation, such deduction was actually given.

At the final advising,

Lord Medwyn.—I concur in the conclusiveness of the arithmetical details given in the respondent's minute, as to the effect of the decision in the case of Chesters. But I have always felt it to be an anomaly in teind law, that if a titular confer upon an heritor a right to his teinds for a price, he may do with it what he pleases, and is himself no farther liable; whereas, if he feus the teinds, the teind-duty is first allocated for ministers' stipend, and is therefore just so much out of the titular's pocket. On the whole, I agree with the interlocutor of the Lord Ordinary.

Lord Moncreiff.—I see no difficulty in this case. The specific form of the objection may not be the same as that urged in some of the previous cases, but the argument is the same, and has been repeatedly refuted and repelled. In the case of Chesters, the teind-duties were first deducted in allocating the augmentation; and if it were to be otherwise in this case, it would be an allocation on the stock.

Lord Meadowbank concurred.

The Court *adhered*, with additional expenses.

Respondent's Authorities.—*Lord Dundas v. Baikie*, 13th February 1793; M. 14,820. *Dundas v. Balfour*, 23d May 1821; *Shaw's Teind Cases*, No. 1.

Lord Ordinary, Cuninghame.—*Act*. Whigham; Robert Rutherford, W.S., *Agent*.—*Alt*. Dean of Faculty (Wood), Cowan; John Donaldson, W.S., *Agent*.—*Teind Clerk*.—[J.W.]

16th November 1841.

FIRST DIVISION.—(H. B.)

No. 3.—*MRS CAROLINE KENNEDY and ANDREW KENNEDY, Petitioners, v. GEORGE STEELL, Respondent*.

Husband and Wife—Parent and Child—Divorce—Circumstances in which the Court refused to remove a child from the custody of a stranger, on an application, presented after the father's death, in name of the mother, who had been divorced for adultery, and of her brother.

Mrs Caroline Kennedy, designating herself "late wife of James Currie, now deceased," presented a petition, with consent of her brother, Andrew Kennedy, professor of music, Dublin, praying for the removal of her son, Charles Wilmot Currie, from the custody of George Steell, writer in Glasgow, to a boarding school in Edinburgh. Steell lodged answers, in which he stated that Mrs Caroline Kennedy "was divorced by her husband, the late James Currie, on the ground of adultery, and that, since the dissolution of that marriage,

she has continued the same criminal connexion, of which several children, now alive, are the fruits." He further stated, that his connection with the child originated as follows:—In May 1835, a person of his acquaintance, now settled in London, "mentioned, as if casually, that a friend of his, an English gentleman of the name of Wilmot, then resident with his wife in Edinburgh, was contemplating a visit to England, and perhaps to the continent, and was desirous, in the meantime, of placing their infant child, a boy, under the care of some person of respectability in Glasgow, or its neighbourhood." The respondent and his wife having no children of their own, agreed to take charge of the child. A few days after, the pretended Mrs Wilmot called upon the respondent, and after apologizing for the unavoidable absence of her husband on business at Newcastle, produced a letter from the person who had first introduced the subject to the respondent, in which he stated that Mr Wilmot had left with him full powers to arrange every thing as to board. Two days after the child, then about thirteen months old, was brought to the respondent's house by Mr Wilmot's servant. For some time the respondent had no doubt that the child was truly the child of a Mr Wilmot, and that the lady who had called as his mother, was Mrs Wilmot; but his suspicions having been awakened, he made inquiry, and ascertained that no Mr Wilmot existed, and that Mrs Wilmot was no other than the petitioner, at that time living separate from her husband Mr Currie, and shortly afterwards divorced by him for adultery. In September 1835, the petitioner, still under the assumed name of Wilmot, applied for the child to be delivered up to her, but the respondent now refused; and having made the person who first negotiated about the child aware of the discoveries he had made, entered into an arrangement, in which he stipulated, that the degrading connexion on the part of the mother should cease, and that she should not interfere with the residence or education of the child. The connection continued to subsist, but no further interference with the child was attempted till 1840, when, in consequence of the death of Mr Currie, the child's presumed parent, a lucrative succession opened to him. Mr Currie having died intestate, the nearest agnate might have served as the child's tutor-at-law, but Mrs Kennedy, with her brother, presented a petition craving the appointment of a certain individual as *factor loco tutoris*. The nearest agnate appeared to oppose the appointment, but ultimately an arrangement was alleged to have been entered into, by which the agnate, on condition of recognising the pupil's legitimacy, and renouncing all right to the office of tutor-at-law, was to receive £500 from the pupil's succession. The respondent further alleged, that the object proposed in the removal of the child to Edinburgh, was to educate him in the Roman Catholic religion, to which both the mother and the *factor loco tutoris* belonged, though the father and all the relatives on the father's side were Protestants. Along with his answers, the respondent produced certificates of his respectability from clergymen in Glasgow, and also a letter from the nearest agnate, stating, that though he had agreed not to claim the office of tutor-at-law, and did not wish to do any thing inconsistent with that agreement, he had a clear interest, as the child's heir-at-law, to see to his comfort and improve-

ment, and that as he was convinced he could not be in better hands than with the respondent and his wife, to remove him from their custody was contrary to his wishes.

The petitioner, in her replies, did not expressly deny the respondent's statements, or allege that the child's comfort was not properly attended to, but she insisted on the relationship of herself and her brother to the child, and the feelings and obligations thence arising, as justifying her application. Divorce only destroyed the patrimonial interests of the parties, but did not affect the rights arising out of relationship. The mother of an illegitimate child has, in the general case, a right to its custody; and it was impossible that the petitioner could be in a worse position. Besides, the respondent had no title whatever to the custody of the child. It was placed under his charge by the petitioner, and therefore, whatever her rights might be in the abstract, or in a question with parties having some legitimate title, it was clear, conformably to the case of *Forbes v. Hume*, March 2, 1832, that the respondent could not be heard in opposition to the present application. The concurrence of the nearest agnate did not alter the matter. As he was the heir of the pupil, there was an insuperable objection to his having any thing to do with his custody; the more especially as he had actually lodged a note, when the application was made for a *factor loco tutoris*, in which he denied the pupil's legitimacy, and claimed his succession for himself. "No doubt it is true that the threatened opposition to the appointment of a factor was prevented, and, as alluded to in the answers, a sum of money was agreed to be given him, on the engagement that he should refrain from injuring the prospects and happiness of the pupil, by making the unfortunate circumstances which attended the connexion of the parents a topic of discussion in a public court." It was now evident that the agnate had not kept this engagement.

The respondent lodged duplies, in which he denied that the petitioner had any title to make the present application,—maintaining, that though divorce might not dissolve the natural ties of affection between parent and child, it dissolved all the legal rights arising out of marriage, and among them, the right of custody or guardianship of the children. But, independently of the legal effect of the decree of divorce, the conduct of the petitioner was in itself sufficient to exclude her from any interference with the child.—Case of Walker, March 10, 1824.

At advising,

Lord President.—The present application raises questions of great importance. Independently of the abstract point of title, there is matter in these papers which calls distinctly and pointedly for the interference of the Court, in order to protect the interests of this pupil. Our attention, in the Second Division, was lately called to the case of an individual of some status, who had the misfortune to become pregnant during her widowhood. A child of the marriage was at the time in her custody, and the question was, whether, in the circumstances, it could be continued. We were satisfied that the point having been brought under the notice of the Court, we were bound to interfere and see that the boy should be removed from her custody, and we accordingly gave an order to that effect. The present is a much stronger case; for I must say I have never read papers displaying more coolness, or greater mystery. The facts are not fairly brought out. We see the name of the woman, and we may have our suspicions as to that of her

paramour, but though it may be disagreeable to make such statements, parties should speak out, and let us know exactly how the matter stands. This much however appears. The woman is divorced as an adulteress. The husband lives for some time after, and dies leaving a fund available to the pupil. Then the mother, after leaving the child to remain a number of years, almost unnoticed, with Mr Steell, whose respectability is not questioned, comes forward with the present application to remove him, and place him in a boarding-school in Edinburgh. Now, it is not necessary to discuss the abstract question, how far an application of this nature can competently be made by a divorced woman. It is enough to know that this woman actually continues to live in a state of reprobation. Such being the case, we are called upon not to give the slightest countenance to her interference, either to fix the residence, or control the education of the child. I say nothing as to the religion in which it is alleged she wishes to bring him up. With that we have nothing to do; but we are bound to refuse an application, the result of which, in all probability, will be, to give the control to this woman herself. It is true that her brother concurs with her, but his application appears to be only *pro forma*, and there is no reason to presume that he would afterwards interfere. But supposing we refuse the present application, the question still remains, whether we should leave the boy where he is, or place him elsewhere. Were there any doubt as to the respectability of the respondent, it would be our duty to remit to the Sheriff to inquire; but from the certificates produced, it is evident that there is no ground of objection on that head. Besides, in allowing the child to remain with Mr Steell at present, we are not deciding that he shall have the custody in all time to come. Circumstances may arise to make that inexpedient. It is of importance to observe, that Mr Steell has the concurrence of the nearest agnate. But then it is said that the agnate has been bought off, and that £500 of the pupil's money has been given him to withdraw his opposition to the appointment of a factor *loco tutoris*. This is another peculiar feature in the present case. I of course reserve my opinion upon it till the proper time; but it is more than doubtful if the Court will ultimately sanction such an application of the pupil's funds. I am clear that we are not called upon, either in law or in the exercise of our equitable jurisdiction, to grant this petition.

Lord Gillies.—I concur in all that has been said by your Lordship. My only doubt is, whether we ought not to go a step farther than your Lordship has proposed. This woman is *in petitorio*. The first thing, then, we have to do is, to look to her title, and consider her object. Now, the object evidently is, to withdraw the child from the custody of the respondent, and place him in her own. It is said, indeed, that she does not want this, but that she merely wishes to transfer him to a boarding-school in this town. Did we grant this application, there is nothing to prevent his removal to-morrow. The lady who keeps this boarding-school is not in Court. We can neither compel her to undertake the custody of the child, nor prevent her from giving it up. The concurrence of the brother makes no alteration in the case, since it is evidently given for the petitioner's interest. Then I see no ground for objecting to Mr Steell. The certificates produced, show that he is sufficiently qualified; and the propriety of his management hitherto is proved by the admissions of the applicant herself. Looking at the whole circumstances,—the ridiculous and false correspondence when the child was first intrusted to Steell,—the indifference manifested by the mother for years, till the succession opened to him,—and the continued guilt plainly charged upon her, and not attempted to be denied,—I cannot listen to any proposal to remove the child, still less to remove him to the custody of a person recommended by the present petitioner. Had she alleged that Mr Steell was not a proper person to have the charge, it would have been our duty to inquire into the allegation. But this is not the case. She wishes him removed, merely because she prefers to have him with a person through whom she would ultimately have him at her sole disposal. But the matter ought not to rest here. We have no direct power, as in Chancery, to make this pupil a ward of the Court, as he would have been made there, in circumstances much less aggravated: But still he is to be regarded as in some sense a ward, as it appears that a factor *loco tutoris* has been

appointed, and has his estate under management. Now, it is said that the factor, in order to remove opposition to his appointment, has paid away a large sum of money belonging to his pupil. If he has done so, are we not bound to take cognizance of the fact? It may be that when the pupil comes of age, this sum of £500, said to have been paid, may go for nothing, and that he may be restored against this dilapidation of his patrimony. If it is true that the factor has given this money to silence opposition, he ought to be called on to appear and explain.

Lord Mackenzie.—I take the same view. If a petition were given in, stating that the child had fallen into evil hands, and praying the Court to rescue him, even a divorced mother must have been listened to, and certainly far more an uncle. Divorce does not go to destroy the relationship of the mother; for I have no doubt that, in certain circumstances, she would be bound to give aliment. Neither does divorce affect the relationship of collaterals; for instance, the father of the mother. The divorce may be itself the very reason for allowing his interference. Suppose a father were to come forward and say, that he had the misfortune to have an adulterous daughter, and that his grandchildren by her had fallen into improper hands,—could it be said that he has no title to interfere? That is out of the question. The present case, however, is not of this nature. The petitioner does not say that the respondent is an improper custodian; but she wishes one recommended by herself, and her brother for her; for he is living at a distance, and evidently does not mean to take any charge. She is doubtless entitled to come into Court; but we are not bound to grant what she asks, as she does not want our assistance to prevent injury to the child. The question is, ought we to disturb the possession of Steell, and give it to another, merely on the mother's recommendation? If there were any doubt of Steell's qualifications, we might institute inquiry. But nothing of the kind is alleged. But what has become of the factor *loco tutoris*? In questions of this nature, it is usual for him to give assistance to the Court. Here he apparently declines to come forward; and I don't wonder at it, for there is something in the matter very strange. It is said that the relations on the father's side have been bribed not to take the office of tutor, and that a factor *loco tutoris* was accordingly appointed, I presume, on the application of the mother and her brother. This case of the factor might have been brought directly before the Court, but the father's relations are not disposed to interfere. They have got the money, and are not disposed to give it back. Supposing that to be the case, I think it is clearly our duty, *ex parte judicis*, as in a matter between us and the factor, to call upon him for explanation. Suppose no explanation is given, is it our business to remain till the party who has been bribed sees it proper to bring a complaint? Unquestionably not. Our duty would be to remove the present factor immediately, and appoint another, with whose help we may be able, if necessary, to find a proper custodian too. I think we ought, in the first place, to refuse the petition, and call upon the factor to clear up this alleged transaction.

Lord Fullerton.—I concur so entirely with Lord Mackenzie, that I think it unnecessary to make any remarks.

The Court pronounced the following interlocutor:

"Refuse the desire of the petition, and decern; find expenses due, and remit the account, when given in, to the auditor to tax and report: Further, appoint the factor *loco tutoris* for Charles Wilmot to give in a minute stating the facts connected with his appointment, and explaining that appropriation of the funds of the said Charles Wilmot which is set forth by the respondent as having taken place."

Act. Rutherford, Macfarlane; John Arnott, W.S., *Agent.*
—*Alt. Moir;* Wotherpoon and Mack, W.S., *Agents.*—N. Clerk.—[H.B.]

16th November 1841.

SECOND DIVISION.—(J.W.)

No. 4.—CHRISTIE of Durie, Petitioner.

Statute—Road Act, 1 and 2 Will. IV. c. 43, § 65—Entailed Proprietor—Expenses—Road trustees, with a view to acquire a right of ferry belonging to an entailed proprietor, made offer of £567 as the value, which was refused; the proprietor, however, made no tender of it for any specific sum, and a jury was summoned to ascertain the value. The verdict was for £625, and the proprietor, in applying to the Court to regulate the investment of the fund for the benefit of the succeeding heirs of entail, craved that the expense of realising and investing the fund should be deducted from it—Held that he must pay his own expenses in realising the fund, but that he might deduct the expense of investing it.

The petitioner was entailed proprietor of a right of ferry, which was taken by the road trustees under the Act 1 and 2 Will. IV. c. 43. The ferry was valued at £2385. 8s., and the trustees offered £567. The proprietor, considering the great difference between the offer of the trustees, and the valuation which he had himself procured to be made, refrained from asking any specific sum. A jury was in consequence summoned to ascertain the value, and they fixed it, by their verdict, at £625. The expenses of the proceedings are regulated by the 65th section of the Act:

“And be it enacted, that in case such jury shall award a greater compensation than the trustees shall have offered, but less than the proprietor or occupier shall have required, the expenses of the process and proceedings shall be borne by such trustees and the said proprietor or occupier, equally; but in case the said jury shall award to such proprietor or occupier the sum so required, or any greater sum, the whole of the said expenses shall be paid by such trustees; and, on the other hand, if the said jury shall award the sum offered by such trustees, or a less sum, the whole of the said expenses shall be paid by the said proprietor or occupier.”

The proprietor, in applying to the Court for a remit to the Sheriff to inquire into the value of certain lands which he proposed to purchase with the price, and to entail for the benefit of the succeeding heirs of entail, craved at the same time that the expenses of realising and investing the fund should first be deducted from it. He *pleaded*—that it was a *casus improvisus*; there being no provision in the Act for the case of a proprietor not asking a specific sum as the value of the subject, but getting more than the trustees offered.

Lord Medwyn—The object of the Statute is signified in the 65th section, and the proprietor was bound to condescend upon a specific sum, which would have brought the transaction under the operation of the Statute.

Lord Moncreiff—It is evidently a *casus improvisus*, for it is not imperatively laid down in the Statute that the proprietor shall claim a specific sum. If the trustees make him an offer, he may refuse it, and then he tries the value, for the benefit of the heirs of entail generally. It would be hard, in such a case, to make the heir in possession pay out of his own pocket the expense of producing such a fund for the future heirs of entail.

Lord Meadowbank—The sale of the subject here was compulsory under the Statute, whether held in fee-simple or under entail. If held in fee-simple, the proprietor must have paid his own expenses, having made no tender to the public at all. Now, is there any ground for applying a different rule to an heir of entail? The trustees made an offer of a specific sum, and the jury found a verdict for a greater. But the proprietor made no offer, which it is contemplated by the Statute that he should make, in order to put it in the power of the trustees to accept of it. The 64th section provides, that where the pro-

prietor “delays or refuses to treat,” recourse is to be had to a jury to ascertain the value. Having delayed to treat, he is presumed to have made an offer which the trustees could not accept of. I am therefore of opinion that he must pay his own expenses, without deducting them from the fund realised.

Lord Medwyn—With regard to the expense of investing the fund, I think it may be taken from the fund.

The Court allowed the expense of investing the fund to be deducted, but not the expense of realising it.

Act. Dunlop.—[J.W.]

17th November 1841.

FIRST DIVISION.—(H.B.)

No. 5.—MAGISTRATES and TOWN-COUNCIL of ELGIN and OTHERS, Suspenders, v. MESSRS GATHERER and WALKER, Chargers.

Church—Manse—Statute 1663, c. 21—Where a manse has once existed, the repair or rebuilding of it falls under the second branch of the Statute 1663, to which the restriction of the expense to £1000 Scots does not apply.

Process—Citation—Res Judicata—1. An edictal citation of “heritors, feuars, and others liable in the expense of a manse and offices,” in a parish partly burgh and partly landward, is sufficient to include the magistrates and town-council of the burgh. 2. A suspension, by individual heritors, of a charge for their proportion of the expense of building a manse, does not form a res judicata as to the whole body of heritors, though the suspenders pleaded the general question of liability, and obtained a judgment finding that the minister’s claim of a manse could not be sustained.—Question, What would the effect have been if these individual heritors had proceeded by declarator?

The parish of Elgin is partly burgh and partly landward, and the ministerial charge is collegiate. Since the period of the Revolution neither of the ministers has possessed a manse, but there seems sufficient evidence to prove that at an earlier period one manse at least existed, and was destroyed by fire. In 1741, the ministers applied to the presbytery and obtained decree for a manse. Opposition was offered by the heritors, and the matter was dropped. In 1764, the presbytery again gave decree for a manse. A stent roll was prepared and approved by the presbytery, who decerned for the proportion to be borne by each heritor, and appointed payment to be made to William Troup, mason in Elgin, who had contracted for building the manse. Several of the heritors having refused to pay, a charge was given by Troup,—the charge being to furnish a manse to the second minister of Elgin. The only heritors who suspended the charge were the Earl of Fife, Stuart of Pittendrich, and Duff of Milton, who ultimately succeeded in obtaining a judgment, finding, “that in this case neither of the ministers of Elgin are entitled to a manse upon the Act of Parliament 1663, and therefore assoilzie the defenders, and decern.” Nothing farther was done in the matter till 1828, when Dr William Gordon, the senior minister, petitioned the presbytery to design him a manse and offices. The presbytery ordered an edictal citation to be given “to the whole heritors, feuars and others in the parish of Elgin, liable in the expense of a manse and offices,” and afterwards gave decree ordaining them to build. The decree was not resisted, but an arrangement was entered into by which the landward heritors, including the representatives of the three who had succeeded in the suspension of 1764, agreed to pay an annual sum of £50 in lieu of a manse. This arrangement subsisted

till 1838, a period of about ten years, when Dr Gordon died. The two incumbents, Messrs Walker and Topp, then presented separate petitions to the presbytery, each praying to have a manse designed to himself. The presbytery granted the prayer of Mr Walker's petition (Mr Topp entering a protest, which, however, was not ultimately insisted in), and appointed the "heritors, feuars, and others liable in the expense of a manse and offices," to be cited by edict, "in order that, with their concurrence, the necessary steps may be taken for providing the accommodation applied for by Mr Walker." Ultimately, the presbytery found "that Mr Walker, as oldest incumbent in the parish of Elgin, is entitled to a manse and office-houses, and therefore ordain the said feuars, heritors and others, to build the same." No contract for building having been entered into by the heritors, the presbytery appointed a committee to advertise for contracts, and also to prepare a scheme of assessment, and afterwards entered into a contract to build a manse, offices, and garden wall, for the sum of £990, which sum they accordingly found "was a burden upon the whole landward and burgal heritage of the parish of Elgin, and falls to be borne by the proprietors thereof in proportion to their real rents, and decern accordingly." The decrees of the presbytery, in their previous assessments, had been given on stent rolls made up according to the valued rent, and including the landward heritors only. The proportion of the whole assessment to be borne by the burgh was stated at £433. 4. 8; and this sum was decerned for both against the Magistrates and Town-council, as primarily liable for the community, and also against the individual burgal proprietors. Messrs Gatherer and Walker, writers in Elgin, were appointed collectors of the assessment.

The Magistrates and Town-council having refused to pay the first instalment, a charge was given them for the amount. A charge was also given to Alexander Hay and James Walker, two of the individual heritors within burgh, for their respective proportions of the instalment. Both charges were suspended, and the bills having been passed on caution, the processes were conjoined.

The suspenders pleaded—

1. The proceedings of the presbytery, and the charge following upon these proceedings, have been, from want of due citation and otherwise, irregular in point of form, and on this ground alone the charge ought to be suspended. 2. It was incompetent for the presbytery to decern for a manse in favour of Mr Walker, in face of a competing claim by his colleague Mr Topp; and they ought to have delayed proceedings until it had been decided in the competent tribunal which of the parties had a right to the manse, or whether indeed either of them possessed such right. No proceedings could competently be taken in the church courts against those alleged to be liable for a manse, till they had it definitely settled by the civil courts that they were liable, and if liable, had it so settled which of the clergymen was entitled to the manse, as to protect them from all claim at the instance of the other. 3. It is *res judicata* by the judgment of the Court in the process of 1769, that neither of the ministers of Elgin is entitled to a manse, and that no legal right to a manse exists within this parish. 4. Supposing a legal right to a manse to exist, no part of the expenses of the manse can legally be laid on the royal burgh of Elgin, or on any of the proprietors of heritage within burgh. It is settled law, that no legal claim for a manse exists within a royal burgh; and although the rule is different where a landward district is attached, yet as this difference arises in respect of the landward district, it is on the

landward district that the burden should exclusively fall; and the burgh ought not to be made worse by having a landward district attached to it than it would otherwise have been. 5. At all events, supposing any portion of the expense to fall upon the burgh, it must be allocated betwixt the burgh on the one hand, and the landward district on the other, according to the valued rent effecting to each respectively. 6. The decree of the presbytery, which is directed both against the Magistrates and Council, and also against the individual proprietors of heritage within burgh, is altogether unwarrantable and illegal. 7. The limitation in the Statute 1663, c. 21, restricting the sum to be decerned for to £1000 Scots, applies, and is in force in the present instance, which regards not the repair of a manse, but the erection of a manse where none exists.

The chargers pleaded—

1. The whole proceedings of the presbytery, and the charge given to the suspenders, have been regular and valid. (1.) The suspenders were duly and legally cited under the general citation given to heritors, being heritors in the sense of the Statute 1663, as legally representing the burgh proprietors, and that without any reference to the criterion of valued or real rent. Case of Lanark, 24th January 1832. (2.) The chargers had not acted counter to any usage in the parish as to parochial assessments, there being no usage whatever in regard to such matters. No instance has occurred of any assessments, except in the case of the new church built in 1825, when a voluntary assessment was agreed to both by the landward and burgal heritors, which could constitute no precedent as to the future. Farther, it had not then been decided that Magistrates are primarily liable for the assessments laid on burgh property for building manses. (3.) It was perfectly competent to charge the Magistrates for the *cumulo* amount of the assessment on the burgh property, under deduction of the sums paid or to be paid by the individual proprietors, more especially as many of these proprietors entirely dispute their liability under the decree of the presbytery. (4.) The whole proceedings of the presbytery being known to the Magistrates, and the question of their liability being distinctly brought under their notice by the landward heritors, and deliberated upon by them, they are in *mala fide* in bringing forward any plea that they were not duly cited to the proceedings. 2. The decree in the former action in 1769 does not constitute a *res judicata*, so as to deprive the present ministers of the parish of Elgin of the legal right to a manse. 3. (1.) The charge in this case being given, not for a manse to any one particular minister, but simply for a manse to the minister of Elgin, disposes of no question of right as between the ministers themselves, and it is *jus tertii* to the suspenders to found on any competing claim brought on the part of Mr Topp. (2.) Supposing the charge to be considered as proceeding on a decree finding that Mr Walker is to have right to the manse, the presbytery are, in the first instance, the judges which of the two ministers is entitled to the possession of the manse. (3.) The protests taken by Mr Topp have been fallen from, and no attempt is made on his part to disturb the finding of the presbytery. (4.) The parochial accommodation in this case being immediately required, and the manse being now in the course of being built, the expense requires to be immediately provided for. The suspenders are not entitled to anticipate that neither of the ministers is to obtain immediate access to the manse when finished, or to withhold payment of their contribution on the plea of a possible competition between them for its possession. 4. The provision in the Act 1663, by which the expense of manses, &c., was limited to £1000 Scots, has been long departed from; and the sum decerned for by the presbytery was moderate in the circumstances, and according to law and practice. Dingwall against Gardiner, November 17, 1816, F. C., affirmed on appeal; Shaw's Cases, 2d March 1821. 5. According to the law as now fixed, the minister of a royal burgh having a landward district annexed, has a right to a manse; the burgh property is liable to be assessed for the expense of building such manse, along with that of the landward heritors; and the Magistrates, as representing the community, are, in the first instance, liable for the assessment laid on the burgh, with relief against the individual burgh proprietors. Auld, 13th June 1827; 2 Wilson and Shaw, 5th July 1828; 6. Sh. and D.;

and Lanark, 24th January 1832; 10 Sh. and D. 243. 6. No usage and no circumstance of any kind exists in the case of the parish of Elgin by which the general rule of law is altered or affected; the landward heritors having always reserved their claim against the burgh heritors; and the arrangement of 1825 being a single instance, and that of a voluntary assessment. 7. The assessment has in this case been properly levied according to the real rent. But the suspenders have no interest to object to the principle of the assessment; because, supposing the assessment to be levied according to the valued rent (as to which it is admitted that the Magistrates represent the community), the result would only be to lay an increased amount of assessment upon the burgh property. 8. The liability of the individual heritors for a proportion of the expense of building the manse, as having acquired a share of church accommodation, does not affect the primary liability of the Magistrates to implement the decree charged on, but merely insures to them their relief against the individual proprietors.

The Lord Ordinary reported the cause on cases, with the following note:

"As the questions argued in these papers are of some importance in parochial law, and the parties have indicated a wish to obtain the opinion of the Court upon them with as little delay as possible, having prepared and printed elaborate cases on the points which fall to be decided in the first instance, the Lord Ordinary thinks it best at once to report the case to the Court.

"It is explained in the revised cases, that the parish of Elgin is composed partly of a landward district and partly of the ancient burgh. It is a collegiate charge; and it seems to be admitted, that, since the Revolution till the present question occurred, there has been no manse possessed by either of the ministers. At the same time, there are certainly strong circumstances stated to show that one, if not both of the ministers, possessed a manse at an anterior period.

"Farther, it rather appears from the statements on record, which are not denied, that both of the ministers in this parish enjoy, equally, certain grounds which are held by them as *glebe*.

"The ministers, as might have been expected, do not appear to have been satisfied with the want of a manse. Accordingly, in 1741, they applied to the presbytery for a decree for a manse, which was awarded; but as the ministers did not insist on that decree, it was dropped. But, in 1764, the presbytery again originated a proceeding for having a manse provided to one of the ministers,—and, after various proceedings, the presbytery, in April 1765, gave decree against the heritors for £335. 17s. 11d. Sterling as the expense of a manse to one of the ministers, and approved of a contract entered into with one William Troup for building the manse, and of a stent roll allocating the assessment among the heritors.

"That decree was afterwards suspended by the Court by interlocutor, quoted fully in the papers:—but the documents produced establish certain specialties well deserving to be kept in view in the present discussion. (1.) It would appear from the suspension presented in 1767 (No. 47 of process,) that the charge then given was to furnish a manse as for the second minister of Elgin. (2.) The suspension and process farther show, that the only parties who then litigated and opposed the decree were the Earl of Fife, Colonel Stuart of Pittendrich, and Mr Duff of Milton. (3.) No opposition, or indeed appearance, was then made for the burgh of Elgin. It appears also, that although the stent roll bore, in words, that it was the "stent and proportion among the heritors of the town and parish of Elgin," there was no assessment on the houses and tenements within burgh.—See the roll, No. 48 of process. At the same time the Magistrates, as representing the community, were assessed for sundry possessions held by them in the landward part of the parish, which it does not appear they resisted.

"It is explained in the record, that the Court, in 1769, found, in the process between the contractor and the three heritors who opposed the decree of the presbytery, "neither of the ministers entitled to a manse under the Act of Parliament 1663;" after which no farther proceedings took place till 1828. In that year, Dr William Gordon, then the senior minister of

Elgin, took steps for enforcing his claim to a manse; the presbytery accordingly gave decree for a manse to Dr Gordon; but the landward heritors entered into an agreement, by which they became bound to pay the reverend incumbent £50 annually in lieu of a manse, and that agreement seems to have been acquiesced in, and implemented by all the heritors (including the representatives of Lord Fife, Mr Duff of Milton, and Colonel Stuart of Pittendrich, who opposed the manse in 1767,) till Dr Gordon's death in 1838, a period of nearly ten years.

"The proceedings were renewed in 1838 for a manse to Mr Walker, who, by the death of Dr Gordon, now became senior minister of Elgin. The presbytery again gave decree for a manse; but now, for the first time, that decree was issued upon a stent roll, which included not only the landward heritors, but the Magistrates and Council as a corporation—said to be the Crown vassal of the whole houses and tenements within burgh—and also the proprietors of these subjects themselves. The questions have been waived for the present, whether the Magistrates and Council, or even the proprietors within burgh, are liable to any extent for the expense of a manse, and if so liable, on what principle they should be assessed, till other preliminary pleas be disposed of, which, if decided in favour of the suspenders, may supersede the assessment altogether. The pleas are fully argued in the revised cases; and it will now be sufficient for the Lord Ordinary briefly to state his views with regard to them.

"I. The Magistrates urge an objection in point of form to the alleged citation given to them before the presbytery. The presbytery issued an edict as against the heritors of the town and parish of Elgin; on that edict the Magistrates did not at first appear, but they were well apprized of the proceedings; they requested time to consult counsel in October 1838, (see Nos. 15 and 16 of process,) and thereafter the decree assessing the Magistrates was not pronounced till January 1839. Looking to the determination of the Court in the case of Lanark, whereby the magistrates of a royal burgh were held, in a question of assessment, to be 'heritors,' it is rather thought that the suspenders here were sufficiently brought before the presbytery by an edict as heritors. But as they were afterwards regularly charged by executions delivered to the whole Magistrates and Council separately (see No. 29), it is clear, that if the least difficulty were felt on this plea of form, it could be obviated by turning the charge into a *libel*; and, therefore, it is supposed the Court will have no difficulty in disposing of this point.

"II. The next question is that which is of most importance in the present discussion, being the plea of *res judicata* urged by the suspenders. It is said that the judgment of the Court in 1769 was conclusive, not only against the reverend incumbent who then claimed the manse, but against all his successors in the benefice. The chargers, on the other hand, refer to the case of Dunfermline, as showing that such a claim as the present cannot be excluded by any judgment against their predecessor at a prior period.

"Now, the Lord Ordinary must own that he is not prepared to find that the defence of *res judicata* cannot be pleaded against future incumbents on a judgment pronounced in a process fairly litigated between the minister serving the cure for the time, on the one hand, and the whole heritors and parties interested, on the other. The difficulty felt by the Court in opening up decrees even in *absence* of parties interested in cases of valuation and approbation, and the direct decision in the late case of Lord Blantyre and Earl of Wemyss (22d May 1838), afford strong grounds for holding that the plea of *res judicata* is entitled to effect in all cases where the judgment founded on has been pronounced in questions litigated by the minister and the whole heritors of the parish; and if that were the case here, it would be for the Court to consider if the case of Dunfermline was not decided on grounds which cannot be applied to other questions where the same specialties do not occur.

"But it humbly appears to the Lord Ordinary, that there are strong circumstances in the present case, to affect the plea of *res judicata* as raised by the parties who alone urge it. Giving the utmost weight to the competency of that plea, in ordinary cases, it can only avail the parties or their successors who appeared and litigated a former process *super eandem rem*. But it appears from the record of the former process, that the only

parties who opposed the manse in 1769 were the *Earl of Fife*, *Colonel Stuart* of Pittendrich, and *Mr Duff* of Milton. The town of Elgin, instead of opposing, acquiesced in the decree. And now it appears that the successors and representatives of the heritors who obtained the decree sought in 1769, have specially waived all plea peculiar to themselves on that judgment; and first, in 1828, they consented to an assessment for an annual payment to the minister in lieu of a manse; and latterly, in 1838, they seem expressly to concur in paying a rateable share of the present assessment. Accordingly, it is not alleged that the present suspenders represent any of the heritors who opposed the manse in 1767. The question, then, comes to be, can parties found on a *res judicata* in a cause to which neither they themselves, nor their predecessors were parties? This of itself is abundantly questionable. Had Lord Fife, Colonel Stuart, or Mr Duff, abandoned their opposition in 1769, the minister, for aught yet shown, must have got his manse. But must not all plea raised by third parties in the present suspension equally fail in 1840, when the successors of the former litigants withdraw their plea? Again, the magistrates who acquiesced in a manse in 1767 cannot, with much justice or consistency, plead that the minister's right is excluded by the decree in a former process, to which they seem then to have refused to be parties.

"As the case stands, therefore, the judgment of 1769, in a question with the suspenders, is no more than a precedent or authority to be weighed against other and later cases. To the suspenders it can afford no proper plea of *res judicata*, as the former judgment was to them *res inter alios acta*. No doubt if Lord Fife and Lord Moray, as representing Stuart of Pittendrich, came forward and urged the plea of *res judicata*, and if that plea had been sustained, then of course the other heritors would have been well entitled to maintain, that the claim could not be insisted in against them, because they could not be made liable for the heavy portion of the assessment falling on these parties, and without their share of the assessment, the manse could not be built; but the consent of Lords Fife and Moray to pay their share of the assessment removes every plea of that sort.

"In these circumstances, the Court has to consider whether there be not much stronger grounds for overruling the plea of *res judicata* in the present instance, than were to be found in the case of Dunfermline; and supposing the claim of the ministers to be still an open question, it is impossible to find any essential distinction between the present case and the second case of Dunfermline in 1805, and that of Ayr in 1820, decided in the House of Lords in 1827; 2 Wilson and Shaw, Appeal Cases, p. 600.

"III. The only other plea urged in these cases is that by the suspenders, that the minister is only entitled to £1000 Scots for a manse in terms of the Act 1663, and not to the sum of £990 Sterling, fixed by the decree of the presbytery. On this point it is difficult, on perusing the various ancient records, of which extracts are produced and quoted by Messrs Gatherer and Walker, in their revised case (pp. 30-45), to resist the conclusion, that long after the Reformation, and indeed at and subsequent to 1663, there was actually a manse in this parish; and if so, the decision of this Court and of the House of Lords in the case of Dingwall v. Gardiner in 1821 (1 Shaw's App. Cases, p. 10), is conclusive in favour of the chargers. The Court will judge from the detail of the respective parties, whether that decision should not rule the present case. No such point seems to have been raised either in the case of Dunfermline or Ayr, though it apparently might have been maintained in both on grounds more favourable for the heritors than in the present instance."

At advising,

Lord President.—I have read this case with all the attention in my power, and, with the benefit of the notes of my venerable predecessor, and after the most careful and deliberate consideration, have arrived at a conclusion conformable with his. In the first place, I do not think there is any validity in the objection taken to the citation. After the case of Lanark, it is impossible to doubt that, in this matter, a citation to the heritors is sufficient to include magistrates. The second point is more difficult, viz., whether the former proceeding amounts

to a *res judicata*, which bars us from entertaining the present claim, and which, whether rightly or wrongly decided, if regularly before the Court, must be held as binding on us? I have read these papers with all the attention in my power, and have not been able to satisfy my mind that there is any solid foundation for this plea. It is a strict technical objection; and your Lordships always see that there is a solid ground for it, and not a mere resemblance between the cases decided. The proper parties—the matter at issue—and the *media concludendi*, must be the same. Now, as to the first of these there is a formidable objection, to which no answer has been given, viz., that the previous action was a suspension of a charge for the shares of three particular heritors. No doubt their case would be important and powerful as a precedent; but there is no proof that they were authorised to act for others,—nothing of the kind. But, in the second place, this was a mere suspension, and not a declarator as to the abstract right of the minister to a manse. Then, again, the presbytery was not made a party; and it would be a serious matter to hold, that the permanent rights of the benefice could be compromised where the presbytery was not a party. The presbytery only gave decree as judges, and were not present as parties. Another objection is, that the charge was given for a manse to the second minister. We are told that this is a technical objection, and was merely a clerical error; but whether it was a blunder or not, the charge was only as to the manse of a second minister. Now, it is clear that this did not seriously raise the question of right as to the first minister, and therefore it is impossible to hold that it was a *res judicata* as to the first. This is too formidable an objection to be got over; and on the whole, it does not appear that there is any solid objection on the ground of *res judicata*. The next point is, whether there is sufficient evidence to satisfy us that there ever was a manse in this parish. Now, if, from the beginning of time, there never was a manse, it would be difficult to establish the right of any of the ministers. But looking at the whole evidence in the documents produced, I am satisfied it is sufficient to show, that long before 1688, the Protestant Presbyterian incumbent was in possession of a manse. It is material to observe, that a formal report was made, stating that the manse was burnt down. I also see evidence that the ground on which it stood is let, and the rent drawn by the minister. Taking the whole evidence together, I have no hesitation in holding that there was once a manse: and so this case is similar to that of Ayr, where the question was carefully sifted; and it was settled, that the minister of a parish partly burgh and partly landward, had a good claim to a manse, wherever it could be proved that a manse had once existed. The point being so settled, we must here follow the same course. But it is said that no more can be claimed for the manse than £1000 Scots. After the case of Dingwall, and the distinction taken by the House of Lords between the first and second branches of the Statute, this cannot be pleaded. Though the former manse has not left even a trace of its foundation, yet as it once existed, the present application falls under the second branch of the Statute, which enjoins us to see that the manse is properly repaired; and this can only be done by giving the sum necessary for that purpose. But, indeed, there is no proper objection to this sum. The manse is finished. It appears to have been erected in the most economical manner, and the minister is actually in possession—enjoying the benefit of it. In these circumstances, I think we ought to find the letters orderly proceeded.

Lord Gillies.—I had some difficulty at first, but I have now come to be of the same opinion. The grounds of that opinion have been stated so fully by your Lordship, that it would only be a waste of time were I to attempt to go over them. I concur entirely.

Lord Mackenzie.—I concur also. It appears to me that the pleas of the Magistrates have all been answered satisfactorily. I think the citation was properly given. The Statute lays the burden on heritors; and all are liable as heritors. They appear to have been once cited as Magistrates, but that is nothing to the purpose. The citation was superfluous; and why adhere to a less correct citation, merely because it happens to have been once employed. Then, as to the plea of *res judicata*, it is evidently not available to the Magistrates, for they were not

parties in the case in which judgment was pronounced. It is true the cases are much connected, but the parties not being the same, there could not be a *res judicata* in their favour. These points being got over, there can be no doubt that, in a parish partly burghal and partly landward, the heritors are liable to furnish a manse. This was settled by the cases of Dunfermline and Ayr, and must be considered a shut point. Then, as to the amount of the sum, which is the only remaining point, we must be guided by the House of Lords. Here we had a difficulty. We held that the Statute was modified by custom, and that the first clause, applicable to building, was in force, but that the limitation of the sum to be expended was in desuetude. The House of Lords did not adopt that view, but another,—that where a manse had once existed, the keeping up of it must be considered as repair; and so the expense of it fell under the second clause, in which there is no limitation. That is the only principle on which it is possible to explain the judgment of the House of Lords; and on that principle I concur with your Lordships.

Lord Fullerton.—I am of the same opinion. The objection to want of citation is altogether out of the question since the decision in the case of Lanark. It is clear also from the consideration, that if they are not liable as heritors they cannot be liable at all, since the Statute lays the burden only on heritors. Whatever mode of citation may have been customary in former proceedings, it is impossible to deny that the word heritors is sufficient to include magistrates. Then, as to the plea of *res judicata*, at first it might seem difficult: For the finding in that case, if in favour of the heritors generally, would undoubtedly warrant the plea of *res judicata*. I am not disposed to rest much on the fact, that the assessment bears to have been laid on for a manse to the second minister, for that is expressly disclaimed in the proceedings; and the only question raised was, whether there should be one manse? I go on the other ground, that the litigation was between individual heritors and the collector. The assessment was laid, and a charge given to those individuals who refused to pay their shares. That was the only point before the Court. No doubt they pled the general ground in which all had an interest; but to determine the question of *res judicata*, we must look at the nature of the litigation, which was limited to the sums leviable from those heritors. There is a very simple test of this: Suppose the judgment had been the other way, and the letters had been found orderly proceeded—when the collector went to other heritors, would any one or all of them have been entitled to suspend, and plead the question of liability over again? What the effect might have been if the process had been a declarator, though only by one heritor, is a different matter. For in a declarator, the general question would have been raised. It would have been a much nicer point, whether one raising the general question in which all were interested, might not be considered as raising it for behoof of all; but no such point is here raised. It is true the others might have got the benefit of the judgment indirectly; for if these individual heritors were not liable, the collector could not have come against any, because he could not have had an effectual charge against all. This would have been a formidable difficulty, but it would not have been founded on the plea of *res judicata*. That difficulty is removed here; for the parties have formally waived their plea, and paid the assessment. But there is another ground by which the plea of *res judicata* is excluded. If the assessment was, as I understand, and as it appears in the papers, laid entirely on the landward heritors, and no assessment was laid on the burgh, then it is quite evident that the Magistrates could not plead *res judicata*; but whether that is the case or no, on the other general ground there was no *res judicata*. Then there is another question as to the amount of the sum for which decree can be given. To that question the judgment of the House of Lords completely applies. It is clear that there was once a manse, but that there has been none for many years. Undoubtedly, therefore, this is not the case of a new manse. The circumstances, then, are precisely the same as those of Dingwall. In that case there had once been a manse, and there was no proper question of repair, for *de facto* the manse had ceased to exist; but the House of Lords held, certainly by a curious construction, that rebuilding

was a matter which fell under the second branch of the Statute concerning repair. We must hold it so here; and that since there was once a manse in the parish, the limitation of the Statute does not apply.

The Court pronounced the following interlocutor:

“Repel the reasons of suspension, in so far as discussed in the said cases, and, *quoad ultra*, remit to the Lord Ordinary to proceed further as shall be just: Find expenses due to the chargers, and remit the account,” &c.

Lord Ordinary, Cuninghame.—*For Chargers*, Dean of Faculty (Wood), Moir; Gordon and Stuart, W.S., *Agents*.—*For Suspenders*, Penney, M. Bell; Ferriers and Duff, and Robert Roy, W.S., *Agents*.—*B. Clerk*.—[H.B.]

17th November 1841.

FIRST DIVISION.—(H. B.)

NO. 6.—MAGISTRATES AND TOWN COUNCIL OF LOCHMABEN, *Petitioners*, v. WILLIAM BECK, *Respondent*.

Burgh—Customs—*The petty customs levied by a corporation under their charter, “for the public good of the burgh,” are not liable to be attached by creditors.*

In 1824, on the application of the Magistrates and Town-council of Lochmaben, the property of the burgh was sequestrated, and a judicial factor appointed. The whole of the property has been sold, with the exception of the petty customs. These the judicial factor has levied from the date of his appointment; but in 1838, the Court granted an interim warrant, ordaining him to pay over part of the proceeds to the Magistrates, in order to defray their expenses of management. This has accordingly been done; but the Magistrates, conceiving that, both in conformity to the decision in the case of Auchtermuchty, and the special terms of their charter, the petty customs belonged to them inalienably, as to them alone belonged the right of “introrritting, raising, receiving, and collecting” the same, “and applying them to the public good” of the burgh, craved the Court,

“1st, to find that none of the petty customs which have been hitherto levied, or may be hereafter levied, under the sanction and authority of the Magistrates and Council, as before set forth, were or are attachable for the debts due to the creditors claiming under the sequestration awarded in 1824; 2d, to ordain the judicial factor to account for and pay over to the Magistrates and Council the customs which have been collected by him, in so far as the same have not been already paid to them; 3d, to find that the Magistrates and Council are entitled, without the interference of the judicial factor, to levy and collect the customs in time to come, and to apply the past and future customs in defraying the expenses already incurred, or which shall hereafter be incurred, in maintaining and protecting the rights of the burgh, and the police and other municipal expenditure.”

The annual amount of these customs, which were said to form the only fund for the annual and casual expenditure of the burgh, did not exceed £16, and even that amount had not been obtained till 1806, when the Magistrates had advanced the rates previously paid.

The judicial factor admitted that the customs were primarily liable for the ordinary expenditure of the burgh, and could not be adjudged, so as to take the power of levying them from the Magistrates; but he maintained, that, in perfect accordance with the case of Auchtermuchty, the creditors were entitled to attach and appropriate any surplus which might remain, when the ordinary expenditure was defrayed. In the present

instance the amount was trifling, but the principle was the same, whatever the amount might be.

The Lord Justice-Clerk having heard this case in the Inner-House as Lord Probationer, gave it as his opinion, that it was clear, from the terms of the charter, that the customs in question formed part of the common good. They could neither be alienated by the corporation, nor attached by its creditors, nor separated from the erection to which they inhered, as an essential part of the rights and privileges which it conferred. Then they were specially appropriated to the burdens and duties of the burgh. If a surplus were to arise and be accumulated, the right of the debtors to receive it would be a different question; but that was not alleged here. The case of the Creditors of the City of Edinburgh could not be appealed to as a precedent, because it was settled by special Act of Parliament; but the right of the creditors to interfere, was excluded both by Act 1491, c. 36, and by the decision in the case of Auchtermuchty, which disposed of the very point now raised. It is clear, however, that the claim for repetition cannot be sustained.

Lord Gillies.—I have no difficulty. The case of Auchtermuchty is clearly in point, and the respondent is practically out of Court: for he says he is bound to pay over what he levies to the Magistrates, in so far as it may be necessary for defraying the ordinary burdens, and keeping up the dignity of the burgh. Their burdens must be small, and their dignity easily sustained, if an income of £16 leaves a reversion to be contended for. Besides, the Magistrates appear to have the power of fixing the amount to be levied. If so, the creditors are struggling for nothing. For, supposing them to succeed, the Magistrates have only to return to the rates levied before 1806, and annihilate the excess, so as to make their expenditure and the amount of the customs exactly correspond. It is argued for the creditors, that the amount might rise to £160, while only £16 were required. But what then? It would, in that case, be the duty of the Magistrates to relieve the inhabitants to the extent of the difference. I am clear that the creditors cannot attach these customs; but as to by-gones, I see no ground for repetition.

Lord Mackenzie.—I am of the same opinion. We must, *pro forma*, recal the sequestration on the grounds stated by the Lord Probationer. Then, it being recalled, the petty customs must in future go to the Magistrates, and not to the creditors. But what is to be done, it is asked, if their amount is greater than the public expenditure requires? There might be some difficulty in saying. Possibly the creditors might be able, as in the ordinary case, to make a fund, so gathered, available for their payment. That is not the case here, and therefore we need not enter into it.

Lord Fullerton.—I agree with your Lordships. It is impossible to distinguish the point now raised from that decided in the case of Auchtermuchty. The customs in question are the petty customs, and they are leviable solely for burgh purposes. They are liable to be modified at the option of the Magistrates, and have nothing of the nature of a perpetuity on which creditors can calculate or adjudge. Before 1806 they were of little value. An addition was made then; but if the burgh expenditure does not require the whole amount, there is nothing to prevent the Magistrates from recurring to the old rates. I don't think there is any good claim for by-gones. The creditors have been allowed to levy them, and the Magistrates, who allowed them, cannot call upon them to repeat.

Lord President.—I am of the same opinion. The case of Auchtermuchty was well considered, and I cannot see any thing like a distinction between that case and the present. The principle of law is perfectly clear. With regard to by-gones, as the Magistrates were parties to the sequestration, their claim of repetition cannot be sustained.

The Court pronounced the following interlocutor:

"Conjoin the petitions: Recal the sequestration and the appointment of the respondent, William Beck, as judicial factor thereon, in so far as applicable to, or concerns the market or petty customs: Find that these customs are not attachable for the debts due to the creditors claiming under the sequestration: Ordain the judicial factor to give in an account thereof, and to pay over to the petitioners the balance of the customs remaining in his

hands since the 10th day of February 1838; and find that the petitioners are entitled to levy and collect these customs in time to come, and to apply the same in terms of law: Find expenses due to neither party, and decern."

For Petitioners, Dean of Faculty (Wood), Hector; William Martin, S.S.C., *Agent*.—*For Respondent*, G. Bell; William Stewart, W.S., *Agent*.—[H.B.]

19th November 1841.

FIRST DIVISION.—(H. B.)

No. 7.—ADAM GLEN, *Pursuer*, v. DAVID BLACK and his CAUTIONERS, *Defenders*.

Public Officer—Messenger—Reparation—Diligence—Statute 1 and 2 Vict. c. 114.—*A messenger instructed to charge a debtor immediately, gave a charge on six days on the 13th, but did not transmit the charge, so as to be in the hands of his employer, till the 21st, and on the 22d, before ultimate diligence could be used, the debtor escaped—Held that the messenger was liable for the debt.*

Diligence—Execution—Charge.—*The charge given bearing to be by virtue "of an extract-registered protested note or bill of exchange," Question, Whether the inaccuracy was such as to make the charge inept?*

A bill for £450, accepted by Lady Charlotte Bury to Adam Glen, baker, Regent Street, London, with a protest for non-payment, was transmitted for ultimate diligence to Gibson-Craigs, Wardlaw and Dalziel, W.S., who, on the 11th November 1840, sent the following instructions to David Black, messenger, Inveraray:

"We enclose registered protest, with warrant annexed, and request you will immediately charge Lady C. Bury for payment. She is at present residing with her brother, the Duke of Argyle, at Inveraray Castle. If you know of any funds or effects belonging to her, we beg you to use arrestment. We are," &c.

No answer having been received, on the 19th they wrote Mr Black as follows:

"We sent you on the 11th, a registered protest and warrant. We desired you to give a charge for payment immediately, and we expected you would have returned us the warrant and execution several days ago. The Duke of Argyle's agent called upon us on Monday to say that Lady C. Bury had received a charge for payment, but that there was some mistake in your charge.

"We cannot understand why you should have retained the warrant so long. The days of charge must have expired; and had you done your duty, by returning us the warrant with a proper execution, our client would, ere this, have been in condition to proceed with ultimate diligence. If, through your delay, Lady C. Bury shall have left Scotland, or through any irregularity in your charge, delay or expense shall arise, we have now to intimate to you, that we shall hold you liable for the debt."

A second letter, in the following terms, was written by them on the same day:

"Since writing you this morning, the Duke of Argyle's agent, Mr Monypenny, has shown us the charge which you gave to Lady C. Bury, and which begins with these words: 'By virtue of an extract-registered protested bill,' &c., you charge Lady C. Bury to make payment of the sum contained in the bill. Now, you have committed an obvious mistake, in calling your warrant an 'extract-registered protested bill.' The warrant is at the end of the extract-registered protest, not the bill. Mr Monypenny seems determined to take advantage of your blunder. As prompt measures are of the utmost importance, and as you have by your delay and blunder defeated the object

which our client had in view, namely, the speedy incarceration of Lady C. Bury, we must now hold you liable for the debt. It is now, therefore, at your own risk, and you may take what steps you please to recover it. You are at liberty to use our client's name, if you can thereby more speedily incarcerate the debtor."

On the 21st, Gibson-Craigs, Wardlaw and Dalziel, received a letter from Mr Black, dated the 19th, but with the post-mark of the 20th, in which he says:

"I now return you the extract-registered protest at Mr Glen's instance against Lady Bury, with my execution, and below is note of fees."

"I understand that her brother the Duke has forwarded instructions to his agent in Edinburgh for the settlement of this debt."

The execution thus returned, bore that the charge was given on the 13th November, "by virtue of an extract-registered protested note or bill of exchange, dated at Edinburgh the 11th day of November current, at the instance of Adam Glen, &c. against Lady Charlotte Maria Bury, presently residing at Inveraray Castle."

On receiving this execution, Gibson-Craigs, Wardlaw and Dalziel, wrote as follows:

"We have this morning received your letter of the 19th, returning the extract-registered protest and warrant, with an erroneous execution annexed. It is erroneous—(1.) In respect that your execution bears to be 'by virtue of an extract-registered protested note or bill of exchange, dated at Edinburgh the 11th day of November current;' and, (2.) The said bill or note bears no such date. The after part of the execution, also, does not correspond with the first. Altogether, we never saw such a piece of bungling."

"You say that you understand Lady C. Bury's 'brother, the Duke, has forwarded instructions to his agent in Edinburgh for the settlement of this debt.' So far from this being the case, Mr Monypenny has no such instructions. Your erroneous charge has been forwarded to him, and he seems determined to take advantage of your blunders. Your execution is dated the 13th, and yet you keep the warrant beside you for six days, without returning it to us. We should be sorry to think so, but all this has very much the appearance as if you were conspiring with the debtor, to allow her to escape."

"We return the registered protest enclosed; and referring to our two letters to you of the 19th, we repeat the intimation, that we hold you liable for the debt. We are," &c.

"P. S.—You are, for your own sake, quite at liberty to give a new and a correct charge on the enclosed, and to follow up ultimate diligence on such correct charge in the names of Mr Glen and his mandatory; but we shall not authorise or sanction any proceeding in their names, based on such an irregular execution as you have already given. If you succeed in apprehending the debtor speedily, you will get payment of the debt, but if you allow her to escape, it will be a total loss to you."

Same day Mr Black replied to the letters of the 19th:

"I have received your two letters of the 19th instant. You would receive the extract Glen v. Lady C. Bury before these letters reached me. My being otherwise engaged was the cause of the extract not being earlier returned, but you will see from the date of the charge that there was no unnecessary time lost."

"The objection to the words, 'By virtue of an extract-registered protested bill,' &c., appears to me to be more ideal than real; but if there were any thing in it, the objection is removed by the subsequent words,—'And the protest recorded in the books of Council and Session, and a decree of the Lords thereof interponed thereto, all in terms, and to the effect contained in the decree and extract referred to.'"

"Lady Bury is unwell, and confined to her room. She

was confined to bed when I left the charge for her with her servant."

On the 22d, Lady C. Bury left Argyleshire, and took refuge in the Sanctuary.

The present action was thereafter raised by Mr Glen and Mr Dalziel, as his mandatory, concluding against Mr David Black, and his cautioners, for the amount of the debt, on the ground both of erroneous execution and undue delay.

The defenders *pleaded*—1. The charge and execution libelled were in due and proper terms of law. 2. The defenders are not, in any view, liable for the debt sued for, seeing that the charge and execution thereof libelled are in conformity with the general practice in similar cases. 3. The pursuer has not incurred loss or damage in consequence of any error in the said charge and execution, for which the defenders are legally responsible. The defenders therefore crave absolution, with expenses.

The record having been closed on summons and defences, the Lord Ordinary pronounced the following interlocutor:

"22d June 1841.—The Lord Ordinary, having heard counsel in this cause, and thereafter considered the record, writes produced, and whole process, sustains the defences, and assoilizes the defenders from this action; but finds expenses due to neither party, and decerns."

"*Note*.—The pursuer claims the whole of a large debt from the defenders, on the ground of irregularities in the charge and subsequent proceedings of the principal defender, the messenger, when lately employed to serve a charge on Lady Charlotte Bury, then at Inveraray Castle. The Lord Ordinary has not been able to satisfy himself that the pursuer is entitled to succeed on either of the grounds laid in the record for supporting this very penal action. The pursuer rests his claim for subjecting the messenger on two grounds:—

"1. It is said that the execution is erroneous, because it is set forth in the outset that it was given 'by virtue of an extract-registered protested note or bill of exchange, dated at Edinburgh the 11th day of November current, at the instance of Adam Glen, &c., against Lady Charlotte Maria Bury, presently residing at Inveraray Castle.' Now it certainly is a very homely and unprofessional description of the document on which the charge proceeded, to describe it as an 'extract-registered protested note or bill';—but the Lord Ordinary cannot say that it could have raised the least doubt or uncertainty in his mind as to the writ upon which the charge really proceeded. The execution plainly sets forth that a charge was given in virtue of an *extract*, which is described to have been an extract of a *protested bill*, i. e. of that protest, with the official copy of the bill prefixed, which, by the usage of Scotland and England, is expressed in the instrument of protest on a bill, and is recorded, along with the copy of the bill, in our records."

"It is of course, however, assumed by the pursuer that the charge was specified as proceeding on a *wrong* or misrecited writ, holding the execution to refer, in the outset, to the date of the protested note or bill, and not of the extract; but that clearly is a wrong reading of the extract. The farther recital of the execution afforded evidence *in gramio*, that the date first specified was the date of the *extract* of the protest, and not of the *bill*. The latter document (the bill) is very distinctly set forth a few lines afterwards in the execution, as dated 20th July, payable three months after date, 'all in terms and to the effect of the decree and extract before referred to.' Now, though no decree was before recited, that word was used as synonymous with 'extract,'—and the *extract* certainly was very clearly set forth in the outset of the execution, as dated 11th November; and the Lord Ordinary would consider it a species of *hypercriticism*, quite unfit to be applied to the writ of one of the humblest officers of the law, such as that now founded on, to hesitate in applying the reference here made to the ex-

tract, distinctly announced in the commencement of the execution as the warrant of the charge.

"In short, when this execution is read as a whole, without dwelling on a detached sentence or word, the Lord Ordinary does think it in every respect distinct and unambiguous;—and if a bill of suspension had been presented of the charge founded on this objection alone, he would without hesitation have refused it.

"It was argued, however, at the debate, that the messenger, in the present instance, had resorted to a new style, which made its validity at least *doubtful*, and therefore that he must be liable to the creditor, on the principle laid down in the House of Lords in the case of *Stevenson*, that when a conveyancer deviates from *accustomed* style, he must pay the penalty, if any error be found ultimately to have been committed. But the messenger's justification on this point appears to be complete. The summary charge on protests registered in the books of the Court of Session, without the necessity of hornings, was unknown prior to the Act of 1 and 2 Vict., cap. 114, passed on 10th August 1838; and if the messenger at Inveraray had been possessed of an excellent treatise on the office of *Messengers and Constables*, published by Mr Darling in 1840, he would have seen how to describe, with faultless accuracy, such warrants as the new Act authorises. But on the supposition that the messenger, as yet, was only furnished with a copy of the recent Act of Parliament as to diligence, the Lord Ordinary, on turning to the schedule, No. 2 of that Statute, feels that he must make considerable allowance for a messenger in a remote country town, acting on his own unassisted skill, who may have filled up an execution under the new form, with a few expressions of superfluous description. The example of right executions given in the statutory schedule (No. 2) sets out thus:—'Upon the day of _____, I messenger-at-arms, by virtue of (state nature and date of extract, and decree or document whereupon it proceeds,) at the instance of B., &c. Now, without impeaching the accuracy of the parenthetical direction contained in this schedule (which probably could not have been otherwise expressed without a multiplicity of forms), it is manifest that the messenger, in the first instance, plainly intended and attempted to follow the statutory schedule, to the best of his understanding, to the very letter; he therefore proceeded to describe the extract, both of the protest and relative document, whereon the charge proceeded, by using the terms '*extract-registered protested note or bill of exchange*.' As the farther recital of the execution showed clearly to every one, learned or unlearned, who read the whole writ, what was the warrant thus referred to, on which the charge proceeded, the Lord Ordinary cannot hold, on any construction fairly applicable to the case, that there was any recital of the warrant in this execution sufficient to annul the diligence.

"II. The second ground on which the liability of the messenger is maintained, appears to the Lord Ordinary to be attended with more difficulty. The warrant for charge here was transmitted to the messenger, by letter from Edinburgh, dated 11th November. The charge was given on Friday the 13th, and consequently, it expired on the evening of Thursday the 19th; but the messenger did not despatch it from Inveraray till Friday the 20th November, as the post-mark, still visible on the letter, proves. By this negligence, it is said that the messenger subjected himself for the debt.

"Under ordinary circumstances, the Lord Ordinary certainly would hold, that a messenger retaining a warrant for diligence in his own possession for a series of days after the charge has been given, without returning it till the *inducia* of the charge have expired, has acted so unwarrantably as to subject himself for the whole of the creditor's damage. He is not entitled, in general, to keep back the hornings, so as to prevent the creditor from raising ultimate diligence at the earliest possible hour after the charge expires. But there were specialities in the proceedings of the creditor which lead the Lord Ordinary to doubt if he be entitled to complain of the delay in the present instance.

"In the *first* place, it is proved by the correspondence produced, that the pursuer, in expectation of recovering the debt from the messenger and his cautioners, wrote to him on 19th November 1840, that he *rejected the execution as informal*, and intimated his resolution not to proceed with farther diligence

against the debtor, and that letter was written *before* the charge had expired. Of course, on the supposition that the execution was inept, this was all right, and the pursuer having his recourse against the messenger, he rested and periled his claim on *that* objection alone. If it shall be found, however, that the execution was not null, can a creditor complain of the non-return of an execution, which he had intimated during the *currency* of the charge, that he held null? It is apprehended that the chief foundation of an action of reparation is awaiting in such a case. A party cannot truly aver that he suffered any *injury* from the want of an execution which he had previously intimated that he was not to receive or act upon when he got it.

"In the *next* place, the pursuer is precluded, by his letter of 21st November, written when he first received the execution, from insisting in any claim against the messenger. The pursuer, by that letter, *returned* the protest and execution to the messenger without caption, that he might deal with these instruments as he chose. That was a legitimate and proper step; and indeed, the pursuer's mandatory could not have acted otherwise, if the objection which he had been advised to state to the execution had been well founded; but, on the other hand, if the execution was *not null*, and if the only legal ground of complaint which the creditor had, was the *delay* of the messenger in returning the execution, then it is obvious the creditor was the more bound to do every thing, in a case which he himself viewed as so very urgent, to save the messenger and his cautioners, in a critical stage of the debtor's affairs, from loss. Instead of that, the pursuer in his letter of 21st November, stated that the creditor could not even '*sanction any proceeding in their name on such an irregular production*.' He thus not only returned the warrant without a caption, but he *refused the use of his name* to the messenger to raise diligence for his own relief in the creditor's name. On the supposition, however, that the execution was *not null*, the Lord Ordinary does not think that the pursuer was entitled so to act. He should have sent the ulterior step of diligence (caption) to the messenger, under an intimation of his liability, so as he might have used it for his own behoof. Having failed to do so, the pursuer is barred, on that separate ground, from now throwing this debt on the messenger and his cautioners."

The pursuer reclaimed. At advising,

Lord President.—I cannot enter into the view put forward by counsel, and noticed by the Lord Ordinary, viz., that a messenger is to be regarded as a humble servant of the law, and that therefore any action brought against him for failure in his duty ought to be decided on very strict principles, as being of a highly penal nature. The situation of a messenger, I humbly conceive, is somewhat different. He is presumed to be properly educated for the discharge of his duties, and before he is permitted to undertake them, the law calls upon him to find security. The case of a messenger is thus the same as that of any other party who has pledged himself to the public, that he possesses the requisite skill, and gives security to indemnify those who might suffer by his want of it. Here, then, an action has been brought against a messenger and his cautioners for a sum of £450, contained in a bill on which he was employed to give a charge in terms of the Act 1 and 2 Vict. c. 114. Two objections are taken to the mode in which he performed this duty: *First*, that his execution is insufficient; and *secondly*, that the return of it, with its warrant, was unwarrantably delayed. As to the *first* objection, though I cannot say that the execution is free from doubt and ambiguity, or is in due conformity to the Statute, I am not prepared to say it is so defective as not to have warranted ultimate diligence. It is certainly so far defective, that any prudent practitioner, on looking at it, must have paused before venturing to proceed upon it. The *second* objection appears to me more formidable. The messenger received instructions to give a charge to Lady Charlotte Bury *immediately*. The instructions were dated on the 11th November, and the execution bears that he gave the charge on the 13th; but then he keeps it by him till the 19th, when the days of charge were about to expire, and then transmits it in a letter addressed to the agents of the pursuer. His letter is dated the 19th, but it bears the post-mark of the 20th, having apparently been put in too late for the post which leaves in-

veraray in the morning at nine o'clock. It thus does not reach Edinburgh till the 21st. Now what follows? Lady C. Bury, who had been charged on the 13th, leaves Inveraray on the 22d—a Sunday,—and that day or the following takes refuge in the Sanctuary. This is the state of the facts, as admitted by the defender, and proves that, by his negligence, the debtor was permitted to escape before the creditor could possibly proceed to take the necessary steps for ultimate diligence. Though the execution had been perfectly unexceptionable, the messenger, by his unwarrantable delay, rendered it impossible to make any use of it; and on this ground, I am much afraid that we cannot sustain the defender's excuses, but must find that, by the way in which he has acted, he has made himself liable for the debt. One excuse for not sooner transmitting the documents is, that "he was otherwise engaged." I cannot receive this as an excuse. Having given the charge (and we cannot forget to whom it was given), he ought to have transmitted it *instantly*, so that it might have been in Edinburgh on the 14th, in time to rectify any error, if any had been committed. But then he gives another excuse, viz., that he had heard the Duke of Argyll had written to his agent to make a settlement of Lady Bury's debts. What right had he to bear this, or pay any attention to it? *Quoad* the party employing him, his single duty was to perform, with the least delay, the duty intrusted to him. This excuse appears to me altogether insufficient, and I must therefore differ from the opinion of the Lord Ordinary, that there is any thing either in the situation of a messenger, or in the particular circumstances of this case, to justify the defender's conduct, and exempt him from liability for the debt.

Lord Gillies.—I take the same view. The messenger had a very disagreeable duty to discharge, but he knew the nature of his office: he took it with his eyes open; and having taken it, his undoubted duty was to perform it without choice, whenever called upon, and against whomsoever. He has nothing to do with the communications of parties. All he has to do is to obey his directions. These directions, in the present case, were few and simple. A warrant is sent to him, and he is directed to give a charge upon it *immediately*. Nothing can be more distinct than this—*immediately*. Now, two objections are taken to the execution of the charge: *First*, it is said that it is informal and inept—null; and, *second*, that whether good or bad, it was too late. It appears to me that either objection is sufficient. If the execution is defective, he is liable for the deficiency. If not defective, but unwarrantably delayed, he is liable for the delay. How, then, does the matter stand? In the *first* place, the charge is very inaccurately and clumsily worded. The expressions used can scarcely be said to import what is meant; yet, as there could be no room to doubt its meaning, on a perusal of the whole, I am not prepared to say whether it was inept or no. And it is not necessary; for I am clearly of opinion that the other objection of delay is sufficient to make the messenger liable. It is important to attend to the dates. The instructions are sent from Edinburgh on the 11th, and the charge is given at Inveraray on the 13th. So far there was no delay. But then the messenger detains the execution till the 19th, equivalent, from the hour at which the post leaves, to the 20th, and it does not reach Edinburgh till the 21st. That was a Saturday, and it thus became impossible to make any use of the diligence, for it is admitted that the debtor was off. It is impossible to listen to the excuse of being otherwise engaged. No engagement could have superseded the engagement to execute the duty which had been intrusted to him. But then he talks of a rumoured settlement of the debt. He had nothing to do with this, and was not entitled to consider it. The Lord Ordinary seems to have attached some weight to the fact, that the messenger was not allowed to act upon the diligence in the name of his employers. This should have weight, if, by acting on it, it could have been made effectual, and if the diligence was in itself such as a prudent man would have ventured to act upon. Neither of these was the case. It is quite possible that the diligence might ultimately have been found good; but were Messrs Gibson-Craig, on looking at it, and seeing how clumsily and inaccurately it was worded, warranted to risk the consequences of its being found inept? Besides, the dates show plainly, that even if the execution had been unexception-

able, it would have been impossible, from the messenger's unwarrantable delay, to use it with effect. I wish we could have sustained the interlocutor, but I am clear that it must be altered.

Lord Mackenzie.—I concur. The action is raised on two grounds. The *first* is, that the statement in the execution is not in terms of the Act of Parliament. I have some doubt, but I rather think this objection is not sufficient. Comparing the statement in the recent Statute with those in the Statutes 1681 and 1696, I rather think the terms of the charge, as given by the messenger, might be supported. But then comes the *second* objection, viz., that of delay to return the execution in due time. Whether the charge was right or wrong, the messenger did not send it back so as to be available to the creditor. The charge was given on the 13th, to pay in six days after. The object was to obtain the warrant of imprisonment as soon as the charge expired, in order that the diligence might have effect. As if to prevent this, the messenger keeps the execution by him, and does not put it into the hands of his employers till the day when, if he exercised due despatch, the warrant of imprisonment would have been at Inveraray. The debtor takes advantage of the delay, and goes off to the Sanctuary on Sunday the 22d. Thus all chance of accomplishing the object of the diligence was lost. There was here evidently a failure of duty in the messenger, and he must be liable, if he is liable in any duty at all. His excuse rather makes matters worse. I am much afraid the true account of the matter is, that he was very reluctant to execute the diligence. It required him to apprehend the Duke of Argyll's sister, and lodge her in the jail of Inveraray. I don't wonder at his reluctance. I don't think the worse of the man's heart for it; but he ought to have recollected that he was a messenger, and forgotten that he was a highlander. I am afraid some feeling of reluctance influenced him; and if he delayed on this account, he is clearly liable. But the Lord Ordinary thinks, that even admitting there was a ground of liability, it is obviated by the answers: *first*, that the agent objected to the diligence, and, by declaring his determination not to act upon it, made despatch in transmitting it unnecessary; and, *secondly*, that he refused to sanction the use which the messenger might make of it for his own behoof. The dates completely obviate the first answer. The messenger was allowed the use of the diligence on the 19th, and this permission was not recalled till the 21st. Now, I agree with Lord Gillies, though my doubt of the regularity of the diligence is not so strong as his Lordship's, that an agent is not bound to allow his client's name to be used when there is an apparent mistake in the diligence, and the consequence of proceeding with it may be an action of damages for wrongous imprisonment. Not long since a sum of £800 was awarded for the imprisonment of a female of ordinary rank for a few days in the jail of Greenlaw; and it would be difficult to say what sum might have been awarded for the wrongous imprisonment of Lady C. Bury in the jail of Inveraray. As far as my recollections go, it is not one whit better than the jail of Greenlaw. The agents were not bound to risk this action, for not only was the diligence doubtful, but the doubt was caused by the fault of the messenger. Perhaps, the irregularity was not such as to ground an action of damages, but it was great enough to prevent the messenger from saying that he suffered wrong in not being permitted to use it. I see no sufficient answer on the part of the defender, and I think we must decern for the pursuer in terms of the libel.

Lord Fullerton concurred.

The Court *altered*, and decerned in terms of the libel, with expenses.

Lord Ordinary, Cuninghame.—*Act*. Rutherford, Neaves; Gibson-Craigs, Dalziel and Brodie, W.S., *Agents*.—*Alt*. Solicitor-General (M'Neill), Horn; John Ross, S.S.C., *Agent*.—*B. Clerk*.—[H.B.]

19th November 1840.

FIRST DIVISION.—(H. B.)

No. 8.—EPHRAIM BOND, *Pursuer*, v. M'LEOD, *Defender*.

Process—Proof—Witness—Competency—Commission to examine a witness abroad, granted, notwithstanding of his appearing to have such an interest in the cause as may render his evidence incompetent.

In this action, in which the pursuer claimed payment of a sum of money, said to have been advanced, the defender moved for a commission to take the evidence of a witness residing in India. The pursuer opposed the motion, on the ground, that though the individual proposed to be examined was thoroughly cognisant of the facts, he had a most material interest in the cause—being in one view directly liable for the debt, and in another view, indirectly liable by way of relief, and so incompetent to give evidence.

The defender replied, that the motion was made in perfect accordance with the practice of the Jury Court, where a commission to examine a witness was considered merely as equivalent to a citation, and the relevancy or competency was left to be determined when the evidence was reported.

Lord President.—There are two questions here: the one, whether this is the proper stage for deciding on the competency of the witness, and the other, whether, supposing it to be the proper stage, the objection is such as ought to be sustained.

Lord Gillies.—The ordinary form is to grant the commission, and allow the objection to the competency to be stated afterwards. I can conceive a case where an objection to the competency ought to be determined at this stage, but I am not prepared to say that circumstances have been stated here sufficient to justify a deviation from the ordinary rule.

Lord Mackenzie.—It appears to me not only that there is nothing sufficiently apparent to require us to refuse the commission, but, on the contrary, that there is enough to show it ought to be granted. There may be competent, and there may be incompetent questions put to this witness, but till they are put, it is impossible to say whether they are competent or not.

Lords President and Fullerton concurred.

The Court granted commission.

For Pursuer, Pyper.—*For Defender*, Maitland.—[H.B.]

20th November 1841.

FIRST DIVISION.—(H. B.)

No. 9.—GEORGE COYNE, *Pursuer*, v. JAMES BOAG, *Defender*,—*Et à contra*.

Expenses—Process—Record—Circumstances in which the Court, on cause shown, allowed the expense of a condescence which the Lord Ordinary held to be unnecessary.

In both of these actions verdict had been given for Coyne, but Boag moved for the expenses incurred in preparing a record by condescence and answers. The ground on which he supported the motion was, that he was willing to have closed the record on summons and defences,—that the Lord Ordinary had strongly recommended this when the cause was first brought before him, and had afterwards, on returning it from avizandum, stated in a note that he still thought the condescence so unnecessary, that the party who had insisted upon it ought to be subjected in the expenses thereby occasioned.

Coyne replied, that the condescence had become necessary in consequence of certain statements which

had been introduced into the defences, and which there was nothing in his summons to rebut, as he never anticipated that they would be made. His statement was, that he had been traveller to the defender under an agreement, by which he was to receive a fixed salary and his travelling expenses. This agreement was to subsist till put an end to by either party giving three months' notice. About six months after the employment commenced, he received a proposal from his employer to allow him, instead of salary and travelling expenses, a certain commission on his sales. He was willing to entertain the proposal, but never accepted it, and continued till his last journey, in rendering an account of his transactions, to state the amount of his travelling expenses. That journey was to Newcastle, and while there he received a letter from his employer, desiring him to get an account of £22 due by a customer. He accordingly received payment on the 26th July, and on the 27th left for Leeds, where his employer then happened to be. He called for him the following day, Saturday the 28th, but not having found him, a meeting was arranged to take place on Monday, at the counting-house of Plint, O'Meara and Company. At that meeting some discussion took place as to the nature of the terms on which he was employed,—he (Coyne) insisting that the original engagement still subsisted, and Boag insisting that his proposal of a commission was accepted. Boag left hurriedly, before receiving any account of the journey, and Coyne then paid into the hands of Mr O'Meara, for Boag's behoof, the sum of £12 odds, being the payment received by him at Newcastle, under deduction of his expenses. The following day Boag dined with O'Meara, and on being informed of the balance left by Coyne, requested that it might be placed to the credit of his account. Coyne now considered his engagement at an end, and accepted an offer made to him by Plint, O'Meara and Company. He was allowed a few days to go to London and see his family; but having met with a very cool reception from his new employers, he inquired the reason, and was shown the following letter which they had received from Boag:

"I observe by your letter a statement regarding Coyne's matters, which I do not recognise, so that if you have received any money from him on my account, you had better return it again to him, as I have handed this matter over to my friend Mr Campbell, to act with in a different way. I trust you will not lose a post in sending him back the money, as Mr Campbell has this day applied for a criminal warrant against him for uplifting my money, and not duly accounting to me for it. The consequences may be serious against yourself if you retain the money a single post after this notice, as he may then have it in his power to say that you sanctioned his settlement."

His employers told him that he must now consider their engagement with him as cancelled. He immediately set out for Edinburgh, to meet the charges for which it was said a criminal warrant was taken out against him, and waited with his agent on the agent of Mr Boag, but, instead of a criminal warrant, was shown the copy of a letter which was addressed to him, in the belief he was still at London, and was in the following terms:

"Edinburgh, 7th August 1838.—Mr Boag, in whose employment you lately were, has learned, that upon the 24th ultimo, you received from Mr Henry Melvain of Newcastle, £22, the property of Mr Boag, but which you have not accounted for

to him. Mr Bosg is exceedingly surprised at this improper act of yours, and has directed me to intimate to you, that unless you account and settle with him in course of post for the money uplifted by you, proceedings of a personal nature will be instantly taken against you, for what is looked upon as a breach of trust."

The summons gave the above narrative, and concluded for

"the sum of £500 Sterling in name of damages, and as a *solatium* for the injury sustained by the pursuer in his feelings, character, and success, and prospects in life, in consequence of the false, calumnious, and injurious statements and accusations made by the defender to his prejudice, in manner before mentioned."

The defences, besides asserting that the pursuer, at the time when he deducted the money in question, knew that he was acting under an engagement which prohibited him from doing so, and producing a variety of documents in support of the assertion, contained a statement that the pursuer himself "had been guilty of a false, slanderous, and injurious statement as to the defender's character," for reparation of which he had raised an action of damages, with which, in the event of being found liable in damages to the pursuer, he was entitled *pro tanto* to compensate their amount. There was nothing in the summons to meet this statement; and the pursuer held, that on that ground alone, a condescendence was indispensable. It was true he had met that statement fully in his defences to the counter action, but the two actions might, for any thing he knew, have been tried by different juries, or been dropped altogether, so as to send him to a jury with an uncontradicted averment made against him, that his claim of damages for slander could not be sustained without compensating it by a claim against himself for similar slander.

Lord President.—As a general rule, we are not disposed to interfere with the opinion of the Lord Ordinary concerning the expenses incurred by the parties in making up the record. Long and unnecessary statements are often introduced, which complicate the case, and increase the expense; and this the Court never will encourage. Still it is clear that we are not bound by the judgment of the Lord Ordinary; and if on cause shown, we are satisfied that that judgment is erroneous, it is unquestionably our duty to dissent from it. In the present case, I am clear that the new matter introduced into the defences, made it necessary for the pursuer to have a condescendence; and I have, therefore, no difficulty in refusing the present motion.

Lord Gillies.—I concur. The record was made up as the pursuer suggested. The case went to the jury, and the verdict returned was in the pursuer's favour. It is quite possible that the same verdict might have been returned, though the record had been closed on summons and defences; but it is also possible—perhaps probable, that if there had been no condescendence, the verdict might have been different. I can conceive cases where there is no room for doubt that a condescendence is altogether unnecessary, and where, of course, the party insisting on it ought to bear the expense; but where there is a doubt, it would be perilous to hold, after a verdict has been returned in favour of the party who considered the condescendence indispensable, that the result would have been equally favourable to him if he had dispensed with it. In the present case, I think the statements made by the pursuer show that he was right in insisting on a condescendence.

Lord Mackenzie.—It certainly is not safe for us, in the general case, to take upon us to decide what papers might or might not have been dispensed with. The Lord Ordinary is the best judge of that; but when statements are made to us showing the necessity of the papers alleged to be unnecessary, we must decide according to the information given us. In actions of damages, in particular, the party who thinks himself

sure of his cause, may be disposed to luxuriate in condescendences. We must look sharp after that, and discourage it; but from the statements now made, I cannot venture to say that the condescendence in question could safely have been dispensed with.

Lord Fullerton.—I am most unwilling to go against the judgment of the Lord Ordinary who prepares the cause, and has full opportunity of ascertaining what kind of record is required to furnish the proper issues. Here the Lord Ordinary, both before the issue was prepared and after, gives a decided opinion that the condescendence was unnecessary; and it appears to me that something stronger than the statement we have heard, would be necessary to justify us in dissenting from that opinion. Where a cause is not to go before a jury, I can understand how very necessary it is, where new matter is introduced into defences, that the pursuer should have an opportunity of rebutting it by a counter statement in the record; but where the cause is to go before a jury, all that the record requires to contain is matter sufficient to raise the issue by which the facts are to be tried. Now, who can be so good a judge of this as the Lord Ordinary? I cannot see how the verdict can be affected by the mode of making up the record. The verdict is given on evidence, and the important point is not what is averred, but what is proved. If the summons and defences did not contain matter sufficient to raise the proper issue, or, in consequence of any omission, precluded either party from bringing forward proper evidence, I could understand the necessity of a condescendence. This risk, however, is sufficiently guarded against in practice, as the record is not closed till the issue is prepared, and the party who finds that the proper issue can't be raised under the record as it stands, has it still in his power to introduce the statements that may be required. Here the Lord Ordinary stated his impression before the cause went to the jury clerks, that a condescendence was unnecessary; and after it returned with the issue prepared, stated expressly in a note that his impression was confirmed, and that the expenses of the condescendence ought to fall on the party who had insisted upon it. I am not satisfied that his Lordship erred in this opinion, and I am therefore inclined to grant the motion for these expenses.

The Court refused the motion.

Lord Ordinary, Cockburn.—*For Motion*, Shaw; Robert Gordon, W.S., *Agent.*—*Against Motion*, Whigham; Thomas Darling, S.S.C., *Agent.*—*R. Clerk.*—[H.B.]

20th November 1841.

SECOND DIVISION.—(J. W.)

NO. 10.—ANN BRUCE, *Pursuer*, v. WILLIAM PETRIE, *Defender*.

Parent and Child—Paternity—Illegitimate Child—Oath in Supplement—*Circumstances held not to amount to a semiplena probatio, so as to entitle a party to her oath in supplement.*

This was an action of aliment for an illegitimate child, of which the pursuer was delivered on the 5th May 1840, and of which she alleged that the defender was the father. He denied the paternity; and in the course of the proceedings before the Sheriff-court of Forfarshire, the pursuer, in her judicial declaration, stated, that on the night of the Monifieth races, the 31st of July 1839, she went down to the Dundee Railway station at Arbroath, to see the evening train arrive, which she thinks was between nine and ten o'clock on the evening of the race-day: That she left the station after the arrival of the train, and returned up the town, accompanied by John Jolly and Jess McDonald: That they went to the house of one Phillip, a vintner, and remained about half an hour: That the three then went to the house of a Mrs Gunn, where the pursuer went to bed, and in the course of the night was awakened by Mrs Gunn to go into another room, where she

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found the defender alone, and remained with him about half an hour or three quarters of an hour.

A conjunct proof having been allowed, the first witness for the pursuer, Elizabeth Henderson, deponed, that on the night of the Monifieth races, while M'Donald and the pursuer were asleep together, Mrs Gunn awakened the pursuer, and sent her into another room to the defender; and that, two or three nights thereafter, the defender was again in Gunn's house, and inquired after the pursuer.

Jess M'Donald deponed in terms of the pursuer's declaration, but that she did not see the defender in Mrs Gunn's.

Jean Valentine deponed, that she went along with the pursuer to the defender, when the pursuer stated that she was with child by him; but the defender said to the pursuer, that she had no claim upon him unless the child came to his time, and then he would answer for it.

On the other hand, John Jolly deponed, that on the night of the Monifieth races he did not see the pursuer, Ann Bruce, nor during the following morning: That he was not in Phillip's tavern with any woman on the said evening of the races, or morning following; nor was he, during that time, in the house of Mrs Gunn: That since the deponent commenced business at Whit-sunday 1837, he has only been once in the house of Mrs Gunn, and that happened in the autumn of 1838: That he recollects distinctly of having once been in company with the pursuer, Ann Bruce, in Phillip's tavern, but this happened fully three years ago.

Mrs Gunn deponed, that in 1839, a short time before St Thomas's market-day, which is held in Arbroath on the 18th day of July, she recollects of John Jolly coming to her house in company with the pursuer and M'Donald: That as she was showing Jolly out of the house by the street door, she saw the defender, William Petrie, passing along the street at the time: That he came up and spoke to her at the door, and accompanied her into her kitchen: That while they were there a rap was made on the street door, and she, not wishing the defender to be seen, directed him to run up stairs, which he did: That she followed up close after him, and found that he had gone into the same room where the pursuer, Bruce, and M'Donald were in bed: That she again went down stairs, and after being absent about five minutes, she returned and remained a short time in the room with the pursuer and defender; and Jess M'Donald having risen from bed, sat down beside them: That the deponent then left the room and went down to the kitchen, leaving the pursuer, defender, and M'Donald together: Further, she deponed, that the defender was never in the deponent's house in company with the pursuer, unless on the occasion above deponed to.

David Ormond deponed, that on the same evening he went out with the defender's father and mother to the defender's house at Waulkmills, and after supping, he and the defender returned to Arbroath betwixt two and three o'clock in the morning: That he parted with the defender in Smithy Croft, where the deponent resides, and he saw the defender go down the road towards his father's house, which is also in Smithy Croft.

The defender's brother deponed, that he was awoke in the course of the night by his brother, the defender,

coming into the house: That day-light was not then come in: That the defender came into the same bed with him, and he again fell asleep. His father returned home from Waulkmills in the morning, a little past five o'clock, and his brother, the defender, was at that time in bed with him.

The Sheriff-substitute pronounced the following interlocutor:

"*Forfar, 4th March 1841.*—The Sheriff-substitute circumduces the term for proving, and having advised the proofs for the parties, minutes of debate thereon, and whole process, finds that the pursuer has brought a *semiplena probatio* of her allegation that the defender is the father of the child in question, and therefore allows her to give her oath in supplement of the proof; assigns
for her doing so."

(Signed) "A. ROBERTSON."

"*Note.*—On the night of the Monifieth races 1839, (i. e. either on the 31st July or 1st August of that year), the pursuer and the girl M'Donald having been shut out of their lodgings, went into a house of bad fame in the neighbourhood, kept by Mrs Gunn, where they went to bed the worse of liquor.

"That night, or very early next morning, the defender, after parting with the witness Ormond, on the street of Arbroath, was in Mrs Gunn's house, where he remained for a considerable time.

"The pursuer got out of bed, and she and the defender were by themselves in Gunn's house for some time.

"The witness Henderson swears, that on the Saturday following she again saw the defender in Gunn's house, and that he expressed a desire that she would bring the pursuer to him.

"The witness Valentine swears, that she and the pursuer went to the defender some time in the following winter, to inform him that the pursuer was with child to him; that when the pursuer did so, the defender denied that he was the father, and said she had no claim on him unless the child came to his time, and then he would answer for it.

"The child was born on the 5th May 1840.

"The defender, in his declaration, denied that he had been in Gunn's house since he was ten years of age.

"The Sheriff-substitute cannot discover, on the evidence, any trace of a plot to saddle the defender with the maintenance of the child, as insinuated by him. There is, it is true, various discrepancies in the evidence. Thus Mrs Gunn dates the meeting in her house about a fortnight before the races; but this seems to be a mistake, for there was only one meeting of the parties there, the circumstances attending which are sworn to by her and by the other witnesses. There are some discrepancies also as to what took place in Gunn's house, but this may be partly accounted for by the state of intoxication in which some of the persons then were. Gunn and M'Donald, too, swear that Jolly was in company with the pursuer and M'Donald that night; while Jolly swears that the occasion on which he was in their company was some months prior to the races. In the view of the Sheriff-substitute, these discrepancies do not demolish the important parts of the evidence.

"The witnesses for the pursuer, and Mrs Gunn, called by the defender, are undoubtedly loose characters, but they are just such persons as would be in the knowledge of the facts to which they swear. There were no other witnesses to these facts, and the evidence of the pursuer's witnesses is corroborated in some particulars by the defender's proof.

"The Sheriff-substitute does not see any grounds for holding, that because the defender happened by chance to be late on the street on the night in question, he has been fixed on by the pursuer as the father of her child, and that she has concocted all the evidence which has been brought against him without a particle of truth in it, so far as he is concerned, unless, however, it is to be held that that evidence is a fabrication of falsehoods, so far as applicable to the pursuer, and that four witnesses (who have no interest in the matter) are perjured, his plea cannot be sustained.

"The defender argues, that the proof is insufficient to identify him as the person alluded to in it. The Sheriff-substitute is of opinion that the proof is sufficient on that point."

The defender reclaimed, and on the

"20th March 1841.—The Sheriff-substitute having advised with the Sheriff, recalls the interlocutor of 4th March, assolizies the defender, and finds him entitled to expenses, whereof appoints an account to be given in and taxed."

(Signed) "A. ROBERTSON."

"Note.—The evidence led by the parties is in many particulars very contradictory, but it is not necessary here to enter upon all of it. The points are very well brought out in the minutes of debate for the parties.

"The Sheriff is of opinion that a satisfactory *semiplena probatio* has not been made out by the pursuer, and that the attempt is defective, and not to be relied on.

"The pursuer's allegation is, that the child was begotten (or at least that the first sexual intercourse between the parties took place) in the house of Mrs Gunn, who seems to be the keeper of a brothel, late on the evening of 31st July, or early on 1st August. She alleges that she and Jess M'Donald were asleep in a bed in Mrs Gunn's house,—that the defender came there for the purpose of sexual intercourse—that Mrs Gunn put him into a separate room—awoke the pursuer, and sent her in to that room—and that the parties remained there together for some time.

"This is indeed sworn to by Eliza Henderson, who appears to be a frequenter of Mrs Gunn's house, and was there, as she admits, at that untimely hour of the night, and also on another occasion a few days after. But she is not supported by any other witness. Jess M'Donald, who was in bed with the pursuer, proves nothing against the defender, and did not even see him in the house, which, to a certain extent, contradicts Henderson; while Mrs Gunn, whose proceedings form the main part of the charge, gives a very different account of the matter, viz., that the defender was merely passing the door at the moment when it was opened by Mrs Gunn to Jolly, who was leaving the house, and that the defender seeing Mrs Gunn, went into the house in order to give Mrs Gunn a dram, and while in the kitchen, a rap was heard at the door, and she directed the defender to run upstairs, that he might not be seen, and that he accidentally went into the room where the pursuer and M'Donald were, and sat down at a table with them. Mrs Gunn says she did not put the parties into a separate room, as alleged by Henderson; nor does she say that she saw any familiarity take place between them, or that any opportunity was afforded them of having sexual intercourse, or that she awoke the pursuer for that end.

"Now, 1st, Henderson is but a single witness; and even if she had stood uncontradicted, and supposing her testimony entitled to the fullest credit, her evidence, unless supported by some corroborative circumstance that could be relied on, would not establish a *semiplena probatio*. For facts amounting in any case to a *semiplena probatio* must be proved like any other set of facts that are to be founded on, viz., by two or more witnesses, or by circumstances supplying the want of a second witness.

"But, 2d, Henderson's evidence is not only not supported by M'Donald, who must have seen some part of what she (Henderson) states, but is positively contradicted by the evidence of Mrs Gunn, whose proceedings Henderson swears to, which totally neutralizes Henderson's evidence.

"This is all the proof, except the statement by Jean Valentine, one of the pursuer's associates, that when the defender was in the following winter charged with being the father of the child, he denied it; but said, 'she had no claim upon him, unless the child came to his time.'

"If Henderson had been a person whose testimony was deserving of full credit, and had stood uncontradicted by any witness equally deserving of credit, the above circumstance mentioned by Valentine would have gone far to supply the want of a second witness, and to make up a *semiplena probatio*. But as matters stand, it is of no value as coming out of the mouth of a single witness of her description, while the main allegation of sexual intercourse is not proved,—Henderson's testimony being neutralized by that of Mrs Gunn.

"But a great deal of evidence has been adduced for showing that the whole story of the defender and Jolly being in Gunn's

house on the occasion in question is false; and assuredly the witnesses adduced on this branch of the cause are much more worthy of credit than Henderson or Valentine,—the former, by her own account, the frequenter of this noted brothel, and the latter the associate of the pursuer, who had previously strayed from the paths of virtue, and on the occasion in question was found in Mrs Gunn's house in a state of intoxication. But if the pursuer's proof has failed, as the Sheriff thinks is the case, it is the less necessary to rest upon the proof of *alibi*, for which much is to be said, and which is still open for consideration."

The pursuer advocated; and on the 9th July 1841,

"The Lord Ordinary having heard the counsel for the parties, and considered the process, Recalls the interlocutor of the 20th of March 1841: Finds that the advocate has brought a *semiplena probatio* of the respondent being the father of the child in question; and remits to the Sheriff, with instructions to allow her oath in supplement, with power to the Sheriff to dispose of the expenses of the advocacy, as well as the expenses in the Inferior Court, according as his judgment shall find the oath affirmative or negative, and decerns.

"Note.—The Lord Ordinary concurs in general with the views taken by the Sheriff-substitute."

The defender reclaimed. At advising,

Lord Moncreiff.—This is a case of some difficulty, and I am not surprised at the difference of opinion among the learned Judges before whom it has already come. But it is a matter to be judged of upon the evidence, and we must decide according as it appears to us. Now, according to President Blair, *semiplena* does not mean suspicion merely, but something more. The pursuer comes into Court, averring the 31st of July to be the particular night on which certain circumstances occurred, and that she was alone with the defender in a room in Mrs Gunn's. She also says that some intercourse took place between them afterwards, but she does not say that any took place before. The evidence of Jolly expressly contradicts her story. As to what took place in Gunn's house, Elizabeth Henderson states, that she saw the defender there, and that he and the pursuer were in a room together for half an hour; and certainly, considering the character of the house, if this were corroborated, it would be quite sufficient to constitute a *semiplena*; but she fixes the date to be the 31st of July, while Mrs Gunn says it was some time before the 18th July. The whole evidence is contradictory as to what took place in Gunn's house; and in such circumstances, we are bound to look at the evidence of *alibi*.

Lord Meadowbank and Lord Medwyn concurred.

Lord Justice-Clerk.—The object of an oath in supplement is, not to cast the balance, or to remedy contradictions.

The Court pronounced the following interlocutor:

"Recal the interlocutor of the Lord Ordinary complained of advocate the cause; refuse to allow the pursuer's oath in supplement; assolizie the defender from the conclusions of the action, and decern."

Lord Ordinary, Cockburn.—Act. Arkley; James Burness, S.S.C. Agent.—Alt. Patton; Graham Binny, W.S., Agent.—T. Clerk.—[J.W.]

20th November 1841.

SECOND DIVISION.—(J. W.)

No. 11.—JESSIE DARLING or WILSON and OTHERS, Pursuers, v. JAMES ADAMSON, Defender.

Process.—Title to Insist.—Trust.—An action at the instance of two trustees and the beneficiaries under the trust, was raised against a third trustee, to compel him to execute the trust; pending the action the trustees, pursuers, died.—Held that the instance remained good, and that the beneficiaries had a proper title to pursue the action without sisting the representatives of the deceased.

An action was raised at the instance of Mr and Mrs Darling, two of the trustees, and their children, the

beneficiaries under the trust-deed of the late Mr Stormonth, against Mr Adamson, another trustee, with a view to compel him to execute the trust. The pursuers prevailed, and were found entitled to expenses, subject to modification. The defender reclaimed upon the matter of expenses, and the Court, before answer, remitted to the Lord Ordinary to modify the expenses. During the dependence of the action the two trustees pursuing died, and the defender moved the Lord Ordinary to sist process until their representatives should enter appearance. The Lord Ordinary reported the case to the Court,—when it was *pleaded*, that the instance was still good, as the beneficiaries who concurred in the action, and who, by themselves and in their own right, had a sufficient title to institute and follow forth the action, still survived. *Answered*—That an interlocutor in favour of a deceased party, was as bad as an interlocutor against a deceased party, and that the representatives of the deceased should be sisted. *Replied*—That the trustees sued *qua* trustees, and their representative in that character is the defender himself, the sole surviving trustee.

The Court *refused* to sist process.

Lord Ordinary, Cockburn.—*Act.* G. G. Bell; J. S. Darling, W. S., *Agent.*—*Alt.* Neaves; Graham Binny, W. S., *Agent.*—[J. W.]

20th November 1841.

SECOND DIVISION.—(J. W.)

NO. 12.—*MRS JANET POLLOK or TENNANT and HUSBAND, Advocators, v. DR WILLIAM POLLOK, Respondent.*

Service—Brieve, Advocation of.—Statute 1 and 2 Vict. c. 86, § 2.—*Process*—A note of advocacy of a brieve was presented to, and marked by the depute-clerk of Session, and was thereafter, without being published in the calling lists, and then enrolled in the printed rolls for the week, laid before the Lord Ordinary named in the note—*Held* that the procedure was correct, and that the next step in the cause was for the Lord Ordinary to advocate the brieve.

James Pollok of Logiegreen, Esq., having fallen into such a state of mental derangement as to be incapable of managing his own affairs, his daughter, Mrs Tennant, in September 1841, presented a petition to the Lord Ordinary on the bills, praying for the appointment of a *curator bonis* to her father, and suggesting Mr James McClelland, accountant in Glasgow, as a proper person to be appointed to that office. A similar application was a few days thereafter presented by Dr Pollok, the younger brother and nearest agnate of James Pollok, craving that he himself should be appointed to the office, which he was willing and bound to discharge gratuitously.

On the 15th October 1841, Lord Fullerton pronounced the following interlocutor:

“The Lord Ordinary officiating on the bills having resumed consideration of the petition of Mrs Janet Pollok or Tennant and husband, answers for Dr William Pollok, replies and duplicates, and productions for the parties—Of new nominates and appoints James McClelland, accountant in Glasgow, to be *curator bonis ad interim* until the 14th day of November next, to James Pollok, mentioned in the petition, with the usual powers, he finding caution before extract, in terms of the Act of Sederunt, and decerns; and allows an interim extract to go out accordingly.

“*Note.*—It is to be regretted that there is here any differ-

ence between parties so nearly connected, and it is perhaps hardly necessary for the Lord Ordinary to disclaim all intention of countenancing any imputation against the respondent, Dr Pollok, by pronouncing the above interlocutor.

“He has only followed what he considers to be the usual practice. There is no question here of the legal rights of the respondent as nearest agnate. He may assert those, if he is so advised, in the common form. The appointment of a *curator bonis* is a matter mainly within the discretion of the Court, and in the exercise of that discretion they are of course guided by the circumstances of each case.

“Here Dr Pollok suggests himself for the situation. His near relationship would give him great claim, if those claims were not opposed by one still nearer, viz., the only daughter of the party, in concert with the wife and sister.

“In the face of such opposition, the suggestion of the respondent cannot, consistently with the usual practice, be listened to. The only alternative is the appointment of a third party; and as Mr McClelland is a third party, against whom no objection is made by the respondent (if a third party is to be named at all), the Lord Ordinary sees no reason to hesitate about appointing him.

“As to the expense of employing a professional person, that can make very little difference; for, from the nature of the subject of management, it is pretty clear that the respondent could not dispense with professional assistance.”

Dr Pollok reclaimed, and meanwhile applied for, and obtained a brieve from Chancery, directed to the Sheriff of Lanarkshire, for the purpose of cognoscing his brother as insane, and of getting himself served as his tutor-at-law. After the brieve had been published, the service was fixed to take place at Glasgow upon Monday the 15th November; whereupon Mrs Tennant and her husband, with concurrence of the wife and sister of Mr Pollok, entered appearance in the cause by lodging a minute of compearance and objections; and thereafter they presented a note of advocacy for the purpose, and in terms of the 2d section of the Statute 1 and 2 Victoria, c. 86, which advocacy was duly intimated. The note was addressed “unto the Right Honourable the Lords of Council and Session,” and the prayer with which it concluded was, that their Lordships should advocate the brieve, &c.; and also, “to remit to, or appoint Lord Cuninghame, or any of their Lordships’ number, to be Judge in the said cause, and to proceed with the same, and to hear and dispose of the complainers’ objections in common form.

By the section referred to, and founded on, it is enacted, that

“where a party claiming right to appear and oppose a service has made appearance, it shall be lawful to any party to remove the cause or proceedings to the Court of Session by written note of advocacy, as aforesaid, not only from any inferior Judge, but also from the Sheriff of Edinburgh, acting under special commission by authority of the Court of Session, and such note shall be received and marked in manner and to the effect foresaid, and be laid before a Lord Ordinary named in the note, who shall advocate the brieve, and be the Judge in the said service.”

It being of importance that the service should be proceeded with as speedily as possible, the respondent requested the clerk of Court to lay the note before Lord Cuninghame, in order that he might advocate the brieve, and be the Judge in the service, as directed by the Statute. But as doubts were entertained by the clerk how far the note of advocacy should not abide the ordinary course of the rolls, the respondent lodged a note, craving his Lordship to order the note of advocacy to be laid before him for the purposes of the

Act. On this application the Lord Ordinary pronounced the following interlocutors:

"16th November 1841.—The Lord Ordinary having considered a note for Dr William Pollok, and heard counsel for the parties—Makes *avizandum* with the process and debate."

"19th November 1841.—The Lord Ordinary having heard counsel on the objections urged by the respondent (advocators) to the enrolment of the present advocacy of brieves in the Lord Ordinary's hand roll, instead of going through the printed roll—Makes *avizandum* with the cause to the Second Division of the Court, and appoints printed copies of the brieve and advocacy, with the certificate of the clerk thereon, to be forthwith boxed, that the case may be reported."

"Note.—On 24th October 1841, Dr William Pollok took out brieves from Chancery, addressed to the Sheriff of Lanarkshire, for cognoscing his brother, James Pollok of Logiegreen, as *insane*. On 9th November, Mrs Tennant, the only child of Mr James Pollok, with concurrence of her mother, the wife of Mr Pollok, presented a note of *advocation* for removing the inquisition to this Court, which note was framed in strict accordance with the late Act 1 and 2 Vict. cap. 86, relative to advocations. The note was not presented to the Bill-Chamber clerk, but to Mr Beveridge, the depute-clerk of Session, who officiates in the causes before the present Lord Ordinary."

"In a few days afterwards the case was enrolled by Dr Pollok, the raiser of the brieve, in the *hand roll* of the Lord Ordinary, to get an order for fixing or expediting the trial. It was then objected that the case had not been regularly enrolled, as it should have been put, *called*, or published in the calling lists, and then enrolled in the *printed roll* of the week. At the request of both parties, this incidental point of form is now reported to the Court."

"The Lord Ordinary was at first disposed to view this as a trivial point of form, which, when fixed either way, was of no great consequence to the law; and he was, and still is of opinion that the objection in this instance is not well founded under the peculiar terms of the Statute, to be immediately referred to. But though the question is in one view very immaterial in itself, the decision may affect other points in the trial of brieves under the new system lately prescribed for them in this Court, of considerable importance in practice."

"By our ancient forms it is well known that brieves were uniformly directed to inferior Judges: See Erskine, B. I. t. 3, § 19. This was probably soon felt to be inexpedient in practice, and therefore advocations of brieves to the Supreme Court were sustained at an early period in cases of importance; but the Court did not, even in these cases, allow the service to be concluded before themselves, but they gave commission to the *macers* to try the case, and directed a brieve from Chancery to be issued to these functionaries to make the necessary inquisition and return,—two of the Judges being usually named *assessors* to the *macers*. All questions as to the title of the pursuer of the service, and other objections thereto, capable of *instant verification*, were heard and decided, either by the Court before a remit to the *macers* was made, or on report of the Lords Assessors at a subsequent stage: See the cases of Sir Alexander Don in 1712 (Dict. p. 14,425), and of Douglas and the Duke of Hamilton in 1761 (p. 14,457). When the assessors determined any point themselves, there does not seem to have been any remedy except by *reduction*."

"This antiquated and preposterous system of trial before the *macers* continued in observance till 1821. By Act 1st Geo. IV. cap. 38, § 11, all brieves to *macers* were abolished, and such inquisitions as were in use to be directed to the *macers* were appointed to be tried before the Sheriff of Edinburgh; and as to the removal of brieves into this Court, it was provided, that 'in all cases of competition of brieves, as well as when a party claiming right to appear and oppose a service shall make such appearance, either party may apply for and obtain advocacy of the brieves to the Court of Session, not only from any inferior Judge, but also from the said Sheriff of Edinburgh, acting under special commission; and the Lord Ordinary before whom the letters of advocacy shall be called shall advocate the brieve, and remit to the fifth or junior permanent Lord Ordinary for the time to be Judge in the said ser-

vice, without prejudice, nevertheless, to the power of the Court, whether on declinature or any other cause shown, to remit to any other Ordinary to be Judge in any service.'

"It is then provided, that the service shall proceed before the Judge of this Court, to whom 'it is remitted in the same plan, form, and manner (unless in so far as the same may hereafter be otherwise regulated, in manner herein after authorised), as services heretofore have proceeded before the *macers*.' The clause concludes with a very ample power to the Court to make such rules 'for altering and amending the form of issuing and executing brieves, and conducting the proceedings in services,' which has not as yet been acted on by the Court."

"Then came the Statute of 1838 (1 and 2 Vict., cap. 86), relative to advocations, which, in section 1, provides very specially for the passing, calling, and enrolling of advocations in ordinary civil causes from inferior courts; while in section 2, that circuitous procedure is not prescribed as to the advocacy of brieves, but, apparently from the summary and urgent nature of the inquisitions required in brieves, it is declared that it shall 'be lawful to any party to remove the case or proceedings to the Court of Session by written note of advocacy as aforesaid, not only from any inferior Judge, but also from the Sheriff of Edinburgh acting under special commission by authority of the Court of Session; and such note shall be received and marked in manner and to the effect aforesaid, and be laid before a Lord Ordinary named in the note, who shall advocate the brieve, and be the Judge in the said service.'

"It is obvious, that under this clause, the Legislature did not intend that advocations of brieves should go through the same course as ordinary processes; but it gave a right to all having interest to remove, *per saltum*, the trial of the brieves from an inferior Judge to a Judge of this Court; and instead of being put out in the calling list, taken to *see*, and then enrolled in the Outer-House rolls, when one or other of the parties comparing might have insisted on a record being made up, a simpler and more summary course is authorised; and the Statute provides that the case 'shall be laid before the Judge named in the note of advocacy, who shall advocate the brieve and be the Judge in the service.'

"This Statute made several important changes on the Act of 1821. Under that Act, the advocations were directed to be called before the Lord Ordinary (it is presumed) of the week, who was to remit them to the junior Lord Ordinary. This necessarily implied an enrolment in the Outer-House printed roll—which direction is entirely omitted in the late Statute. But, besides, there is a more important change in the law of brieves by the last Act. It is now imperative on the Court (or at least Lord Ordinary) to advocate the brieve, and be the Judge in the service. The Court has no discretion to refuse the advocacy, and to send the brieve back to the inferior Judge to be tried, as was done under the Act of 1821, in the case of Jardine and Currie.—See 4 Shaw's Reports, p. 158, 8th July 1825. The enactment is express and unqualified, that the Lord Ordinary 'shall advocate the brieve.' This is placing the right of either party, and in fact of any one interested, to insist on a trial of the brieve in this Court, just as under the Judicature Act of 1825, any party interested in a civil suit involving an interest of more than £40 Sterling, has a right to advocate the case for trial by jury, without assigning any reason, than that he prefers that mode of trial in this Court."

"But while brieves are thus summarily removable into this Court, it seems to have been the policy of the Legislature that the inquisition should proceed with as little delay as possible. The brieves for serving heirs, and for cognoscing *furiosity*, are governed by the same rules; but in each case the law has always been jealous of delay and opposition, and allows the service to proceed *ad interim*, to establish the title of the heir, or to procure the necessary protection to a fatuous party, leaving any error to be corrected by *reduction*. Hence, no reasons of advocacy are allowed in the advocacy of brieves, and no calling of the cause is provided; no right is given to take the advocacy to *see*; but the case is at once to be laid before the Lord Ordinary, who is apparently to proceed just as the assessors of the *macers* did in former practice."

"If the case were enrolled in the roll of other advocations, that very course might imply that this was to be treated as an

ordinary cause, in which every form of the advocacy process is to be gone through; and all orders of the Judge preparatory to trial to be reviewable by reclaiming notes, and possibly by appeals to the House of Lords, in case of difference of opinion among the Judges. But that would be an utter obstruction of justice, and would often prostrate the great object of services, as it might be doubted if the powers of the Court to give *interim execution* would apply to the progress of a service. The policy of the law has ever been, to give the most summary dispatch in services, and on the same principle that the retour of the inquest of Chancery cannot be stopped by any allegation of error in the jury or presiding Judge, the party aggrieved cannot get a new trial on the ground of misdirection, but the retour must be made first to Chancery; and the form of review is by *reduction*,—thus implying that the trial of the brieve is a separate process, which the Court can only review in that form without interfering with the trial during its progress.

"These views naturally lead to a consideration of the powers of review possessed by the Court over the judge of the service, even in its preparatory stages. Such power was taken for granted in the case of the Rev. William Fraser against Lord Lovat, in December 1840 (reported only in the Jurist of that date), when the Second Division altered and enlarged a diligence (which had been allowed by the present Lord Ordinary as Judge of that service in limited terms), and granted a wider range of expiation to the raiser of a brieve of propinquity. But the question now suggested did not occur, and was not considered. It is, beyond all doubt, expedient that such power of review should exist (if the delays incident to appeals to the Court of last resort *pendente processu* can be avoided), to prevent the hardship and loss to individuals and families, which an error in the conduct of any Judge in a service may inevitably lead to, as exemplified in the case of Sommerville against Thomson, (Fac. Coll., 19th May 1815). And, on the whole, if there be any doubt as to the ulterior course of proceeding in these services, it would form a strong ground for the Court exercising, without delay, the powers competent to them by the Act of 1821, 'to alter and amend the form of conducting the procedure in such services.'"

Lord Cuninghame having reported,

Robertson pleaded for Dr Pollok—That the advocacy of a brieve was a process *sui generis*, and was not to proceed as an ordinary note of advocacy. By the 2d section of the Statute, it was to be laid before the Lord Ordinary named in the note, and might be laid before him in vacation as well as during Session. It was of a summary nature, in which there was to be no record; and it was imperative upon the Lord Ordinary, on its being laid before him, to advocate the brieve, and be Judge in the service. Thereafter, the cause was to proceed by fixing the day of service, as the Sheriff would have done had there been no advocacy. If there be any objection in bar of trial, it ought to be stated at the trial, and not at the present stage. The legal remedy for protecting a person who has become insane, is by the service of a tutor-at-law; the appointment of a *curator bonis* is merely a prætorian remedy.

Maitland—The only point to be considered is, in what shape the cause is to be brought into Court? The practice is, to call advocations of brieves in the ordinary way, and to allow them to be taken to see. The second section provides, that such note shall be received and marked in manner and to the effect foresaid; that is, in the manner an ordinary note of advocacy is received and marked, as provided in the first section.

Solicitor-General replied—That the first section of the Act refers to ordinary advocations; the second to a competition of brieves; and the note of advocacy

is to be received and marked by the clerk, to the effect of stopping proceedings in the Inferior Court; but after this, the mode of proceeding prescribed in the two sections is totally different. By the second section, the note is to be laid before the Lord Ordinary, who shall advocate the brieve without going through the course of the rolls, which implies the making up of a record.

The Court pronounced the following interlocutor:

"Find that the first step in the present process is to advocate the cause: Remit to Lord Cuninghame accordingly, to advocate the cause, and proceed further in terms of the Statute."

The Court then disposed of the reclaiming note against Lord Fullerton's interlocutor, by recalling the appointment of William McClelland as *curator bonis*, and remitted to the Sheriff to report to them a neutral person to be appointed to that office, until the service of the tutor-at-law.

Lord Ordinary, Cuninghame.—*Act. Maitland, Moir; Wotherpoon and Mack, W.S., Agents.*—*Alt. Solicitor-General (McNeill), Robertson; James Burness, S.S.C., Agent.*—*F. Clerk.*—[J.W.]

23d November 1841.

FIRST DIVISION.—(H. B.)

No. 13.—JOHN CRAIG, *Suspender, v. BROCK and FERGUSON, Respondents.*

Diligence—Charge—Process.—A warrant to charge in name of a company, and the individual partners, is not sufficient to sustain a charge in name of the individuals only, without any mention of the company.

The firm of Brock and Ferguson, grocers and spirit merchants at Hamilton, drew the following bill on John Craig, senior, farmer, Auchinraith, and John Craig, junior, his son:

"£29. 8. 6. Sterling. Hamilton, 8th September 1840.

"One month after date pay to us, or our order, at the British Linen Company's office here, the sum of twenty-nine pounds eight shillings and sixpence Sterling, value of"

(Signed) "BROCK and FERGUSON."

The Craigs accepted the bill, but did not pay it, and a protest was taken, which bore that the bill was duly protested "at the desire and instance of the drawers and holders thereof, Messrs Brock and Ferguson, grocers and spirit merchants in Hamilton, and John Brock and Thomas Ferguson, grocers and spirit merchants there, the individual partners of the said company." The protest was registered, and extract obtained, containing a warrant to charge the acceptors to make payment, "all in terms of the said bill, protest, and decree above written, and that to the said Messrs Brock and Ferguson, and John Brock and Thomas Ferguson." The execution of the charge omitted the company name of Brock and Ferguson altogether, and was as follows:

"Upon the 22d day of December 1840 years, I, James Kemp, Sheriff-officer, by virtue of an extract-registered protest and warrant of the Sheriff of Lanarkshire, at Hamilton, thereon, dated the 21st day of December 1840 years, at the instance of John Brock and Thomas Ferguson, grocers and spirit merchants in Hamilton, against John Craig, senior, and John Craig, junior, farmers, both residing at Auchinraith, Blantyre, passed, and in her Majesty's name and authority lawfully charged the said John Craig, senior, and John Craig, junior, to make payment of the sum of twenty-nine pounds eight shillings and sixpence Sterling, and the legal interest thereof since due, and

till paid, contained in and due by a bill, dated the 8th day of September 1840 years, drawn by the said John Brock and Thomas Ferguson upon, and accepted by the said John Craig, senior, and John Craig, junior, payable one month after date; and that to the said John Brock and Thomas Ferguson, within six days after the date hereof," &c.

The extract-registered protest, with the execution on a separate paper, having been presented at the office of the Particular Register of Hornings for Lanarkshire, the execution was registered, and on a minute, bearing to be "Minute for Messrs Brock and Ferguson, pursuers," warrant was craved and granted, to imprison the debtors "till they fulfil the said charge." John Craig, senior, was imprisoned accordingly, and brought the present note of suspension and liberation; in support of which

He *pleaded*—1. When a debt has been contracted to a partnership exclusively in its social character, and as a company firm, diligence upon such a debt, not at the instance of the company, but of individuals styling themselves partners of that company, is inept; and much more is such diligence inept, when it does not even connect these individuals with the creditor in the document of debt, by setting them forth as partners of the firm; Bell's Com. 4th ed. Vol. II. pp. 619, 620, and authorities there referred to; Thomson on Bills, p. 601, *et seq.* 2. The charge under suspension is irregular and illegal; (1.) Because it bore to proceed upon a warrant, and ordered payment of a bill which had never existed, and was in both respects disconform to its warrant: (2.) Because it ordered payment to be made of a debt for which no warrant to charge had been granted, and to persons as drawers who are not the drawers, and at whose instance no warrant had either been sought or obtained, and was thus, in both respects, without any warrant at all; Act Geo. III. c. 72, § 41; Bell's Principles, § 338, 339, 344, 146, and the authorities there stated; Thomson on Bills, under the head Protest of Bills. 3. The execution of a charge, which is on a paper apart, does not sufficiently apply and refer to the warrant on which it professes to be given. Authorities *ut supra*. 4. The warrant of imprisonment following upon the charge was illegal; (1.) Because the previous charge being illegal, all that followed upon it was equally so; (2.) Because the warrant was to imprison till that illegal charge be implemented, by making payment to persons, who had no warrant to charge, of an alleged bill for which nobody had a warrant to charge; (3.) Because the warrant to imprison is not at the instance of the individuals who alone charged, and is at the instance of a party who never charged, while there is no derivative title from the one to the other. Authorities *ut supra*.

The respondents *pleaded*—1. Having regard to the terms of the bill, which was the foundation of the diligence, and to the fact that John Brock and Thomas Ferguson are the only partners of the company of Brock and Ferguson, there is nothing in the terms of the protest, or warrant of charge, to render the charge, as given, irregular, or liable to any solid objection in law; Bell's Com. 4th ed. Vol. II. pp. 619, 620, and authorities there referred to; Thomson on Bills, p. 561, *et seq.* 2. In the circumstances, as appearing from the terms of the bill, and the preceding steps of the diligence, the application for a warrant to imprison, and the war-

rant itself, were made and granted conformably to law, and the objections taken to them ought to be repelled: Act Geo. III. c. 72, sect. 41. Bell's Prin., § 338, 339, 344, 146, and the authorities there stated. Thomson on Bills, under the head Protest of Bills, and authorities there stated. 3. Generally, the reasons of suspension are unfounded, and the letters ought therefore to be found orderly proceeded, with expenses.

The Lord Ordinary ordered minutes of debate with the view of reporting the cause, and issued the following note:

"In this case, a bill was drawn under the firm of Brock and Ferguson, and it was protested, and warrant of charge given by the Sheriff to Brock and Ferguson, and John Brock and Thomas Ferguson, partners of the said company. The charge was given as at the instance of John Brock and Thomas Ferguson, grocers and spirit merchants in Hamilton, referring to a bill 'dated the 8th September 1840, drawn by the said John Brock and Thomas Ferguson.' The charge having expired, warrant for imprisonment was granted on a minute for Messrs Brock and Ferguson, pursuers, indorsed upon the protest. The protest, charge and minute, are in the same document. The suspender maintains that, in this case, the charge was not in conformity to the protest, and has founded on the case of Forsyth v. Hare and Co., 18th November 1834 (S. and D., XIII. p. 42), on the Statute 1681, c. 20, and the decision in the case of Selby and others, where it was held, that in every step in the progress of a bill, in order to authorise diligence, the rights of parties must be clearly made out, and maintains that by this, in making the charge in disconformity to the protest, the debtor in the bill might have been prevented pleading compensation against the company. The Lord Ordinary has come to be of opinion, that there is no disconformity in the diligence in this case, and that, according to the form used in the protest and charge given, the party might have had the benefit of every plea of compensation which he might have been entitled to use against the bill; but as these proceedings took place under the recent Act of Parliament, and relate to the due execution of a diligence, he has thought it proper to report this case to the Court."

At advising,

Lord President.—This is a novel objection. The parties admit there is no case precisely similar to it. I for one think the objection is not to be got over so easily as the respondents seem to imagine. In the first place, we must look to the terms of the bill. It is dated Hamilton, 8th September 1840, and is drawn for a specific sum by Brock and Ferguson on the suspenders, the Craigs. The bill was not paid: it was regularly protested; and the protest, after giving an exact copy of the bill, bears, that it was taken at the instance "of Messrs Brock and Ferguson, grocers and spirit merchants in Hamilton, and John Brock and Thomas Ferguson, grocers and spirit merchants there, the individual partners of said company." The Sheriff grants warrant to charge in the names of the very same parties. The messenger proceeds to give the charge, but takes it upon him to depart from the terms of the protest and his warrant; and instead of repeating the names of the firm as they stood on the bill, describes the protest and warrant as having been obtained at the instance of John Brock and Thomas Ferguson, and charges the acceptors to pay to the said John Brock and Thomas Ferguson. The question is, was he entitled thus to deviate, and is the charge so given such as authorised summary diligence on the bill; for it is necessary always to attend to this. I have great difficulty in holding that it is. The duty of the messenger was precise and definite, and his charge ought to have been in strict conformity to the protest. It is said he knew that the names he gave were those of the individual partners of the company. But these names are not on the bill. The only names are "Brock and Ferguson." No doubt the Sheriff, in his warrant, sets forth the names of the individuals as well as the company; but still he gives the proper description, and did nothing to authorise the messenger to drop the

proper phraseology of the bill itself. I see no authority for that. I know of no *dictum* anywhere, that an officer, when performing a specific duty, is entitled to cut and carve on the description of the parties, and give one which he himself thinks sufficient. It is true, in point of fact, that the names given are those of the individual partners; but where was his authority to give them? If he had proper evidence of the fact before him at the time, ought not the charge to have referred to that evidence? It appears to me that this is a deviation without authority; and as the diligence used was summary, we are bound to apply to it the strictest possible rules. I can figure cases in which great injury might result from such a deviation. I do not mean the case of compensation referred to by the suspenders, and which, it is said, might be cut off as against the company, by using the names only of individual partners, but cases in winding up bankrupt estates, where the ranking might be affected by such a deviation in form as occurs here. On the whole, the objection may seem narrow; but I apprehend it is fatal.

Lord Gillies.—I concur, though with some reluctance and hesitation. Your Lordship's observations appear to me just. A messenger is merely an instrument, and is not entitled to abridge, or make what he may think an improvement on his warrant. All he has to do is to give a charge conformable to its terms. Nothing is so simple, and nothing can justify its not being done. It is impossible not to regret the blunder, but it is equally impossible to overlook it. The charge was, to make payment to John Brock and Thomas Ferguson of a bill said to be drawn by them. This is literally untrue. The bill was not drawn by these individuals, but by the company of "Brock and Ferguson." It was not drawn by both, but by one of them in name of the company; though no doubt, in so far as it formed an obligation, it was binding on both. Take the case of a bill drawn on the house of Coutts and Company, —could a charge be given on it in the name of Miss Burdett, Sir J. Antrobus and others? This would be absurd. Is the messenger entitled to proceed on his private knowledge of the individual partners? Certainly not. The terms of his warrant are clear and unambiguous, and he should have followed them.

Lord Mackenzie.—I have arrived at the same conclusion, and for the same reasons. The bill in the charge is totally different from that in the protest. In the charge, there is no mention of a company, or any intimation of the existence of a company, but of two individuals, to whom the debtors are required to pay. This is the sum and substance of the charge, and it won't do; for the bill charged upon was not drawn by individuals, but by a company. We must here assume that the protest is regular; for the present is not a question of damages, where a prior irregularity in the protest might be pleaded, but merely a suspension,—in which all we have to decide is, whether the execution is such as to warrant the diligence which has been used upon it? I think it is not. Two cases have been referred to, which I consider strong. The one was the case of a husband who charged in his own name on an obligation which had been granted to his wife before marriage. The charge was objected to, and though it might have been pleaded that the marriage was notorious, the charge was held to be insufficient. The other was a case of diligence used against an individual member of a company, and in it the charge was found to be inept, because it was given to the individual only, without any mention of his being member of a company. I concur with great reluctance, but I think it is impossible to sustain this charge.

Lord Fullerton.—I am quite sensible of the propriety of adhering to strict rules in questions of diligence. Here the plea is, that the messenger did not keep in all the names contained in the registered protest. The variation is to be regretted, but looking at the whole circumstances, I am not able to say that it is fatal. The objection appears to me the most critical that ever did occur. The bill was drawn by Brock and Ferguson. It is admitted that John Brock and Thomas Ferguson were the sole partners of the company; and the Sheriff grants warrant in the name both of the company and the individuals. The execution mentions the individuals only. The statement contained in the execution is true, at least to this extent, that the individuals to whom payment was ordered to be made, are the only

individuals who were entitled to receive it. I have often found it difficult to reconcile the decisions as to the competency of proceedings in the name of a company; but it seems to be fixed, that on a bill granted by a company, a charge may be given to every individual partner of the company. On a similar principle, the charge which may thus be given to the individual partners, they themselves might be entitled to give. The charge here is not given in the name of the company, but it is given in the name of all the members composing it; and though there is an irregularity in the execution, which is to be regretted, I don't think it is such as to be fatal to the diligence.

The Court pronounced the following interlocutor:

"Sustain the objection, that the charge is disconform to the warrant; therefore suspend the letters *simpliciter*, and decern; and grant warrant to the Magistrates of Hamilton to set the suspender at liberty, but find no expenses due."

Suspender's Authorities.—Reid and Sons v. Lancaster and Jamieson, 14th Jan. 1795; Bell's Folio Cases. Freebairn v. Dalrymple, 26th Feb. 1829. Smith v. Selbie, 10th July 1829. Forsyth v. Hare and Company, 18th Nov. 1834. Wordie v. M'Donald, 15th Dec. 1831. M'Donald v. Fraser, 24th Jan. 1832. Fotheringham v. Campbell, 28th June 1826. Statutes 1681, c. 20, and 1696, c. 36.

Respondents' Authorities.—Thomson v. Liddell, 2d July 1812. Anderson v. Bolton and Barker, 26th Jan. 1810. Selkirk v. Dunlop and Company, 30th May 1804; Baron Hume's Decisions, p. 277. Anderson v. Currie, 26th May 1836. M'Lean v. Rose, 9th Dec. 1836. Thomson on Bills. Russel v. M'Nah, 26th May 1824. Salmon v. Paddon and Vannan, 17th Dec. 1824.

Lord Ordinary, Murray.—*Act.* Buchanan; J. Cullen, W.S., *Agent.*—*Alt.* Neaves; Wotherspoon and Mack, *Agents.*—[H.B.]

23d November 1841.

FIRST DIVISION.—(H. B.)

NO. 14.—JAMES BRYSON, *Pursuer*, v. MUIR'S TRUSTEES, *Defenders*.

Process—**Summons**—**Conjoined Action**—**Competency**—*An original and a supplementary process being conjoined—Held that a declaratory conclusion contained only in the former, was, in consequence of the conjunction, competently directed against the defenders in the latter.*

Continuation of case, Vol. XIII. p. 453. The original and supplementary actions having been conjoined, the defenders in the latter action lodged additional defences, in which they maintained, that the conclusion for payment in the supplementary action having been withdrawn, agreeably to the decision of the Inner-House, the original incompetency was not cured, but rather increased, inasmuch as there was now no conclusion against them to any effect whatever. The only conclusions to which a defender can be called to answer, are those in the particular summons under which he was cited. It was true the actions had been conjoined, but the effect of this conjunction could not be to direct all the conclusions of both actions against the defenders in each of them. There being then no conclusions remaining in the supplementary action, the defenders in it were entitled most emphatically to plead the defence of "no process."

The Lord Ordinary repelled the plea of incompetency.

The defenders reclaimed. The Court ordered the conclusion for payment to be withdrawn, but sustained the competency of the declaratory conclusion.

Lord Ordinary, Cockburn.—*Act.* More, Penney; Lockhart, Hunter and Whitehead, W.S., *Agents.*—*Alt.* Dean of Faculty

(Wood), R. Macfarlane; Andrew Howden, W.S., Agent.—[H.B.]

23d November 1841.

FIRST DIVISION.—(H.B.)

No. 15.—CREDITORS OF CHRISTIES.

Process—Cessio—Examination.

Application by creditors for authority to bring two debtors imprisoned at Dornoch to Edinburgh, to be examined by commission in a process of *cessio bonorum*, was supported on the ground that the books of the debtors (bank agents), which were of great bulk, were lying in process; that the importance of the examination made it necessary that counsel should be present; that on both accounts it would be less expensive, and more convenient that the examination should take place here. Application granted.

Act. Anderson, Monro.—Alt. Russel.—[H.B.]

23d November 1841.

SECOND DIVISION.—(J.W.)

No. 16.—ANN MACPHERSON, Pursuer, v. WILLIAM MACPHERSON and OTHERS, Defenders.

Expenses—Honorarium to Counsel—Process—Circumstances in which the fees of three counsel were allowed against a party found liable in expenses.

Vide ante, Vol. XIII. p. 555. The executors of Sir John Macpherson, defenders, having been allowed their expenses in this case, and an account thereof having been given in and taxed, it was *objected*, that the account contained a charge for fees to three counsel instead of two. *Answered*, that two of the executors were domiciled in England, and one in Scotland: That two separate defences were given in, resting upon distinct pleas; but that the executors concurred in making up only one record.

Lord Macdowbank.—The executors gave in separate defences, although they agreed to make up only one record: two junior counsel must therefore have been employed in the Outer-House, and neither party was bound to drop his counsel in coming to the Inner-House. Here they were entitled to one senior counsel, so that I think the pursuer has nothing to complain of.

Lord Moncreiff.—There is a great deal in the special circumstances of this case, although the general rule is, that the fees of only two counsel can be charged against the party found liable in expenses.

Lord Justice-Clerk.—Separate pleas were maintained by these defenders, and I don't know if they could have been compelled to join their defences.

The Court, in respect of the special circumstances of the case, allowed the charge for three counsel.

Act. Crawford.—Alt. Penney.—[J.W.]

23d November 1841.

SECOND DIVISION.—(J.W.)

No. 17.—JAMES KING, Pursuer, v. P. & W. CREIGHTON, Defenders.

Bill of Exchange—Indorsation—Designation—Alteration—Suspension—A bill was indorsed by several parties, and when it passed out of the hands of the last indorser, no designation was attached to his own signature or to those of the prior obligants. Subsequently designations were added, inaccurate as to some of the prior indorsers; and a charge being given by the holder to the last indorser, he presented a bill of suspension, on the ground that the errors in the designations vitiated

the diligence and also the note, as there were alterations upon it in material parts by which his recourse against the prior obligants was injured.—The Court repelled the reasons of suspension, and found the letters orderly proceeded.

This is a suspension of a charge given upon a bill blank indorsed by the payee and five successive holders, of whom the pursuer was the last. When the note passed from his hands, all the blank indorsements consisted of the name and surname only of the different indorsers, without any addition or designation. The note fell due on the 15th–18th May 1829, and was then in the hands of the defenders, who had added designations to the names of the indorsers, some of which were incorrect. The following is a copy of what now appears on the back of the note:

“ James Dunlop,

“ Provanhall, near Glasgow.

“ Alexander Dunlop,

“ Provanhall Toll, near Glasgo.

“ James Hunter,

“ Farmer, Carmedie, near Glasgo.

“ William Hunter,

“ Coalmaster, near Provanhall, by Glasgow.

“ Andrew Dunlop,

“ Dairy Seller, Port-Dundas.

“ James King,

“ Writer, Glasgow.

“ Pat. and Wm. Creighton.”

From the evidence subsequently taken at the trial, it appears, 1st, that although Alexander Dunlop is designed, Provanhall toll, near Glasgow, there is in truth no toll at Provanhall, but Dunlop, at the time the bill was indorsed, was tacksman of Drygate toll, which is three miles from Provanhall. 2d, The designation added to James Hunter's indorsation is, farmer, Carmedie, near Glasgow, whereas he resided at Harehouse, Lightburn, and was a tacksman of coals. 3d, William Hunter is designed coalmaster, near Provanhall, by Glasgow, whereas his proper designation is, farmer at Hollowglen or Howglen, near Shettleston. 4th, After the pursuer's name there were at first added the words, “banker, Falkirk,” but these were afterwards scored out, and the designation, “writer, Glasgow,” which is admitted to be correct, was substituted.

Various proceedings having taken place upon the bill, as reported *ante*, Vol. XI. p. 216, 21st December 1838, and on 19th February 1839, the process being remitted to Lord Jeffrey, the following interlocutor was pronounced:

“ 2d March 1839.—The Lord Ordinary having heard the counsel for the parties on the remit from the Court, of 19th February last, and whole process, and made avizandum, finds that the chargers have shown no sufficient cause for altering or recalling the interlocutor of Lord Fullerton, of 21st June 1838, reclaimed against, and therefore refuses the prayer of their reclaiming note; and of new sists this process until steps are taken to bring the previous suspensions, at the instance of James Hunter and William Hunter, to a conclusion.

“ Note.—It is not necessary to justify a judgment sisting one process till the issue of another, to make out any legal incompetency in proceeding with that which is so sisted. It is enough that it appears highly reasonable and expedient that such a course should be adopted. It is merely a judicial order as to the order of proceeding, and prejudices in no degree the legal merits of the cause.

“ Now, in this case it is admitted, that the former suspensions were discussed at considerable length, both before the Lord Ordinary and in the Inner-House; and that the special reason of suspension upon the validity of which the present case now entirely depends, was not the only reason relied on in the bill

and expedite letters, and continued to be the leading reason in the revised reasons; but that it was upon the question of relevancy exclusively that the case was taken to the Inner-House, and ultimately remitted to the Lord Ordinary, and to the jury roll, for investigation. It is obviously more reasonable and expedient, therefore (at least, *prima facie*), that the question should be tried *with the proper and original parties* in those previous and prepared processes, than that the present suspender should be obliged to go over the whole discussion anew, and be at the expense, in relation to what is truly but a *resulting interest* of his own, of ascertaining whether these former suspenders had really a good ground for resisting the claim of the chargers.

"But the considerations which have weighed most with the Lord Ordinary, in this discretionary question, are these:—1st, That a judgment rejecting the objection to the charge in the case with the Hunters, will be *res judicata* to secure the present suspender's recourse upon those parties, if ultimately obliged to pay the chargers, upon an assignment of their diligence against those prior indorsers, while a similar judgment in the case with the present suspender would be *res inter alios*, and might be effectually resisted when he came, on the faith of that judgment, to seek his recourse against those prior obligants. 2d, The other consideration is, that as the present suspender's case depends on his making out that the chargers have, in point of fact, wrongly designed the Hunters in the warrants of their diligence, and consequently afforded them a good defence, both against their original charge, and his claim of relief, it is evident that he might be put to a disadvantage in proving facts, as to the history and condition of those third parties, which would not be experienced by them; and that it is more expedient, therefore, and more likely to bring out the real truth of the case, that the matter should be settled with those parties themselves, who are already in Court in previous processes, embracing, if not resting exclusively on this very ground.

"In such circumstances, the Lord Ordinary cannot listen to the surmise, that those previous suspenders, with whom the prejudicial question has been correctly raised, may not be so solvent as the present suspender. And as to the suggestion that they may not now choose to insist in this, their only original ground of suspension, or be ultimately successful upon some other, so as to make it unnecessary to give any separate decision on the merits of this, the Lord Ordinary can only say, that while he sees no ground for anticipating such a result, he apprehends that if it should, notwithstanding, occur, it will be competent for the chargers to proceed with the present case, and that any inconvenience which they may possibly suffer from following the course now proposed, must be less than would be imposed on the suspender by following any other. Under the words of the interlocutor, the Lord Ordinary understands that the chargers will be entitled to proceed with the present case as soon as it appears, in the cases with the Hunters, that the prejudicial question is not to be discussed or decided in those cases."

The defenders reclaimed, and the Court altered the interlocutor; after which the case returned to Lord Jeffrey, who remitted it to the jury roll by the following interlocutor:

"5th November 1839.—Having heard parties' procurators, remits this case to the jury roll."—"Note.—It is generally very inexpedient to determine points of relevancy before the facts are ascertained. But where, as in the present case, the relevancy may depend on specialties or qualifications of the main fact averred by the suspenders, the objection to such a course of proceeding seems insuperable. The issue, it is understood, will not be the special one, whether the designations of the parties are false or incorrect; but, generally, whether the suspenders are resting and owing the sum charged for, *which will leave every thing in law, as well as in fact, open at the trial.*"

Under this judgment, which reserved all matters of law entire, the case came on to be tried at Glasgow before Lord Ivory, in September 1840. On that occasion various witnesses were examined, and documen-

tary evidence produced, after which the Dean of Faculty (Hope), for the pursuer, put in the following minute:

"On the part of the pursuer, James King, I consent that if the Court be of opinion that the pursuer is not entitled in law to the verdict, the Court shall pronounce judgment in the suspension for the chargers, without any further trial."

The following verdict was returned:

"At Glasgow, 3d September 1840.

"The jury find for the pursuer, subject to the opinion of the Court upon the questions of law arising out of the facts, as appearing from the Judge's notes and documents produced."

(Signed) "WM. CLERK."

The Court then appointed the minute, verdict, and notes of the Judge, to be printed and boxed, after which an interlocutor was pronounced ordering minutes of debate.

Pleaded for the pursuer—

That there was no legal protest of the bill, and, consequently, that the defenders lost all recourse both against the granter and the indorsers. The protest sets out with a copy of the bill, and in that copy, while the names of all the indorsers, as they originally stood, are inserted, there are also added the erroneous and incorrect designations, by which the application of those names to the true owners of them is destroyed. There is, therefore, no protest against the parties whose names actually stand on the bill as indorsers; and in terms of the Statute, the defenders necessarily lost all recourse against the prior obligants in the bill. Farther, the same errors and blunders must be considered as fatal to the validity of the charge and diligence. The letters of horning are founded on the protest, and adopt the whole of its blunders. In the execution of the charge, there is an attempt to correct some of the errors in the previous steps of the diligence, but the execution thereby becomes disconform to the warrant; and the record being closed, it is now incompetent to turn the charge into a libel. The alteration of a bill without consent of the parties, and in any material part, such as the date, the term of payment, the sum, the names of the parties, and the place of payment, is fatal to its validity, independently of the Stamp Acts. In giving notice of dishonour, the pursuer must have followed the precise terms of the bill and protest, and must have sent his notices either to parties who did not exist, or to places where the real parties were not to be found. In either case his recourse must have been cut off, and the defenders are not entitled to demand payment from him, as if they were in a situation to deliver up the bill to him, with all his rights and remedies unimpaired. Under such circumstances, there can be no ground for doubting the materiality of the alterations in question.

Pleaded for the defenders—

That the pursuer was not relieved from liability in respect of the designations added to the names of the indorsers. Indorsers do not require to add their designations to their signatures. They are not of the essence of the indorsation. Without any designation at all, the bill would have been a sufficient warrant for proceeding against the parties by their real designations. And if they admitted their signature, no point could have been made by them on the want of designation. To make an alteration a vitiation, it must be in a material part of the bill, such as the date, sum, or term of payment. But the residence of the indorsers is altogether immaterial. No presentment of the bill is made there: so that the plea of undue negotiation cannot enter into the question. The addition is merely a memorandum for the holder, and if inaccurate, he might not obtain the benefit he expected from it. But in this respect he would be no worse than he would have been if there had been no designations at all; and if the identical indorsers were known or discovered, no disadvantage whatsoever could be sustained. The pursuer is not in a condition to plead injury to his recourse against the prior indorsers. He admits that he himself got notice; but he does not assert that on getting such notice, he gave notice to any of the prior obligants. The defenders were not bound to do this for him; and the consequent legal pre-

sumption is, that he did not mean to claim his recourse. He may have had no recourse to claim. Further, the defenders were not bound to have proceeded against any of the prior indorsers, and are not bound to assign over to the pursuer regular or complete diligence against them. But, the pursuer does not sufficiently distinguish betwixt the act and the instrument of protest. Even supposing that the copying of the designations into the instrument made it irregular, the bill was sufficiently negotiated when it was noted; and it will not be disputed that a protest may be extended, from the noting at any time within forty years, and that if a mistake is committed, it may be rectified by extending the instrument of new. It is said that the pursuer must have given his notice in terms of the designations, which could never have reached the parties, and would, therefore, have been nugatory and unavailing. But, he must be held to have known who the parties were, and where they were to be found, who were liable to him in recourse, or against whom he meant to keep up his right of recourse; and it would have been absurd for him to have taken the information, or to have asked the information, of indorsees subsequent to himself, and deriving title from himself.

At advising,

Lord Medwyn.—The objection of the pursuer is, that after the note had been indorsed by him, and put out of his hands, incorrect designations were added to the signatures of some of the prior indorsers. But this is no vitiation of the note. The addition did not relate to any of the essentials which go to constitute a bill,—the parties, sum, date, or term of payment. It was merely a memorandum, and did not affect the features of the bill, or alter any thing contained in it, or the parties signing it. The inaccuracy of the designations might have injured the pursuer's recourse, by his notice not reaching the prior indorsers; but if he gave value for the bill, he must have known the parties with whom he transacted; and by adding his own indorsement, he was the more bound to know, or to have inquired who the prior obligants were. On receiving notice himself, he ought to have given it to the preceding indorsers; and there was nothing to prevent his doing so in the case of those whose designations were correct. It is said that the charger was bound to make over to the suspender valid diligence on receiving payment from him, but if he gave no notice, he cannot plead this. The parties do not deny their signatures, although the designations are inaccurate. The notary simply asks payment from the drawer or acceptor, and if refused, protests against all parties. When the charger intimated the dishonour of the bill to the suspender, he gave no notice to the prior indorsers; I conceive that the charger did all that he was bound to do.

Lord Moncreiff.—I am of the same opinion. It is admitted that the pursuer was the last indorser, but he says, that certain designations were added to the signatures of the prior indorsers, and that the bill was vitiated, and his recourse injured. Now, it is clear law, that if notice was given to the pursuer himself, the charger was entitled to proceed against him. The defence turns upon technical objections. In the *first* place, did the inaccuracy of the designations extinguish the recourse of the pursuer against the preceding indorsers? The designations are wholly immaterial to the bill as a document of debt, and might have been deleted. If an ordinary action had been raised, and the deletion explained, the action would have been effectual, notwithstanding the accident of a wrong designation. As to the errors in the instrument of protest, the act of protesting consists in the noting, of which the instrument is merely an extension. But taking the instrument of protest here, does it not state that this particular note had been duly protested? In the *second* place, if the errors in the designations did not exclude recourse, did they render diligence incompetent? This does not depend on the validity of the diligence used against Hunter and Dunlop, for there was nothing to prevent the extension of a new instrument of protest containing correct designations. These do not form part of the bill, and, as mere markings, cannot vitiate it. The authorities lead to this, that an inaccuracy in parts not material may be corrected. In the *third* place, if the errors put the recourse of the last indorser in peril, and he could have made out this defence, he might have had a good deal to say. But the charge is liable to no fault in itself against

him, and the premises are awaiting to his plea; for, in my opinion, he is not entitled to *executio parata*.

Lord Justice-Clerk and *Lord Meadowbank* concurred.

The Court pronounced the following interlocutor:

"Find that the said verdict ought to be entered up in favour of the defenders, and not for the pursuer, and ordain accordingly; and in respect of the said finding, they repel the reasons of suspension; find the letters orderly proceeded, and decern: Find the defenders entitled to the expenses incurred by them in this cause; appoint an account," &c.

Pursuer's Authorities.—12 Geo. III. c. 72, § 41. *Ferguson and Co., v. Belch*, 17th June 1803; *Fac. Coll. Campbell*, 22d February 1827; *Sh.*, V. 412. *Watts*, 11th July 1828; *Sh.*, VI. p. 1048. *Chitty*, p. 130, 5th ed. 1818. *Bell's Com.* Vol. I. p. 391. *Macfarlane*, 1st July 1796; 11 *Fac. Coll. Master v. Miller*, 4 Term. Rep., 320. *Hamilton*, 3 S. and D., p. 345. *Robertson*, 4 *Ibid.*, p. 40. *Corrie*, *Ibid.*, p. 228. *Murdoch, Robertson and Co.*, 26th December 1801; *Long and Moore, Espinasse's Cases*, III. p. 165. *Graham v. Gillespie*, 27th January 1795; *Fac. Coll. Callender v. Kirkpatrick*, 10th December 1812; *Fac. Coll. Fleming v. Scott*, 1st July 1823; 2 S. and D., p. 446. *Macara v. Watson*, 3d June 1823; *Ibid.* p. 360. *Tidmarsh v. Grover*, 1 Maule and Selwyn, 735. *Cowie v. Halsall*, 4 Barn. and Ald., 197. *Turner v. Haydon*, *Ibid.* I. 1. *M'Intosh v. Haydon*, 1 Ryan and Moodie, 362. *Calvert v. Roberts*, 3 *Campbell's Reports*, p. 343. *Low v. Campbell*, 10th December 1825; 4 *Shaw*, p. 299.

Defenders' Authorities.—*Leys, Masson and Co. v. Forbes*, 7th September 1831; 5 W. and S., 403, *et seq.* *Chitty on Bills*, 9th ed., pp. 181, 184. *Thomson on Bills*, p. 183, and cases cited. *Lowe v. Campbell*, 10th December 1825; 4 S. and D., p. 299. *Trappe v. Speirman*, 3 Esp., 57. *Price v. Mitchell*, 4 Camp., 200. *Richards, Holt*, 364. *Note. Grierson v. Earl of Sutherland*, 28th June 1727; *Mor.* 1447. *Bell's Com.*, I. p. 420. *Wilkinson v. Johnston*, 3 B. and C., 428. *Fernandez v. Glynn and Others*, 1 Camp., 564. *Brown and Company v. Dunbar*, 1807; *Fac. Coll. Alexander v. Scott*, 28th November 1827; 6 S. and D., 150. *Chitty on Bills*, p. 464, 9th ed., 1840. *Commercial Bank*, 24th February 1818; *Fac. Coll. Bell's Com.*, I. 426. *Thomson on Bills*, 522. *Downes v. Richardson*, 5 Barn. and Ald., 674. *Mackenzie v. British Linen Company*, 29th November 1825; *Fac. Coll.*

Lord Ordinary, Jeffrey.—*Act. Maitland, Buchanan; John Cullen, W.S., Agent.*—*Alt. Solicitor-General (M'Neill), A. M'Neill; Lachlan Mackintosh, S.S.C., Agent.*—*Jury Clerk.*—[J.W.]

TEIND COURT.

24th November 1841.

No. 18.

The following augmentation was awarded:

Carlisle—Presbytery of Lanark—Old stipend, 2d February 1821, 16 chalders, and £8. 6. 8. for communion elements. Stipend modified of this date, 18 chalders, and £15 for communion elements,—being an augmentation of 2 chalders, and £6. 13. 4.

24th November 1841.

SECOND DIVISION.—(J.W.)

No. 19.—*DANIEL KING, Pursuer v. MARGARET PATRICK or KING, Defender.*

Proof.—Witness—Objection to Credibility—Malice—Extra-judicial Statement.—*In leading the proof allowed in a process of divorce, a witness for the pursuer was interrogated by the defender, whether, on a particular occasion, she had said she would be revenged against the alleged paramour? which she denied. On the cross-examination of a subsequent witness,*

the defender asked, whether, on the same occasion, she had heard the preceding witness make any statement relative to the paramour? The pursuer objected that the question was incompetent, as being an attempt to contradict what the previous witness had stated on oath. The commissioner allowed the answer to be taken down in writing, and sealed up; on appeal, the Court, holding it to be the object of the question to prove malice against the previous witness, repelled the objection, and allowed the packet to be opened; but under the reservation, that if, from the answer, it appeared that the question put did not apply to the identical occasion deponed to by the previous witness, the answer should be struck out.

This was a process of divorce brought in January 1839. The oath of calumny was emitted on the 20th February, and the record was closed on summons and defences, 5th March 1839. On the same day, parties were allowed a proof of their respective averments, and a remit was made to the Sheriff's Commissaries accordingly. A variety of objections were taken by both parties during the leading of the proof, and on appeals to the Court against the deliverances of the commissioner, were articulately disposed of by the Lord Ordinary, who at the same time decerned and declared in the divorce in terms of the conclusions of the libel. On a reclaiming note for the defender, the whole of the findings of the Lord Ordinary were adhered to, except the fourth, which related to an objection stated by the pursuer to a cross question put by the defender to a witness, called Susan Craig. Elizabeth Hamilton, a witness also for the pursuer, and who had been examined previously to Susan Craig, being interrogated for the defender,

"Whether the deponent recollects of being in the house of Mrs Cross upon one occasion, when a person named Samuel Cooper came there, and communicated some tidings respecting Mr Macfarlane?" (the alleged paramour) "Depones in the affirmative. Interrogated, and desired to say what were the tidings which Cooper communicated on that occasion? To which question it was objected by the counsel for the pursuer as being quite incompetent. Whereupon the counsel for the defender, without admitting the validity of the objection, proposed to remodel his question, and to put it as follows: Whether, in consequence of what was so communicated by Cooper, the deponent made any observation, and if so, what that observation was? To which question it was objected by the counsel for the pursuer, that as remodelled, it was, if possible, more clearly incompetent than as previously expressed. The counsel for the defender having still pressed the question, but without entering into argument in support of it, the commissioner allows the question to be put, reserving to himself, and to the counsel for the pursuer, still to interfere, in the event of the defender's counsel following up the question by any farther questions plainly irrelevant. Against which deliverance the counsel for the pursuer appealed to the Lord Ordinary. And the witness being called in, and the question being put to her, she depones, That she does not recollect of any particular observation which she made, either to Cooper or to Mrs Cross. Interrogated, Whether, in consequence of what Cooper communicated, the deponent stated that she would be revenged against the defender and Mr Macfarlane, or against one or other of them? Depones in the negative. Being specially interrogated, Whether, on that or on any other occasion, the deponent said, in presence of Mrs Cross and of Cooper, or in presence of either of them, that she would be revenged, and called God to witness that she would be so? Depones in the negative. Interrogated, Whether, at that time, or at any subsequent time, the deponent did not express feelings of revenge or hostility against Mr Macfarlane? Which question was objected to by the counsel for the pursuer, and the objection was answered by the counsel for the defender; whereupon the commissioner repelled the objection. Against which deliverance the counsel for the pursuer appealed to the Lord Ordinary; and the question having been

put to the witness, she depones and answers, That she certainly did feel hurt by some expressions respecting her, which she understood Mr Macfarlane had used before the Presbytery, but the deponent never expressed any feelings of revenge or hostility against Mr Macfarlane."

At the examination of Susan Craig, the following proceedings took place. Interrogated for the defender,

"depones, That the deponent recollects upon one occasion of being at Mrs Cross's house, when she saw there the said Elizabeth Hamilton, and a man named Samuel Cooper. Depones, That on the same day on which the deponent saw Elizabeth Hamilton and Cooper at Mrs Cross's, there had been a meeting of the Relief Presbytery regarding the said Rev. John Macfarlane. Interrogated, Whether the deponent heard Elizabeth Hamilton make any statement relative to Mr Macfarlane upon that occasion; to which question it was objected by the counsel for the pursuer, that it was incompetent to prove the extrajudicial statements of a witness, in order to contradict or discredit her evidence *in causa*; to which it was answered for the defender, that the object of the interrogatory was to prove that Elizabeth Hamilton, upon the occasion in question, had expressed vindictive feelings towards Mr Macfarlane, and had declared that she would be revenged upon him on account of a statement which he had made, or was understood to have made, at the meeting of presbytery; that the fact thus proposed to be proved was of the most vital importance in considering the evidence adduced by the pursuer in this case; and that the witness, Elizabeth Hamilton, had been specially questioned on the subject, as appeared from the proof, pp. 80 to 85, both inclusive. The commissioner having heard the counsel for the parties, is inclined to think that the rule of not inquiring into extrajudicial statements of witnesses for the purpose of discrediting their evidence, is not strictly applicable to the present case, where the fact is in dispute, whether or not the witness, Elizabeth Hamilton, had used the vindictive expression referred to from page 80 to page 85 of the proof. At the same time, from deference to the opinion of the learned Judges who presided at the trials in the cases of Walker, 13th July 1836, and of the Hercules Insurance Company, 26th and 27th July 1836, the commissioner resolves that the question may be put to the witness in the meantime, and her answer to the same to be taken down on a paper apart, to be sealed up, and to lie *in retentis* until the point in dispute be decided by the Lord Ordinary."

The Lord Ordinary, in the fourth finding of an interlocutor which he pronounced on 23d February 1841, disposing of the whole cause, sustained the objection, and refused to allow the sealed packet to be opened. In a note previously issued, the Lord Ordinary expresses himself to the following effect, in reference to this objection:

"4. The Lord Ordinary is of opinion, that the objection stated by the pursuer on p. 113 of the proof, to a cross question put by the defender to Susan Craig, is well founded, and ought to be sustained. The object of that question is, to prove by this witness, that Elizabeth Hamilton, the principal witness for the pursuer, expressed herself before the Relief Presbytery in a vindictive manner towards Mr Macfarlane, the alleged paramour. But as Elizabeth Hamilton herself was examined specially as to her statements on that very subject, and gave explicit answers, (see proof, p. 82, &c.,) the only object of the defender's cross question must be to contradict what Elizabeth Hamilton had stated on oath. As the law stands, however, such a proof is not admissible in ordinary cases, and the Lord Ordinary does not see that there is any ground for making an exception of the present case."

At advising the reclaiming note presented by the defender,

Lord Justice-Clerk.—There are points of considerable nicety involved in the fourth finding of the interlocutor of the Lord Ordinary. They arise thus: When Elizabeth Hamilton was examined, certain questions were put to her with a view to get

an avowal by her of uttering vindictive expressions against the alleged paramour of the defender. This she denied; and in the cross-examination of another witness, the defender tries to establish the fact. Three questions arise here: 1st, Supposing the expressions proved a vindictive purpose or feeling against the paramour, is it sufficient to affect the credibility of the witness? 2d, Supposing an inquiry into such a purpose to be competent and relevant, must it be made out by the witness herself, or may it be proved on the cross-examination of another? 3d, Has the question been put to the witness herself with sufficient precision as to satisfy the law that the question put on cross, related to the same expressions, and to the same occasion? As to the first point, I am of opinion that it is a relevant objection to the credibility of a witness, that she avows a purpose of being avenged against a person whom she considers to be the paramour. Objections to credibility are much broader than those entertained against the admissibility of witnesses. Any feeling or purpose which may prompt to a false or exaggerated representation of facts, and which it can be made out that the witness is under at the time, is sufficient to affect credibility. If the hostility be entertained against the defender in the process, it will be relevant, though general; but if against the paramour, I apprehend it must be in relation to the cause. In regard to the second point, whether the expressions must be made out by the examination of the witness herself only, or may be proved by the evidence of others, it is not proposed to contradict the evidence given *in causa* by Hamilton, but to establish her hostility. It is not competent to prove the extrajudicial statements of a witness in order to contradict her evidence on oath. It is not competent to examine the witness herself with such a view, as was held in the case of Hardie. And if the evidence of Susan Craig were adduced to contradict Elizabeth Hamilton's evidence *in causa*, it would be excluded to that effect. But still it might be admitted as substantive evidence of enmity and malice; Mackay, 4 Mur. 283: For evidence may be competent for one purpose, though not for another. One competent mode of proving enmity, is by proving expressions of hostility. It is necessary to examine the witness herself, that she may give an explanation of her feelings; but her denial cannot exclude the proof of malice, as of a fact, by others. It is not competent to discredit a witness *in initialibus*; Dickson, Mur. 1. p. 43; and the pursuer cannot, by the order in which he examines his witness, affect the right of the defender to establish his objection to her credibility. If Susan Craig had been examined first, still the defender was entitled to get at his objection: nor was he limited to one species of evidence. He might do it partly by the witness herself, and partly by others. He must examine the witness herself, as her explanation of her feelings is material; but if she fail him, he cannot, by giving her an opportunity for explanation, cut himself off from establishing his objection. The third point, and one of the greatest consequence, is, whether the question put to Susan Craig was the same as that put to Elizabeth Hamilton? The greatest care must be taken, that the question is the same and identical; for if the witness referred to a different occasion, her answer would go for nothing. In this case, I am humbly of opinion that the questions put were substantially the same. The objection to the question was taken at the first; and it seems to have been the understanding of all parties that the defender had satisfied the identity of the questions at the time. The objection to the identity, if there be any, ought to be stated before those to the competency. But although the understanding of the commissioner and the counsel be apparent, it is quite essential that the witness understands the question in the same way, and that it relates to the same identical occurrence and occasion. This can appear only when her evidence is taken; and if there be any doubt attending it, the Court will reject her evidence. On the whole, therefore, I am of opinion that we must alter the fourth finding in the interlocutor.

Lord Meadowbank.—I concur in the opinion delivered, and have nothing to add to the general observations which have been made. But there is one point on which I would not wish to give a decided opinion, because we are not called upon to do so; and it is this, that if Susan Craig had been examined first, it would have been competent to put the question to her, in the same way as when she was examined subsequently to

Elizabeth Hamilton. That is a point which has not yet been ruled, and it is not necessary for us to determine it here. The expressions used being indicative of malice, are an exception to the general rule applicable to the extrajudicial statements of a witness. The questions put to Elizabeth Hamilton and Susan Craig are identical. If there were a discrepancy, I would make a distinction; but it is sufficient that the counsel and commissioner understood them to be identical, to warrant us in at least opening her evidence to see what it is. As to the more general question asked Elizabeth Hamilton, whether, on any occasion, she had said she would be revenged,—I would not have admitted the same general question to be put to Susan Craig.

Lord Moncreiff.—The point raised is one of very great importance, in so far as it is of general bearing, and I concur in the opinion, and in nearly all of the observations delivered by the Lord Justice-Clerk. I think the question, as put, must be admitted, to the effect of looking at the written answer. However much we may admire the law of England, our practice is in one point very different. Where a witness, on oath, denies that he ever did say otherwise than he has done on his oath, by our law we cannot call other witnesses to discredit him. And if the whole object of the question put to Susan Craig was to prove that Hamilton had not spoken the truth when she denied having used expressions of malice, we could not have admitted the question. But here the question relates to substantive evidence of feelings, which it is not necessary should be sufficient to exclude the witness as incompetent, but merely to affect her credibility. The objection to the question was overcome in the case of Mackay v. Macleod (4 Mur., 283), where Lord Cringletie brings out the distinction. In the first place, the enmity is not cherished against the defender, but the paramour. The objection, however, does not go to the admissibility of the witness—only to her credibility; and the paramour and defender are involved in the same charge. In the second place, if the question could not be put without having been put also to Hamilton,—I say nothing of what would have been the effect if Craig had been examined first,—was it put with precision to Hamilton as to time, place, and occasion? On this point I have great difficulty. There was a vagueness in the question, and a want of precision as to the persons to whom she made the statement. If Craig had been mentioned, it might have revived her recollection, and she might perhaps have been able to explain. No doubt the pursuer's counsel and the commissioner assumed the questions to be identical; but this Court will protect the witness and party notwithstanding. A general question would not have been enough to warrant the question put to Craig. We may look at the answer; but if it does not sufficiently show the identity of the questions, it must be struck out.

Lord Medwyn.—I consider this a very important case, and had made out notes of my opinion; but as I concur with those which have been delivered, I shall not go over them. I rather, however, concur with the opinion of Lord Meadowbank, that it is not necessary we should determine here what would have been the effect of the pursuer's having examined Susan Craig first.

The Court altered the interlocutor as to the fourth finding, repelled the objection, and allowed the sealed packet to be opened.

Lord Ordinary, Cuninghame.—*Act.* Robertson, Macfarlane; Wortherspoon and Mack, W.S., *Agents.*—*Alt.* Solicitor-General (McNeill), Patton; Lockhart, Hunter and Whitehead, W.S., *Agents.*—*F. Clerk.*—[J.W.]

24th November 1841.

SECOND DIVISION.—(J.W.)

NO. 20.—MARGARET BRYSON or TORRANCE, Pursuer,
v. JAMES BRYSON, Defender.

Title to Sue—Executor—Process—*One of three executors brought an action in her own name, against one of the other co-executors, for her share of a debt due by him to the defunct. The summons libelled that the third executor refused to concur in the action, and there was no averment that any debts of the deceased remained to be satisfied—Held, in the circumstances, that she was entitled to pursue the action.*

By a codicil, dated 17th January 1837, the deceased Mrs Cunison bequeathed to James Bryson, the defender, Charlotte Bryson and Margaret Bryson, the pursuer, and to Ann Bryson, now deceased, the residue of her whole moveable estate, share and share alike. The summons in the present action sets forth, that James Bryson was owing to the deceased at the time of her death a sum of £500: That the pursuer is one of the executors of the deceased Janet Bryson or Cunison, decerned to her *qua* nearest of kin, conform to decree-dative of the Commissary of Glasgow in favour of the pursuer and the said James Bryson, defender, and his sister Charlotte Bryson—the latter of whom refuses to concur in this action; and under the foresaid codicil the pursuer is entitled to one-fourth part or share of the foresaid debt, for payment of which restricted sum the summons concluded.

The defender *pleaded, inter alia*—That the pursuer being only one of several co-executors, has no right to pursue the present action without the concurrence of the others.

The Lord Ordinary pronounced the following interlocutor:

"22d June 1841.—The Lord Ordinary having heard counsel on the closed record, and thereafter considered the process, in respect that the object of the present action is to constitute and realise the share of a specific fund, alleged to have been intromitted with, or still due by one of the next of kin of a party defunct, to another of the next of kin,—that it is specially averred in the libel, that the other next of kin now in life refuses to join in the suit, and that no ground is stated for inferring that creditors or third parties other than the next of kin have now any interest in the succession of the defunct, Repels the first defence and plea in law urged on record for the defender: And appoints the cause to be enrolled in the motion roll *quam primum*, that parties may come prepared to state whether they have any farther evidence to adduce on the merits on either side, and in what form such proof shall proceed; reserving the question of expenses till an ulterior stage of the cause.

"Note.—The Lord Ordinary is not aware of any principle in law, or of any authority in our books, for holding that an action by one of the next of kin of a party deceased against another relative in the same degree, who is said to have had a super-intromission with, or drawn a larger share of the funds of their common ancestor than he ought to have done, under such circumstances as are here averred, should be pronounced incompetent. The case of a stranger debtor being sued by one only out of several co-executors, is obviously a very different suit from the present, as third parties may plead that, without a title, they may be exposed to a second accounting at the instance of others interested. The object of the present action, if the pursuer's libel can be substantiated, resolves into this,—to constitute the right of one of the successors of a defunct to a rateable share of a particular fund, said to have been wrongously intromitted with, or appropriated by others of the next of kin, to the exclusion and prejudice of the pursuer. The Lord Ordinary is unable to conceive any ground, in law or in form, on which such an action of accounting and payment can be objected to."

The defender reclaimed, and argued—

If the pursuer sues as beneficially interested in the executry, she must sue the executors; for a beneficiary cannot sue the debtors to the estate directly. She may pursue as executor, but the summons is not libelled as executor; and she is only one of three executors. The office of executor being one and indivisible, one out of several is not entitled to sue against a stranger debtor; Stair, p. 591; Inglis, M. 16,115. Where any of the executors refuse to concur, the remedy is, to sue the executors to recover, or to institute a process to have them ordained to concur; or by a process in the Commissary Court to have them excluded; Young, M. 3380. In the case of Rogerson, 11 Shaw, p. 569, some of the executors, pursuers, were divested during the progress of the cause by disposition *omnium bonorum*; but the whole were originally parties to the suit, and the remaining four were allowed to proceed. The defender is a co-executor; but he is a debtor to the deceased, and is in so far a stranger. This is not an accounting, as the Lord Ordinary assumes, between two co-executors, when all other parties have been satisfied. The defender here is entitled to a proper discharge; and this the pursuer could not grant, being only one of several executors. No doubt, when a debt has been constituted by decree at the instance of all the executors, each is entitled to recover and discharge his own share. In the case of Mactargat, 12th May 1829, two co-executors raised a multipointing in name of the debtor, and called all the executors, and in this way obtained decree for their share.

Answered—

The general rule does not apply here; for in order to meet the difficulty, it is set forth in the summons that the debt is due by one of the co-executors, and that the other refuses to concur. The conclusion also of the summons is restricted to one-fourth share of the debt. The only ground of objection stated is, that the defender may be liable in second payment to other parties; but of that there is no risk, as only one-fourth is sued for, and the defender can't say that any other party has claims upon the executry; Stair, III. 8, § 59. In the case of Inglis, M. 16,115, the payment was found not legal, only in so far as it exceeded the proper share of the executor. The remedies proposed involve a multiplication of litigation, and are unsuited to the forms of modern pleading.

Lord Medwyn.—The general rule is, that the executors must pursue the creditors to the estate, and that legatees cannot. But if the executors, thinking the claim unjust, or if acting capriciously they should refuse to concur, Stair mentions a remedy adopted in the case of Young, where he was secluded from office, and the other executors allowed to go on. Here one of the executors raises an action, libelling the refusal of another to concur against the third, who is the debtor, and who cannot be expected to concur. It is stated in the summons that the sister refused to concur; perhaps it would have been better to have called upon her to concur, or to state the cause of her refusal by protest. I do not lay much stress upon the case of a voluntary payment to an individual executor. In the case of Rogerson, two out of six executors having been divested by disposition *omnium bonorum*, the remaining four were allowed to carry on the suit to the extent of their own shares; and it is of no consequence that the process was originally in the names of the whole. In Mactargat, the executor raised a multipointing, and brought all into the field; but the action was held relevant for recovering his own share. I am therefore of opinion with the Lord Ordinary, that the instance is good, and that the discharge would be good.

Lord Moncreiff.—I am also clear for sustaining the interlocutor. This is a special case, and not that of a stranger debtor. In Hope's Practices there occur some important observations which I shall read—(reads p. 147, and p. 180). Charlotte Bryson is set forth in the libel as refusing to concur; and it is not averred that there are debts of the executry for which this money may be required. The case of Mactargat is explicit, and is an express judgment on the very point.

Lord Meadowbank concurred.

Lord Justice-Clerk absent.

The Court adhered.

Lord Ordinary, Cuninghame.—*Act. G. G. Bell; William-son and Robert Rhind, W.S., Agents.*—*Alt. Monteith; Alexander Hamilton, W.S., Agent.*—*F. Clerk.*—[J.W.]

25th November 1841.

FIRST DIVISION.—(H. B.)

No. 21.—*MISS MARY COWIE and OTHERS, (Lovie's Trustees), Pursuers, v. GEORGE DUNCAN, Defender, —Et à contra.*

Sale—Misrepresentation—Sub-lease—Reparation—Damages.—The seller of a lease found liable in damages to the purchaser for concealing the existence of a written sub-lease which he had previously granted of part of the lands, though that sub-lease was defeasible at the pleasure of the landlord.

James Lovie, tenant of the farm of Fortree of Esslemont, on the 9th March 1838, entered into a minute of sale with George Duncan, in which he acknowledged to have sold to Duncan his lease of the farm, and “all right and title which I and my heirs have to the possession and occupation” thereof, “with the houses and pertinents,” —“with the whole stocking and other effects of every description at present thereon, including cattle, horses, and farming utensils, turnips and fodder.” He further engaged “to prepare the land for the ensuing crop 1838, and to afford grain and grass seeds, and to sow the same at my own expense, and to conduct the whole necessary farming operations until Whitsunday next, in case the said George Duncan shall not have taken up his residence on the farm before that time.” Duncan, on his part, engaged, besides relieving Lovie of all prestations under the lease, to pay to him the sum of £560 at Whitsunday 1838, with interest till payment, and penalty in case of failure.

Duncan entered into possession, and paid £260 of the price at the stipulated term, but he refused to make any further payment till compensated for certain articles of furniture which he alleged to have been removed from the farm contrary to agreement, and also for the damage which he sustained by a part of the farm, extending to about eighteen acres, being withheld from him by a crofter of the name of Rainnie, to whom Lovie had, in 1833, granted a written sub-lease at a rent of £4. 10s. Lovie's trustees denied that any furniture had been improperly removed, and alleged, that when the minute of sale was entered into, Duncan was perfectly aware of Rainnie's possession, and understood that no deduction was to be made on account of it from the stipulated price. After Lovie's death counter actions were raised,—the one by his trustees, concluding for payment of the balance of the price,—and the other by Duncan, concluding for payment of £124, “being the difference of value for nine years' rent between the actual worth of the subjects sublet, and the elusory rent of £4. 10s.,” and also for payment of £17. 3. 6., being the value of the articles removed improperly from the farm.

A proof was led, in which one of Duncan's witnesses deponed, that he had visited the farm at Duncan's request, for the purpose of inspecting it previous to the purchase of the lease; that Lovie, in pointing out the boundaries, included Rainnie's croft in the farm, and said that “Rainnie was a tenant at will, and had no lease,” but was a useful man about the farm; that to the best of his recollection, the price which Lovie asked for the farm was £600.—John Duncan (the party's

brother) deponed, that he was present at the inspection of the farm with the previous witness; that Lovie “included Rainnie's croft within the boundaries of the farm,” and said that Rainnie “was merely a tenant of will, and that my brother could remove him whenever he liked,” and that “Rainnie had no lease.” That Lovie also said, that “my brother would find Rainnie a very useful man about the farm;” and “at this time asked £600 for the lease.”—Duncan's witnesses valued the rent of Rainnie's possession from 15s. to 20s. per acre, but other witnesses thought the actual rent enough.—Mr Brebner, factor on the estate, deponed, that Lovie had no power to sublet, but that he, on the proprietor's behalf, had consented to the sublet to Duncan; that the minute of sale was made out under his direction; that to the best of his recollection, Lovie never mentioned to him that he had sublet any part of the farm; that he was confident he never mentioned that any part of it was let on a written sub-lease, otherwise he would have caused notice to be taken of it in the minute of sale; that a summons of removing was prepared by him, and executed against Lovie, in order to give Duncan a free entrance to the farm, and that this summons was meant to extend to the whole farm of Fortree; that Lovie never applied for leave to sublet Rainnie's croft; and that if leave had been asked, he does not think he would have given it.—William Rainnie, the crofter, deponed, “I consider the rent I pay a sufficient rent.” “I have paid my rent to Mr Duncan since he became tenant of Fortree.” “He never asked me to remove.” “Since Whitsunday last, Mr Duncan desired me to ask £40 for the croft.” “I asked £40, but Mr Duncan did not offer me that sum.” “I would give up my croft for £20,”—“I mean the £20 for the ground alone, exclusive of the value of the houses and dung.” “Mr Duncan bade me seek for the croft; and I said, What will I seek? Will I seek £20?” Mr Duncan said, “I might ask more than that, as he would give me more than that.”

Lovie's trustees *pleaded*—1. The defender having purchased the lease in the full knowledge of the existence of the sub-tack, cannot pretend afterwards to retain any part of the purchase price on the ground of not having obtained possession of the whole subjects sold. 2. It was the duty of the defender, in purchasing the lease, to inform himself as to the state of the possession; and, without an averment of fraud and deception on the part of Lovie, no ground of damages on his part would exist. 3. The defender having brought forward no objection during Lovie's lifetime, but, on the contrary, made payment, without objection, of a large part of the purchase price, and promised payment of the rest, cannot now retain any part of the balance on the ground of not having got possession of all he bargained for. 4. The claim of deduction for articles removed is unfounded, in respect the defender got delivery of all the articles sold to him, received the articles without objection, and only brought forward his claim of deduction about six months thereafter.

Duncan *pleaded*—1. The sale of a lease implies, at common law, warrandice from fact and deed. 2. In the circumstances of the case, the deceased James Lovie was bound to place the defender in the full right of the lease sold to him, in the same manner and to the same effect as he (Lovie) held the same from the land-

lord; and the pursuers are still bound to do so before exacting payment of the stipulated price; or failing this, they are bound to give a deduction from the price, so as to indemnify the defender from the loss he sustains by part of the subjects contained in the lease being under a sub-lease to the foresaid William Rainnie for the remaining years of the principal tack. 3. In the circumstances of this case, the foresaid sub-lease, granted for the whole period of the principal lease, having been fraudulently concealed from the defender at the time that he purchased the principal lease from the said James Lovie, he is entitled to retain the price to the extent of the damage occasioned through such fraud. 4. In the case of moveable property, a purchaser is not bound to pay for articles sold to him, but not delivered.

The Lord Ordinary decided in favour of Lovie's trustees in both actions. His Lordship's note in the action in which Duncan was pursuer, is as follows:

"The grounds on which the Lord Ordinary, after again considering this case, continues to think the claim of Duncan is not well founded, either in law or in substantial justice, are these:—

"1st, It is proved by witnesses on both sides, that Duncan, before concluding his agreement with the deceased James Lovie, knew that William Rainnie was possessing a croft. Two witnesses swear that Lovie told Duncan that Rainnie was a tenant at will; but that communing was confessedly some days before the final conclusion of the bargain, and at a time when Lovie was asking £600 for an assignment of the lease. It was subsequent to that period that Duncan concluded a bargain with Lovie for a transfer of the lease at the diminished price of £560, which diminished price may have been struck in consequence of the set of Rainnie's croft.

"2d, In the missive that passed between Lovie and Duncan, no notice was taken of Rainnie's croft; and no stipulation was made for Rainnie's removal, though the purchaser then knew that he possessed a croft. On the contrary, other stipulations were made which show that Rainnie was to retain his possession. Thus, it was provided that Lovie was to prepare the whole land for the ensuing crop, which the purchaser was to possess, and to sow it out at his own expense, &c.; but Duncan saw that no such preparation was made of Rainnie's croft. Notwithstanding which Duncan accepted of and entered into possession without any complaint made at the time (Whitsunday 1838) that he had not got such possession as Lovie himself previously enjoyed, and had agreed to give over to Duncan.

"3d, It is established by the testimony of Mr Brebner, that he got from Lovie and Duncan jointly, soon after the transaction was concluded, in the spring of 1838, a note of the crofters, against whom a summons of removing should be served at the landlord's instance, in order to clear the possession for Duncan's entry prior to Whitsunday 1838. That writ is produced (No. 28 of process); and while it contained a conclusion for removing Lovie himself and Alexander Milne and James Marr, it did not include the crofter William Rainnie. Though Mr Brebner did not know the reason for this omission, it shows plainly that both Duncan and Lovie had previously agreed that Rainnie should not be removed.

"4th, There is no evidence that there was any objection made by Duncan to the sublet of Rainnie's small croft till after Lovie, the person who could best explain the transaction, was dead. But the Lord Ordinary holds that it was then too late for the pursuer to object, and to retain possession of the subjects which had been given and accepted of by him at Whitsunday 1838, in the same manner as Lovie previously held possession. It must be presumed that Duncan, on taking possession at Whitsunday 1838, knew well by that time on what terms Rainnie was actually possessing his croft, as he did not get the natural possession of that part of the lands. Notwithstanding which the pursuer contentedly took such possession as was then given him, without protest or objection of any sort. Pos-

sibly he might have thrown up the bargain if he laboured under any mistake as to Rainnie's croft. But he made no objection when Lovie was alive. On the contrary, he took payment of one or more terms' rent from Rainnie, and thus led that individual, as long as he lived, to suppose that the purchaser acknowledged the transaction to have been of the same nature and import as Lovie understood it. The advancement of such a claim after Lovie's death, is sufficient of itself to raise an inference against the pursuer's claim.

"Lastly, On the proof as it stands, the Lord Ordinary is of opinion that the evidence, when fairly weighed, does not show that the pursuer suffers any real loss or damage by the sublet of this trifling croft. Two apparently respectable and extensive farmers swear, that the rent paid is the full value of the croft, and that only five acres are really worth retention by the subtenant; and although the pursuer has certainly called various witnesses, who put a higher valuation on the subject, yet the testimony of Alexander Rainnie and William Rainnie (witnesses whose views should rather be in favour of than against their surviving landlord), goes far to throw great discredit on the whole claim, pleas, and statements of the pursuer. At all events, even if the proof as to damage were nearly balanced, the Lord Ordinary conceives that the facts deponed to by the Rainnies ought, *ceteris paribus*, to turn the scale in favour of Lovie's heirs."

Duncan reclaimed. At advising,

Lord President.—I have not a favourable opinion of Duncan's claim. I don't say I agree with every thing contained in the interlocutor and note of the Lord Ordinary; but if the claim is to be sustained, it must be to a very limited extent. In the first place, it is clearly proved by the oath of Rainnie, that he did not put a higher value on his sub-lease than £20; and I see very good evidence, as far as Rainnie's testimony affords it, that he was prompted and advised to ask a larger sum. He says to Duncan, "what will I seek? Will I seek £20?" Duncan's answer is, that he might ask more, as he would give more. What construction can be put on this conversation but this, that Duncan wanted to enhance the value of the damages, and show that he was claiming no more in his action than he was entitled to receive. It is said that Rainnie's sub-lease is useless, because not sanctioned by the landlord. Certainly this sanction has not been given, and it does not appear that Duncan has ever made any application to the landlord on the subject. Possibly, if he were to apply, the landlord would put an end to the question at once. The claim is undoubtedly made in circumstances not calling for any favour, though the concealment of the written sub-lease by the other party, is far from creditable. On the whole, if damages must be awarded, I am clear that their amount ought not to exceed £20, and that we ought not to give any expenses.

Lord Gillies.—I have arrived at the same conclusion, and on similar grounds. I cannot refuse credit to the two witnesses who deponed that Lovie said there was no regular lease, and therefore, I think that some damages must be awarded. But then the sub-lease is in this curious situation. Mr Brebner, the factor, depones that Lovie had no power to sublet without the landlord's consent. The landlord, therefore, can put an end to Rainnie's possession at once, and the sub-lease would go for nothing. What Lovie said was thus true in law, but not true morally. There was, strictly speaking, no sub-lease; and Mr Brebner says he is confident, if leave to grant a sub-lease had been asked, it would not have been given. It may therefore be said, that as Duncan, by applying to the landlord, might in all probability get Rainnie removed, he has not sustained any injury. Still, however, there was a misrepresentation; for it is sworn that Lovie said there was no written lease. On the other hand, the conduct of Duncan, in endeavouring to enhance the amount of his loss by urging Rainnie to ask a larger sum for it than Rainnie thought it worth, is most reprehensible. I am satisfied, therefore, that we must alter the interlocutor, and find some damages due; but we ought to restrict them to the smallest possible amount. They ought not to exceed £20. Witnesses have been brought to put a much higher value on the damage; but it is ridiculous to value such land as Rainnie's, consisting chiefly of Aberdeenshire moss, at 20s. per acre.

Lord Macenzie.—I am of the same opinion. I do not see how we can disregard the evidence which goes to show that Lovie made a statement not consistent with truth, viz., that Rainnie had no sub-lease, and only possessed during pleasure. The sub-lease thus said not to exist, had been written for a considerable time before. But unless we disbelieve that the false statement was made, we must award some amount of damages. I cannot agree with the Lord Ordinary in presuming that the falsehood, if made, had been confessed and retracted before the minute of sale was concluded. This is not proved, and cannot, in the absence of proof, be presumed. That being the case, a wrong has been committed, and there must, to the extent of the injury sustained by it, be a good claim of damages. It is objected to the action, that it amounts to the plea *quantum minoris*. I don't see this. For the action evidently proceeds on the warrantice in the sale, and the seller under it is bound to deliver the subject unencumbered, in the same way as a borrower is bound to purge an encumbrance in the case of granting an heritable bond. I am clear there is no incompetency in the action as a claim of damages founded on the warrantice. But there are other points to be considered. The first is, whether any damage has been sustained at all; and the second, whether, if damage has been sustained, there is not a good defence on the ground of personal exception. The odd manner in which Duncan has proceeded almost amounts to this. The sub-tenant does not put any high value on his possession. He says the rent is a fair rent. He is not very reluctant to quit; but Duncan goes to him and asks him to put a larger value on the sub-lease;—in other words, does every thing he can to induce him to stay, and so keep up the injury of which he complains. If in this way he really caused the injury, there can be no doubt that he lies open to a personal exception. I don't see, however, this is the case; for though the tenant puts little value on his croft, it is pretty obvious that he will not be disposed to quit it for nothing. Some small sum of damages must therefore be given. Twenty pounds are certainly the outside of it. I would rather say less. It is plain that the sub-lease is bad, and it is said that there is no damage sustained in consequence of it, as the landlord may put an end to it at pleasure. No doubt he may; but he is not bound to put an end to it; and we don't know that he will, as he has not done it. Mr Duncan is not able to do it of himself, and therefore something must be given to him in name of damages; but the amount ought to be a minimum.

Lord Fullerton.—I am very much of the same opinion. It seems impossible to get over the evidence which goes to prove that Lovie asserted there was no sub-lease; and I see no ground for the presumption adverted to by the Lord Ordinary. The only question then is, the amount of the damages. On this head there is a good deal of contradictory evidence,—some of the witnesses saying that the rent paid is far below the true value, and others, that it is quite enough. The most decisive evidence is that of the tenant himself, who is willing to take £20. The probability is that the value is less, but it certainly cannot exceed it.

The Court pronounced the following interlocutor:

“Alter the interlocutors complained of: Find the said George Duncan entitled to the sum of £20 Sterling of damages, in respect of the sub-lease of Rainnie's croft; and decern against the said George Duncan, in terms of the conclusions of the libel against him at the instance of the trustees and executors of James Lovie, under deduction of the said sum of £20: Find no expenses due to either party, and decern.”

Lord Ordinary, Cuninghame.—For Reclaimer, Dean of Faculty (Wood), Inglis; Handyside and Wilson, W.S., Agents. —For Respondent, Solicitor-General (McNeill), Moir; Inglis and Donald, W.S., Agents.—F. Clerk.—[H.B.]

25th November 1841.

FIRST DIVISION.—(H. B.)

No. 22.—JAMES HENRY HOUSTON'S EXECUTORS, Pursuers, v. JAMES DUNCAN (*Scougall and Company's Trustee*), Defender.

Bankrupt—Dividend—Trustee, Liability of.—*Held that no part of the expenses incurred by the trustee and the general body of creditors in unsuccessfully litigating a claim, can be charged or allocated so as to affect that claim; and that the trustee, having once had sufficient funds to answer the claim, is liable, first as trustee, and then if necessary personally, for its amount.*

The estates of Richard Scougall and Company were sequestrated on 17th November 1814, and Boyd Dunlop, merchant in Glasgow, was appointed trustee. The bankrupts had had large dealings with the house of Fraser, Houston and Company; and in August 1815, the executors of James Henry Houston, who at the time of his death was sole partner of that house, intimated to the trustee that their claim against the bankrupt estate amounted to £23,497. 14. 2., independently of some claims of relief. The intimation was entered in the sederunt-book, but the trustee refused to admit the claim, because it was believed that certain assignments of cargoes which the claimants had received from Scougall and Company, shortly before the bankruptcy, were reducible under the Act 1696, and if reduced, would throw the balance the other way. In November 1816, the claimants presented a petition to the Court, praying that the trustee should be ordained to rank their claim. On the other hand, the trustee, under the authority of the creditors, commenced proceedings for the reduction of the assignments. Accordingly, a protracted litigation took place, both in the Court of Session, where the question of undue preference required to be tried, and also in the Court of Chancery in England, where the proceeds of the cargoes assigned were payable. In the latter Court a remit was made, with consent of parties, to one of the Masters of Chancery, who reported, that the amount appearing due to Houston's executors amounted to £21,940. 14. 1. In the Court of Session, judgment was given against the trustee, and this judgment was affirmed on appeal. In November 1815, and in September 1816, two dividends, each of 8d. per pound, was paid from the sequestrated estate. Neither of them was paid to Houston's executors, but the amount which the dividends would have produced on their claim, was entered in the sederunt-book on the footing of its being a disputed claim.

Boyd Dunlop, the trustee, having died, was succeeded in his office, in April 1823, by James Duncan. Dunlop was greatly indebted to the estate at the time of his death; but as he had previously become bankrupt, the amount could not be recovered. Action was afterwards raised against his cautioners (Houston's executors sisting themselves as parties), but the cautioners were assoilzied, on the ground that the loss sustained was to be ascribed to the negligence of the creditors, who had failed duly to superintend the trustee's conduct. Subsequent to the appointment of James Duncan as trustee, funds had been recovered to the estate to the amount of above £4300; but, after paying £2300 of dividends on admitted claims, and expenses consisting chiefly of those which had been incurred in the unsuccessful litigations with Houston's executors,

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the sum recovered was so much reduced as to leave in the trustee's hands a balance of only £200.

In these circumstances Houston's executors brought the present action against James Duncan, the trustee, concluding that he should be decerned to make payment to them of the two dividends of 8d. per pound effeiring to their claim of £20,337. 10. 10., with legal interest from the terms at which the same were declared payable, or at least that he should be decerned to pay to account of their claim,

"such sum as, upon a just and fair accounting, shall appear to be the amount of the funds of the said sequestrated estate realised by the said defender, but without deduction therefrom of the expenses disbursed or incurred in the litigations and other proceedings aforesaid, taking place between the pursuers and the said sequestrated estate and the trustee thereon, or of any other charges or expenses not properly falling on the pursuers; or otherwise, to set apart, consign, and deposit in bank, the said sums on account, and for behoof of the pursuers, as executors foresaid, that the same may be drawn by them in payment of their just and true claim as creditors on the said sequestrated estate."

In support of the action the pursuers *pleaded*—1. The defender having personally realised funds of the sequestrated estate sufficient to pay the dividends due on the claim of the pursuers, then under discussion, was bound to perform the statutory duty of depositing in bank a sum equal to the amount of these dividends, in order to meet the claim if sustained; and having failed to perform this statutory duty, the defender is liable to make good the amount of the dividends to the pursuers. 2. At all events, the defender, as trustee in the sequestration, is bound to account for, and to pay to the pursuers, the dividends in question, out of the funds of the estate actually realised by him, so far as these funds will go; and in this accounting he is not entitled to deduct, as in a question with the pursuers, the expenses of the litigations with themselves. The defender was not entitled to appropriate and divert the funds of the estate to the prejudice of the pursuers, by litigating with the pursuers for the benefit of the other creditors; and, as in a question with the pursuers, he must look for relief of those expenses to the creditors under whose instructions he acted. 3. In either view, the pursuers are entitled to make good the dividends pursued for, by effect being given to the conclusions of the present action, or one or other of them. 4. The defender, by his own previous proceedings and admissions, has excluded himself from objecting to the amount of the debt due to the pursuers. At any rate, the pursuers are entitled to have this ascertained; and in the meantime, to have an order on the defender to deposit in bank the amount of the dividends appertaining to the claim. 5. The pursuers are entitled to interest on the dividends sued for, not less than to the principal thereof; and are, at all events, entitled to bank interest, such as would have accrued had the dividends been duly deposited in bank, until the time when they fell to be paid, and to legal interest thereafter.

The defender *pleaded*—1. The proceedings referred to having been carried on by the defender under the instructions of the creditors, they ought to have been called as parties to this action. 2. In the special circumstances of this case, the pursuers are barred from making any such claims against the defender as those now advanced by them. 3. The defender being bound

to obey the instructions given by the creditors at their general meetings, duly called in terms of the Statute, and the resolutions of which were not complained of, but allowed to become final, is entitled to be indemnified, out of the funds of the sequestrated estate, of all expenses incurred, or other consequences resulting from such resolutions. 4. The dividends referred to by the pursuers ought to have been lodged in the bank by Mr Dunlop, and allowed to remain there till their claims were finally disposed of, and the pursuers ought to have seen that this was done; and having, in consequence of their own negligence in this respect, failed in their claim against Mr Dunlop's cautioners for these dividends, their claim for the same now lies exclusively against Mr Dunlop's estate. 5. The claim of the pursuers has not yet been satisfactorily adjusted or liquidated, and till this shall be done, no claim for interest can lie at their instance.

The Lord Ordinary pronounced the following interlocutor:

"24th June 1841.—The Lord Ordinary having heard the counsel for the parties, and considered the process, repels the defences: Finds that the two dividends effeiring to the claim of the pursuers, amount to £1355. 16. 8: Finds that, in reference to this sum due to the pursuers, no part of the funds expended in the litigation with them can be charged, or allocated so as to affect their claim: Finds that, if this principle be acted upon, the defender, as trustee, has, or ought to have, and *quoad* the pursuers must be dealt with as still having, a sufficiency of funds to answer the above claim; and that, if he has not, he is liable personally to make it up: Therefore, finds the defender liable, first as trustee, and then, if necessary, personally, for the foresaid sum, for which decerns; reserving to the parties to be hereafter heard as to interest, on which point they have not yet spoken, and reserving to the defender any recourse which he may have against all or any of the creditors: Finds the defender liable in expenses: Appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same, and to report.

"*Note*.—It is unnecessary to decide as to the conclusion for settling aside a sum to meet the pursuers' claim; because, if the pursuers be right in their demand to have the expenses of the litigation with them struck, in so far as they are concerned, out of the accounts, enough will be still in the trustee's hands, or must be in law held to be so, to satisfy their debt.

"Now, the Lord Ordinary thinks that, in dealing with the pursuers, no part of the £2000, or whatever the sum may be that was spent in litigating unsuccessfully with them, can be charged or allocated, so as to diminish the sum otherwise due to them. It is as firmly fixed as any point can be, by positive and repeated decisions, that a creditor who has been successful in a law-suit with other creditors, is not to have any of the costs laid on his dividend, or on the fund out of which this dividend is to be paid. If such costs have been charged against the general fund, then, *quoad* him, this charge must be corrected, and he must be dealt with as if the money was still in hand.

"The defender's plea, that he spent that money under the directions of the creditors, whose resolutions were not complained of, will not do. For, 1st, The creditors did not, in point of fact, give any direction which the trustee ought to have held as ordaining him to infringe the legal right of the opposing creditor. They merely told him to proceed with the litigation. But this could only have reference to the funds liable to defray the cost of that litigation; i. e. such funds as remained after satisfying the pursuers' claim. Their order to go on did not surely imply that the trustee was to go on at another man's expense. 2d, The creditors could not lawfully give any such order. No creditors can lawfully direct a trustee to violate one of the clear and positive directions of the Statute; the 30th section expressly ordains the trustees to leave in the bank money sufficient to answer unsettled claims. The defender had a sum

here which had been left by his predecessor, and he had the unsettled claim of the pursuers; yet, instead of leaving enough of this sum for their debt, he spent it; and is it any defence to the injured creditor to say that his opposing brethren bade this be done? 3d, It is true that the pursuers did not complain of the creditors' resolution. How could they? Could they petition the Court against a resolution by their opponents in a law-suit to appeal to the House of Lords? Could they hinder their adversaries from going on with their own cause? If the trustee saw that there were no free funds out of which the costs could be paid, he ought to have declined to proceed, unless they had agreed to furnish him with the means of going on.

"The defender pleads, that it is not against him, but against the creditors, that the pursuers should have recourse. The Lord Ordinary does not think so. In the eye of the law the trustee still has money enough in his hands to pay their dividend; for, *quoad them*, his books must be cleared of all the expenses by which the disappearance of the fund is accounted for. It may be true that, after this is done, the trustee may, *de facto*, not have the money; but, in dealing with the pursuers, he must be held to have it. And if it is in consequence of obeying directions of the creditors that he has it not, it is *he*, and not the injured creditor, who must have recourse against these creditors.

"The defender says that in no case has any trustee been found personally liable for such loss. This is probably true, because in no case has their personal liability been necessary. Can any case be produced where a trustee, who has spent a creditor's share of the funds in unsuccessful litigation with that very creditor, was not bound to replace the money, though out of his own pocket in the first instance, where this was necessary, for the creditor's redress?"

Duncan reclaimed. At advising,

Lord Gillies.—I have come to be of opinion that the interlocutor of the Lord Ordinary is well founded. It is admitted that the creditors themselves would have been liable for the dividend, without deduction of the expenses, and that they are not entitled to carry on a litigation, especially an unsuccessful one, with the money of their antagonist. It does not necessarily follow that the trustee is personally liable. That is the sole question before us. To make him personally liable, he must have been guilty of misconduct or gross negligence,—as for example, any departure from his duty under the Statute. I do not think *mala fides* necessary, and it is not alleged. The only question is, whether he was guilty of such negligence as to subject him in personal liability? As to this I can have no doubt. The clear duty of the trustee is, to set apart a sum sufficient to pay the dividends on a disputed claim. It is said the former trustee uplifted the sum in bank. Then the duty of the present trustee was clearly to replace it. The terms of the Act are imperative: "In case any of the debts claimed upon shall be objected to in whole or in part, a share of the fund corresponding to the utmost amount of the sums or dividends to which the disputed articles may be entitled, shall be left in the bank till all such questions are determined." This provision bears reference to no particular time. During the whole of his management, it is his duty to see that the money is lodged as soon as recovered. Having failed to do so, I think he must be held to be personally liable.

Lord Mackenzie.—I am of the same opinion. There are here two points. One of these has been given up, namely, that the claim of this creditor has been lost altogether by his own neglect, which, it is said, relieved the cautioners of Dunlop, the former trustee, of all liability for the sums which had been deposited, but afterwards uplifted by him. This point does not now seem to be seriously insisted in. The funds were lost more by the negligence of the other creditors than of this party; and therefore, I have no difficulty on that point. I agree with Lord Gillies, that when the trustee made recoveries, it was his duty again to set aside a sufficient sum to meet the dividends on this creditor's claim. His not having done so cannot make his situation better. While matters so stood, a majority of the creditors directed the trustee to carry on a law-suit against this creditor. The result of the action having proved that they were in the wrong in that, the question is, whether the trustee

was warranted in paying the expenses of the litigation out of the fund applicable to the payment of this person's dividends? I think he was not. It is said that he was bound to obey the orders of the creditors. Perhaps so. But did that imply a power to take the trust-funds applicable to other purposes, and expend them in the litigation? Certainly not. The creditors gave him no direction to do so. If there had been an express minute ordering him to apply the trust-funds in the litigation, and this creditor had due intimation of this intention, and had not complained, there would have been some pretence for this plea. But there was no such minute; there was no warrant for this use of the funds, which I consider illegal. The sum must be held as still in his hands. It is said that the conclusion of this action is to make the trustee personally liable. But the same might be said of every accountant who discharges himself by a wrong item; and here the trustee attempts to discharge himself by entering these expenses in this account, which I do not think he is entitled to do.

Lord Fullerton.—I am of the same opinion. The case lies within a narrow compass. It is admitted, that if there be a litigation between an individual creditor and the body of creditors, in which the former is successful, his dividend of the estate cannot be burdened or diminished by the expenses of that litigation. It follows, that if the dividends have been lying in bank, and if the trustee uplift them and apply them in defraying the expenses of the litigation, he will be liable to the creditor in repetition. And even although he may have been ordered by the majority of the creditors so to apply the money, he cannot plead that order with effect in a question with this individual creditor. Indeed, it seems to be admitted, that if the present trustee had found in bank a sum of money deposited by the former trustee to meet this creditor's dividends, he would have been liable to make repetition if he had paid the expenses with it; and the defence is put entirely upon an alleged distinction between that state of matters and the present. Take the case that no money was left by the former trustee,—the defender admits that he recovered more than sufficient to meet the pursuers' dividends; but his argument is, that though he would not have been entitled to take the money out of bank, he was not bound to put it in. I think this a narrow ground. And even though the Statute were worded as it is said to be, I should entertain doubts as to the distinction. It would be a very strained interpretation of the Act to give effect to it. But the words of the Statute themselves remove all doubt. It contains no provision for setting apart. All that is enacted is, that there shall be a permanent keeping for the creditors' security. If a particular sum had been set aside, and expressly appropriated to the creditors' dividend, the trustee could not have drawn it from the bank. But this is not what is provided. The Statute merely enacts, that when a creditor's claim is disputed, the funds in bank shall not be reduced below such a sum as is necessary to meet his dividends. Now, the defender here recovered money enough to pay these dividends; and there is no question as to his liability to place it in bank. Under the Statute, the trustee was bound to place all that he recovered in bank. He could only have £50 in his hands at a time. Is it then possible to contend, that the obligation to keep a sum to meet this creditor's dividends did not apply as much to the defender as to the original trustee? And because he violated this duty, is he therefore to be free from his obligation to account to the creditor? He ought to have always had enough to satisfy the dividends; and he either has these dividends now, or must in law be held to have them. Unless the proposition could be made out, that by Dunlop's mismanagement this creditor's claim was lost to him altogether, the defender has no case. But such a proposition cannot be supported. The obligation to keep funds is as strong on Duncan as it was on Dunlop. I presume it is unnecessary to notice the defence founded on the proceedings in the action against Dunlop's executors.

Lord President.—Upon very full consideration of the whole circumstances of this case, I am of the same opinion as the rest of the Court. I can see no grounds for altering the Lord Ordinary's interlocutor. The first litigation against Dunlop's cautioners cannot affect the question. That was not an action for behoof of Houston. The litigation was for some time in

dependence before any appearance was made for Houston, and even then, it was made merely because it was thought that he was in a more favourable situation than the other creditors to try the question with the cautioners. Now, if the sum had been recovered in that action, it must have been deposited in bank, and kept free from the expenses of the litigation. But the new trustee made additional recoveries, and before the payment of the second dividend a claim was given in for Houston; and by the Statute, a fund is directed to be set aside to await the discussion of such a claim. Was that not sufficient certification to the trustee? Here was a large claim, which the creditor said he would make good in due course, and for which he called upon the trustee to rank him. There was no misleading here; the matter was just in the ordinary situation,—the claim having been made in a formal manner, and the trustee having thus been warned of his duty to lay aside the dividends, I do not enter into the question, whether this trustee received any funds from his predecessor. It is admitted that, posterior to his own appointment, he recovered more than £2000, which was more than sufficient to meet this creditor's dividends. Now, keeping in view that he was duly certified of the claim, and that he was directed by the Statute to lay aside funds to meet it,—was he entitled, even if he had received the most direct instructions from the creditors, to take the funds so recovered and spend them in litigation? I apprehend not. No trustee, whether on his own responsibility, or by the directions of the creditors, is entitled to go on spending in litigation the whole funds which should have been kept for this creditor's dividends. But there were no special directions of the creditors to use the dividends in conducting the litigation. And is it enough to free the trustee from responsibility for those dividends, to say that he so spent them? Although, therefore, I admit that this is a direct action of personal responsibility against the defender, I cannot find any legal grounds for relieving him from it. He was bound to square his conduct by the Statute under which he acted. It was his duty to have called the attention of the creditors to the fact, that there were no funds to meet the expenses of the litigation, except those provided to meet the dividends. He should have said that he could not go on without encroaching on those funds; and he should have asked the creditors if they were ready to provide him with the means of conducting the litigation. I think it impossible not to adhere to the interlocutor.

The Court adhered.

Lord Ordinary, Cockburn.—*Act.* Maitland, Penney; John Court, S.S.C., *Agent.*—*Alt.* Rutherford, More; Andrew Howden, W.S., *Agent.*—*N. Clerk.*—[H.B.]

25th November 1841.

SECOND DIVISION.—(J.W.)

No. 23.—DAVID PRENTICE and COMPANY, *Pursuers and Respondents*, v. JAMES COCHRAN, *Defender and Advocate*.

Process—Statute 1579, c. 83—Prescription, Triennial—*A party raised an action on an open account within three years from the date of its last item: the action was dismissed by the Sheriff, and in consequence a second action was brought, but not until after the lapse of the three years—Held incompetent to sustain the conclusions of the action, except by the writ or oath of the defender.*

On the 24th July 1839, the pursuers raised an action against the defender in the Sheriff-court of Glasgow for the sum of £23. 11. 6., being an account for newspapers terminating 26th September 1836. The Sheriff dismissed the action, on the ground of its being brought in the name of David Prentice and Company, the company firm, without having conjoined with it the names of any of the individual partners. In consequence, the present action was brought; but the summons is dated the 16th of December 1839, more than three years from the date of the last item in the

account. The defender pleaded prescription; and a record having been made up, the Sheriff decerned in terms of the libel.

The defender advocated, and *pleaded*—That the plea of prescription was not obviated or elided by the former action or judicial demand which the respondents allege had been made against the advocator,—in respect, (1.) That the said former action was utterly incompetent, and had accordingly been dismissed as such by a final and unchallenged judgment of the Court in which it was brought. There had truly, therefore, been no former action or judicial demand at all: And, (2.) That as the present action,—being the one in which the alleged claim is attempted to be made effectual,—had not been brought within the prescriptive period, it was irrelevant and incompetent to found on any other or former action which had proved abortive: *Vide* *McLaren v. Buick*, 27th February 1829; *Shaw*, Vol. VII. p. 483.

On the other hand, it was maintained by the respondent—That there is no good defence against the claim at the instance of the respondents, on the ground of prescription,—inasmuch as (1.) the prescription pleaded was, in the circumstances of the case, inapplicable; (2.) It was, at any rate, interrupted by the summons raised against the advocator on 24th July 1839, the execution of that summons on the same day, and the judicial proceedings which followed.

The Lord Ordinary pronounced the following interlocutor, with note annexed:

"6th November 1841.—The Lord Ordinary having heard the counsel for the parties, and considered the process, advocates the cause: Repels the plea of prescription; and before farther answer, appoints the respondents, within eight days, to produce excerpts taken from their books, at the sight of the Sheriff, of all entries relative to the matter in dispute, and all discharges relative thereto; and appoints the party in possession of the letter referred to in the note by the Sheriff-depute, of 3d March 1841, and there described as No. 23, to produce that letter also within eight days; and directs these writings to be added to, and to form part of the proof; and reserves all questions of expenses.

"*Note.*—The Lord Ordinary is not satisfied that the shorter prescriptions cannot be interrupted; and though certain *dicta* seem to have been thrown out *obiter* on the point in the case of *McLaren*, 27th February 1829, what the Court did in that very case was inconsistent with this plea; because, instead of deciding at once, that interruption did not apply to the triennial prescription, they went into a discussion as to the validity of the action said to have been interrupted, and decided on the ground that the interruption did not take place because that action had been incompetent.

"If the action on which interruption is pleaded here had been raised at the instance of an incompetent party, or of a party incompetent *as set forth* in the summons, the Lord Ordinary would have been inclined to the opinion, that such an action could not interrupt. He would have been so inclined, on the principle on which it has been settled, that interruption is not affected by an action before an incompetent Court. The objection of incompetency in the party, *as set forth*, seems to him to be about as strong as that of incompetency in the Court.

"But the action here was at the instance of a competent party properly set forth. To be sure the Sheriff *erroneously* decided the opposite way, and dismissed the action; and instead of advocating his judgment, a new action (the present one) was instituted. But although the Sheriff's erroneous judgment be final and conclusive, *quoad dismissing that action*, the Lord Ordinary does not think that it must necessarily receive effect when the correctness of that action is maintained,

to a different effect, in a different process, before a different Court. If that action was properly brought, he does not think that effect can be withheld from it, as an interruption of the prescription, because the Sheriff took a different view of it in another process.

"The Lord Ordinary orders the additional writings to be produced *ex proprio motu*. The books are referred to in the proof, and their contents are referred to by the witnesses, and, therefore, as the best evidence, they ought clearly to have been exhibited. The letter, No. 23, was perhaps properly rejected by the Sheriff, when it was only sought to be added to the proof as *res noviter*, though, considering the fire, this is not without doubt. But it is not properly *new matter* recently discovered: It is a piece of new evidence, the production of which is required by the justice of the case. The right of the one party to have it disclosed, or of the other to keep it concealed, may be questionable. But it is within the power of the Court to order it to be added to the proof."

The advocator reclaimed and argued—

That there is a manifest distinction between the long and the short prescriptions. The long prescription is founded on the presumption of dereliction, and is interrupted by any solmen act overcoming this presumption; whereas the triennial prescription proceeds on the presumption that the debt is paid. The abortive process could not interrupt the running of the prescription; for the Act 1579 ordains that all actions of debt for house-rents, &c., shall be pursued within three years, otherwise the creditor shall have no action, except by writ or oath of party. In M'Laren, the first action was brought before the Sheriff, and was dismissed as incompetent,—the nature of the action being maritime. A second was raised before the proper Court, but not until the years of prescription had elapsed. It was held that prescription had taken effect—the dismissing of the previous action being considered equivalent to there having been no action at all.

Answered—

That the first action was raised within three years from the closing of the account libelled. The summons was competently raised in name of the company firm, and before the competent Court. Though dismissed, and that wrongly, it was of the nature of a judicial demand, and was very different from the case of M'Laren, where the action was brought before a court having no jurisdiction. In Douglas, 26th November 1784, M. 11,127, it was found that the production of bills in a process of ranking and sale interrupted prescription, so as to allow of a separate process being instituted upon them, after more than six years had elapsed from their date: Sloane, 1st June 1827; 5 Shaw, p. 742, and National Bank, 5th December 1837, show that a judicial demand, although made in processes which may turn out ineffective, is sufficient to interrupt prescription.

Replied—

The first action raised was dismissed, and the judgment acquiesced in by the party. We cannot now inquire into the grounds of the judgment; but there is no distinction between this case and that of M'Laren, unless we go into the merits of the Sheriff's judgment, and hold that M'Laren's action was rightly dismissed, and that the present action was wrongly dismissed. If the party was dissatisfied with the Sheriff's judgment, he ought to have brought it under review by advocacy, and kept alive his right of action. The cases referred to do not apply. The production of the bills in the ranking and sale was regular and competent, although, from the failure of funds, other steps might be necessary to complete recovery. The case of Sloane was an action of count and reckoning, in which it was said one item of the accounts had prescribed; but the action was brought in time, and the Court found that the account was produced in time. The case of the National Bank was a multiplepounding, in which a claim was lodged; but an ordinary action was instituted to constitute the debt, and decree was ultimately obtained under the multiplepounding.

Lord Medwyn.—The triennial prescription proceeds upon the presumption of payment, and unless the action be pursued within three years, nothing can elide it but the writ or oath of the party. The long prescription, on the other hand, is founded upon

dereliction. The present case is ruled by that of M'Laren, where the first action raised was abortive, from its being brought before an incompetent Court; but there is no difference between such a case and one in which the action, though competently raised, was dismissed. I differ, therefore, from the views of the Lord Ordinary.

Lord Moncreiff.—I cannot distinguish this case from that of M'Laren, which proceeds upon the principle that the short prescription rests upon the presumption of payment, and the long prescription upon dereliction. What is to be the effect of the doctrine contended for? Is an incompetent action to keep alive the right of pursuing for other three years, or for forty years? The Sheriff dismissed M'Laren's first action on incompetency, but we cannot go into the merits of the Sheriff's judgment here; the pursuer acquiesced in it, and it has become final. He should have brought an advocacy or reduction, and so stood upon his original action. Instead of this, he acquiesced in the dismissal, and then brings another action beyond the years of prescription. I have looked into all the cases, and think none of them apply.

Lord Justice-Clerk.—I am of the same opinion, and rest entirely upon the Statute, which explicitly declares, that "all actions," &c., be pursued within three years, otherwise the creditor shall have no action. Now, has the present action been pursued within the three years? It is brought beyond the three years. The Statute makes no mention of prescription. It is a statutory declaration, that there shall be no action unless pursued within three years. I see no prescription, and no opening for interruption. It is of no consequence whether the former action was competent or incompetent. If it was competent it ought to have been followed forth: if incompetent, it cannot preserve the right of action.

Lord Meadowbank concurred.

The Court pronounced the following interlocutor:

"Recal the interlocutor complained of; sustain the plea in defence founded on the Act of Parliament 1579, c. 83: Find it competent to the pursuers to sustain the conclusions of the action by the writ or oath of the defender; and remit to the Lord Ordinary to proceed accordingly; reserving all questions of expenses *hinc inde*."

Lord Ordinary, Cockburn.—Act. Solicitor General (M'Neill), Macfarlane; Charles Fisher, S.S.C., Agent.—Alt. Penney; Simon Campbell, S.S.C., Agent.—T. Clerk.—[J.W.]

25th November 1841.

SECOND DIVISION.—(J.W.)

No. 24.—ROBERT BEVERIDGE, *Suspender*, v. ROBERT HENDERSON, *Charger*.

Bill of Exchange—Proof—Circumstances held sufficient in themselves to prove that the acceptor of a bill, bearing to be for rent of grass-parks, was not the true debtor in the bill, but that the acceptance was for the accommodation of the drawer, deceased.—Observed, That the proof of verbal statements made by the drawer to the bank-agent and to his own trustees, acknowledging that the bill was for his accommodation, was irrelevant and inadmissible.

Vide ante, Vol. XIII. p. 142, also relative case, p. 139.

In terms of an interlocutor pronounced in this case, 19th December last, a proof was taken and reported. A minute also was lodged for the charger, in which he admitted the averment contained in the ninth reason of suspension, viz., "that the entry, 'Mr Monro, £65,' contained in the 'state exhibited (in pencil) by Mr Colville at his meeting with Messrs F. and J. at signing the minutes,' referred to in that article, refers to the bill charged on;" "and also that the gentlemen alluded to in that state are Messrs Ferrie and Jamieson, W.S., Colville's trustees and agents, and the minutes referred to are those which were made out as

expressive of the footing on which they had accepted the trust, and entered on the management."

The first witness for the suspender was Mr Ferrie, who deponed,

"That in consequence of repeated conversations with Mr Colville, the deponent's impression was that Mr Beveridge was not the real debtor in the bill, and this was one of his reasons for not proceeding against Mr Beveridge." Being interrogated, "What were the other reasons for not proceeding against Mr Beveridge besides the one stated? Depones, That he did not consider Mr Beveridge in such circumstances as that the debt could be recovered." "Interrogated, and requested to state particularly what the conversation was which led the deponent to the understanding above mentioned, and whether Mr Colville on that occasion stated to the deponent, that the bill in question had been granted for his (Colville's) accommodation? Depones, That he cannot condescend more particularly than he has done upon that conversation, but he could not say that Mr Colville in so many words said it was an accommodation-bill, or an acceptance not for value." The result of another conversation was, "if not to convince the deponent that it was an accommodation-bill, at least to induce him not to commence proceedings against Mr Beveridge."

Mr Thomson deponed, that at a meeting

"where at least Mr Colville and Mr Ferrie were present, the deponent remembers a good deal of conversation taking place about the above-mentioned bill in Monro's hands: That Mr Colville, on some of these occasions, told Mr Jamieson or Mr Ferrie that Mr Monro was likely to do immediate diligence on that bill, and that it must be taken up; and he told Mr Jamieson or Mr Ferrie that the bill was for his own debt, and that they must not trouble Robert Beveridge about it, nor even write a letter to him on the subject." Being examined for the charger, "depones, That he thinks that statement was made at a meeting in Ferrie and Jamieson's office, a short time before the bill was paid, and he thinks the admission was addressed to Mr Ferrie; and he is not sure if Mr Jamieson was present. Depones, That the statement was made most explicitly by Mr Colville, who requested that Mr Beveridge should not be written to, as that would just set him upon him (Colville) to annoy him; and it was no matter of inference on the deponent's part: it was an explicit statement of Colville's."

Mr Steele, agent for the Western Bank of Scotland in Kinross, during the years 1834 and 1835, being shown excerpts from the books of the bank, deponed,

"That he knows, from the remarks which he now observes in the said paper of excerpts, opposite to the entries of the bill in question, that he must have been told by Colville that he (Colville) was the true debtor in the bill." "And being desired to state the particular occasion on which Mr Colville told him that the bill in question was granted for his (Colville's) accommodation? Depones, That it is impossible for him to tell on what occasion, from the multiplicity of Mr Colville's transactions, and the number of bills that pass through the hands of a bank-agent: That, as stated before, he infers from the remarks which he sees in the excerpts, that Colville told him that he was the true debtor in this bill, and he has no precise recollection of Colville's conversation about this particular bill, although he remembers well that Colville told him that Beveridge had accepted several bills for his accommodation."

Mr Jamieson, who was examined for the charger, deponed, That he does not remember

"any specific allusion to the bill charged on, on the part of Mr Colville; but, from casual remarks, the impression upon the deponent's mind was, that the bill was a debt really due by Mr Beveridge to Mr Colville, and that it was not Colville's proper debt. Depones, That he is quite certain Mr Colville never told him that it was his (Colville's) proper debt, and nothing ever occurred to lead the deponent to infer that it was Colville's proper debt, and Colville never said anything to Mr Ferrie, in deponent's presence, that would lead to such an inference." "Afterwards, being desired to say why no diligence

was done against Beveridge upon the bill in question? Depones, That he never heard Colville give any other reason, except that he considered Beveridge worth nothing, and at the same time, he, Colville, hoped he might effect some arrangement with Mr Beveridge's brother for its payment." "Depones, That no steps were ever taken to get Mr Beveridge's brother to pay Beveridge's debt: That that was mooted between the deponent, Colville, and Ferrie, but Colville did not wish it to be done from his friendship for Beveridge, the suspender."

The proof being reported, the Lord Ordinary pronounced the following interlocutor, with the note annexed:

"20th March 1841.—The Lord Ordinary having heard the counsel for the parties on the proof adduced since the remit from the Inner-House, and on the whole cause—Makes *avizandum* with the same to the Lords of the Second Division; and appoints the said proof, with such relative exhibits or documents as the parties may think fit to annex, to be printed and boxed to the said Lords at the second box-day in the ensuing vacation, in order to be reported; and grants warrant for then enrolling in the Inner-House rolls.

"*Note*.—As the proof was allowed before answer, and only to a limited extent, by a judgment of the Inner-House, after deliberations, with the full tenor of which the Lord Ordinary cannot be acquainted, and which were differently represented by the parties, he has thought it best at once to report it for their consideration.

"The case, in his view of it, is attended with no little difficulty. On the one hand, the evidence of the bank-agent and of Ferrie is very strong in favour of the suspender's allegation, that the bill was for Colville's accommodation; and this is very powerfully corroborated by the fact, that no steps were taken against the suspender by any of the parties concerned for so very long a time. But it is remarkable that neither of these witnesses can swear positively that Colville ever made any such direct statement in their hearing, and the omission of any proceeding against the suspender is partly accounted for by the opinion which seems to have been generally entertained of his inability to meet the demand. The witness, Thomson, indeed swears positively enough to Colville's direct and repeated admissions of the bill being for his own accommodation. But his testimony (in so far as it is within the commission) is discredited, and, indeed, substantially contradicted, by that both of Ferrie and of Jamieson; even after making all due allowance for the general preponderance of *positive* over *negative* evidence. It is something, too, in favour of the suspender, that Colville, who is represented by all parties as much more ready to exaggerate his *means* than his *liabilities*, is yet proved to have been uniformly averse to any prosecution or molestation of the suspender for this bill. But the effect of this, again, is a good deal taken off by the evidence of his having been a great personal favourite.

"If this, however, had been all the evidence in the case, the Lord Ordinary (holding the question of its *competency* to be finally settled) would probably have thought it sufficient for the suspender's purpose. But it is most materially altered by the testimony of Jamieson—the only acting trustee of Colville, and the party, accordingly, whose motives for omitting to proceed against the suspender it was of most importance to ascertain. Now, he not only swears that he never heard any thing from Colville which led him to believe that the bill was not a proper debt of the suspender's, but he materially shakes the credit of Ferrie—especially as to what took place at the roup of the grass-parks in 1835.

"There is a fact, however, connected with that last transaction, which, when taken along with the express and peculiar tenor of the bill in question, weighs more with the Lord Ordinary against the suspender than any thing else in the case. In all questions of this kind, the written acknowledgment of the party in the document under suspension, even where it is allowed to be impeached by opposite testimony, is yet always to be regarded as *very strong evidence against him*;—and not to be got the better of, except by very conclusive and satisfactory proof. Now, in this case, the bill bears to have been granted

not only for value, but *for value in rent of grass-parks*; and it seems clearly established, 1st, That at the time of granting it, the suspender was really a tenant of grass-parks belonging to the drawer, the rent of which must have been nearly of the amount of the sum in the bill; and, 2d, That he has not attempted to prove, or indeed specifically to aver or explain, how this rent was ever paid or settled, otherwise than by granting this bill. It is possible that the importance of these facts might not have been seen when the record was prepared, or the proof allowed; and that the Lord Ordinary now presses them too hardly against the suspender. But if they are as he takes them to be, he inclines to think that they add so much to the evidence afforded by the tenor of the bill itself, as to make it outweigh both the circumstantial proof, and the indirect and somewhat conflicting testimony which is set up against it."

At advising,

Lord Medwyn.—The proof in this case was allowed on account of the distinct averment, that Colville had acknowledged to his own trustees that the bill in question was for his accommodation, and the Court thought it right to see the evidence of this before answer; but it never was intended to relax the ordinary rule of law, that the acceptor of a bill must prove that it was accepted for accommodation by the writ or oath of the drawer. The soundness of this principle, if ever there was raised a doubt of it, receives ample confirmation from the present case. The acknowledgments were alleged to have been made to persons naturally interested, and who might be supposed to recollect them: yet the proof is most unsatisfactory. The bill falls due on the 21st January 1834, and was retired by Monro in February. Colville subsequently puts his affairs under trust, and among his liabilities, includes this bill in the hands of Monro. Monro applies for payment, and receives a letter of authority to draw payment from Ferrie and Jamieson, the trustees. Colville lives two years thereafter, and makes no demand. I do not think the case mended by the proof; and I was just as much inclined to draw the inference before as after the proof, that it was Colville's debt. No bank-agent would have given up the bill as Colville's debt, except upon Colville's own authority. I leave the proof out of view; but looking to the fact that the bank-agent gives up the bill as Colville's debt,—that he himself includes it in his list of debts, and orders payment,—that neither he nor his trustees ever attempt to recover—I am led to the conclusion that he was the true debtor. If he had made a claim in his own lifetime, Beveridge could have proved by his oath that the bill was for his accommodation.

Lord Meadowbank concurred.

Lord Moncreiff.—I am of the same opinion. Colville is now dead, but he survived two years after the bill fell due, and made no claim against Beveridge. It is all the more improbable that he should let it lie over, when he was cautioner to the bank for Thomson, their agent, to the extent of £5000, and some time after accepted another bill to Beveridge, which he paid. The executors take the bill out of his repositories, after neither he nor his trustees had made any claim. The proof is most unsatisfactory; and I do not think we should go into it, because the other circumstances lead to the presumption of unfair dealing with this bill, and that Colville was the true debtor.

Lord Justice-Clerk.—The proof here is taken before answer, and the Court had great difficulty in allowing it. Now, what is proposed to be proved? The verbal statements of the drawer, that the acceptor was not the true debtor. In my humble opinion, this is altogether irrelevant and inadmissible. Nor can I draw any distinction between such statements being made to the bank-agent or the trustees, and any other person. A written statement cannot be so cut down. I don't touch the case of Macdonald, 23d December 1836, where fraud was alleged. Laying aside the proof, is there enough in the circumstances of this case to stay diligence? The document of debt is a bill on which diligence might be used. Delay in such a case is material. At maturity, the last indorser pays and retires the bill; he takes no assignation, and makes no demand on the acceptor. Before this the drawer had fallen into difficulties and executed a trust. His trustees pay on his order, and take no assignation, or make any demand on the acceptor. They act as if it were Colville's debt. They continue in the manage-

ment of the trust for two years thereafter, and the present demand is made by another man of business. Would not the circumstances have protected the trustees from liability in not demanding payment? much more must they protect the acceptor. Such conduct and circumstances show that it was Colville's debt. I am therefore for suspending the charge.

The Court suspended the letters *simpliciter*, with expenses, under deduction of those incurred in taking the proof.

Lord Ordinary, Jeffrey.—*Act.* Rutherford, Russel and Macfarlane; Greig and Morton, W.S., *Agents.*—*Alt.* Solicitor-General (M'Neill), Marshall; M'Ritchie, Bayley and Henderson, W.S., *Agents.*—*F. Clerk.*—[J.W.]

25th November 1841.

SECOND DIVISION.—(J. W.)

No. 25.—JOHN HARVEY, *Suspender*, v. ADAM FORREST, *Respondent*.

Process—Jurisdiction—Burgh—Small-Debt Act—Public Officer—*Found that the proceedings in the Small-Debt Court, held by the magistrates of a burgh as justices of the peace, must be regulated by, and in conformity to, the provisions of the Statute 6 George IV. cap. 48: 2. That the warrant and decree in an action before the said Court being signed by the depute town-clerk instead of by the clerk of the peace or his depute, the proceedings were incompetent and invalid.*

On the 18th September 1838, Adam Forrest, tailor, Leith, presented a complaint "unto the Honourable the Magistrates of Leith, Justices of Peace for the town of Leith and liberties thereof," against John Harvey, concluding for payment of the sum of £1. 4s., being the amount of an account for attending in Court four days to be examined as a witness and party relative to objections lodged by Harvey to his right to continue on the roll as a voter for a member of Parliament. The claim and warrant of citation was signed by Alexander Hay, who was the depute of the town-clerk, Mr Anderson. The citation and service of the complaint was made by John Mackay, officer; and the judgment decerning for the modified sum of 16s., with 2s. 5d. of expenses, was signed by Mr Hay.

During these proceedings a minute was lodged by Mr Harvey, declining the jurisdiction of the Court; and, besides presenting the present suspension, he raised also an action of reduction of the decree.

In the suspension it was *pleaded*—That the Magistrates were not entitled to hold courts in the capacity of Justices of the Peace, under the 6th Geo. IV. c. 48, which was passed in regard to counties and stewartries: Farther, supposing them entitled to hold courts as Justices of the Peace under the Statute, they did not conform themselves to the requirements therein enacted, in respect, 1st, That the complaint was not addressed to the Bailies as Justices of the Peace of any county or shire, as required by section 3 and schedule A of the Act: 2d, That the complainer was cited to appear before the Magistrates of Leith, and not before the Justices of any county or shire, as is required by the said section and schedule: 3d, That the person who signs the warrant of citation was not the clerk of the peace of the county of Edinburgh, or a deputy by him appointed, as is required by the said section, or a clerk appointed by section 22: 4th, That the copy citation did not bear that the complaint and warrant had been

served upon the complainer; and *lastly*, That the judgment pronounced does not bear to be by one of the Justices of the Peace of any shire or county, as is required by the said section 3 and schedule.

On the other hand, it was *pleaded* by the respondent—That the Magistrates of Leith had been in the actual and uninterrupted exercise of the powers and jurisdiction of Justices of the Peace under the Small-Debt Acts for a long period of years. By the charter granted to the city of Edinburgh by Charles I, dated 23d October 1636, the Provost and Bailies of the city of Edinburgh, and their successors, are made and constituted “Justices and Commissioners of our Peace within our said city of Edinburgh, ports of Leith and Newhaven,” &c. By the Dock Act, 39 Geo. III. c. 44, § 16, it is enacted, that the Magistrates of Leith for the time being, “shall have and enjoy the same powers and jurisdictions in and over the town of South Leith and harbour thereof, and the aforesaid dock or docks, and other works and houses contiguous thereto, in all actions and causes that may come before them, as are competent to the Lord Provost and Magistrates within the royalty of Edinburgh.” By the Parliamentary Burgh Act, 3 and 4 Will. IV. c. 77, § 30, it is enacted, “that the Magistrates and Town-council to be elected for the said burghs or towns (comprehending Leith) under the authority of this Act, shall have such and the like rights, powers, authorities, and jurisdictions as is or are possessed by the Magistrates and Council of any royal burgh in Scotland.” And by the Commission of the Peace, dated 23d February 1838, the Provost and Magistrates of Leith for the time being are nominated and appointed special justices “to keep our peace in the city of Edinburgh, and the liberties thereof.” It was further pleaded, that any alleged irregularity in the appointment of the clerk to the Magistrates *qua* Justices, or any irregularities in the form of procedure, would not void the procedure, or render the present suspension competent.

The Lord Ordinary pronounced the following interlocutor:

“8th July 1840.—The Lord Ordinary having heard parties, and considered the process—Sustains the respondent's plea, that the suspension is incompetent: Dismisses it, and decerns: Finds the suspender liable in expenses; appoints an account thereof to be given in; and, when lodged, remits it to the auditor to tax and to report.

“*Note*.—The suspender insists that the Justices' Small-debt Statute, and even the schedules, though these last be given as mere examples of forms, shall receive the most literal and judicial construction—a construction so rigid as to render the Act worse than useless. For example, the Statute directs the citation and the service of the complaint to be by a ‘constable or peace officer.’ It was done in the present instance by an officer; but because the schedule happens to say ‘A B constable,’ and the officer here was not a constable, it is maintained that this vitiates the whole proceedings. Some encouragement has perhaps been given to this hypercriticism by one or two judgments; but though the Statute no doubt must be interpreted fairly and legally, quibbles which destroy its practical usefulness are entitled to no favour.

“The Lord Ordinary is of opinion, that the Magistrates had jurisdiction to decide the cause as Justices; that the objections, taken to the regularity of the proceedings are all groundless; and that, with one exception, they are all frivolous.

“This exception, which forms the only difficulty in the case, relates to the clerk.

“The Statute provides that the warrant to cite, and the judg-

ment, shall be signed by ‘the clerk of the peace, or any depute by him appointed.’ Considering that the object of the Act is to give cheap and speedy justice to poor people, in poor causes, it would not have been unreasonable to hold that these suitors were entitled to rely that the clerk *de facto* was the clerk *de jure*; and that if they found a person in the office, and recognised by the public and the Justices as entitled to be so, they were safe in dealing with him, especially when there was nobody else to whom they could resort as more truly the clerk. But in the case of Cumming, 19th November 1833, the Court found that a secret flaw in the appointment of the acting clerk nullified the whole proceedings. This decision seems to have made the history of the clerk's appointment, with the view to discover a blot in it, a subject of inquiry with all parties seeking for grounds for suspending small-debt decrees. There is another case of the kind before the Lord Ordinary.

“The objection taken here is, that those who appointed the clerk had no authority to do so; and the facts are, that the Magistrates, as Justices, had appointed Mr Anderson, and that Anderson had given a deputation to Mr Hay, by whom the papers in this case were signed. Now, it is said that the ‘clerk of the peace’ means the ordinary Justice of Peace clerk for the county, or at least a clerk who can only be named by the Crown.

“If this be correct—and if it be true that the Magistrates, acting as Justices, cannot appoint their own clerk to officiate within their own town—then the Lord Ordinary does not see how his judgment on this point can be maintained. But it appears to him that the Magistrates can make such nominations, and he believes that they have been in the general and inveterate practice of doing so. The case of Edinburgh is disputed by the parties, but it does not seem to be disputed that this has been the practice at Leith since ever the Magistrates there acted as Justices.

“All that the suspender says about the case of Mabon, 15th November 1836, and about the constitution of the burgh court at Leith, is inapplicable to any thing that occurs here. The Magistrates of Leith are in the commission of the peace, and they have not decided beyond £5, and therefore we have nothing to do with their magisterial history or constitution, or any alleged extension of jurisdiction.”

The suspender reclaimed. At the advising of the cause on 5th March 1841, the Court were unanimously of opinion that the Magistrates of Leith had jurisdiction to pronounce the judgment complained of as Justices of the Peace, and that the proceedings before them, in that capacity, were sufficiently formal and regular, provided the objection stated to the appointment of the clerk of court should not be held to be a fatal objection; upon which last point minutes of debate were ordered.

From the minute of the suspender it appeared, that in the year 1821 the Magistrates of Leith first resolved to hold their Small-Debt Court agreeably to the then subsisting Small-Debt Act, and on the 5th of July following they expressly, *qua* Justices of the Peace, appointed Hugh Veitch, town-clerk of Leith, to be justice of peace clerk of Leith, with the usual powers attached to the office. In consequence of the death of Mr Veitch, a meeting of the Town-council was held on the 21st January 1837, at which the Provost, Magistrates and Council, appointed Mr Anderson town-clerk of Leith, “with the usual rights, powers and principles of the office.” In virtue of the power to appoint deputies, Mr Anderson, on the 22d of April 1838, nominated Mr Alexander Hay to be his deputy in the said office of town-clerk of Leith. By the Act 1685, c. 17, Justices of the Peace were authorised to nominate their own clerks at their first meeting; but this Act was repealed in the following session, and the no-

mination of the clerk to the Justices of the Peace was declared to be a right and privilege belonging to the Secretaries of State. It was *contended*—

That the provisions of the Small-Debt Act demonstrates, that the clerk of the peace so appointed, or his deputy, is the officer to officiate under that Act. Section 3 provides, "that all such causes shall proceed upon complaint agreeable to the form, in schedule (A), subjoined to the present Act, stating shortly the origin of debt or ground of action, and concluding against the defender; and the clerk of the peace, or any deputy by him appointed, or in case he shall fail to appoint one, the clerk to be appointed within the district as hereinafter provided, shall adject to the said complaint, and on the same paper, a warrant signed by him agreeable to the form, in schedule (A), subjoined to the present Act. The provision for the appointment of an interim clerk is contained in the 22d section,—“In case the clerk of the peace shall fail to attend, either personally or by a sufficient deputy, in any of the said districts, at the meetings appointed by the said Justices, of which the said clerk of the peace has had due notice, the Justices who shall attend at such district meeting or meetings, shall, and they are hereby empowered to name an interim clerk for that district, who shall be removable by any subsequent Quarter-sessions, and another clerk may then be appointed by the said Quarter-sessions from time to time as they shall see cause.” The clerk of the peace for the city and liberties of Edinburgh is Mr Callander, who holds his commission, dated 12th April 1837, from the Secretary of State, and in these terms,—“by himself or his deputies to sit and officiate as clerk in all meetings of the Justices of the Peace, or courts holden by them within the said city and liberties.” The case of *Cumming v. Monro*, 19th November 1833, is perfectly decisive, that a summons subscribed by a person not duly authorised to exercise the office of clerk, is an absolute nullity. And it is moreover conclusive, that such nullity may be challenged in the form of a suspension.

It was *argued* by the respondent—

That the clerk of the Magistrates was truly the clerk of the peace, *quoad hoc*. There is a distinction between what may be called “Charter Justices,” and Justices *nominatim* appointed in the usual commissions of the peace. The appointment in burghs must be regulated by the terms of the charters, and by the usage following thereon. By the charter of the city of Edinburgh, the Magistrates are appointed Justices of the Peace; and up to the year 1827, when a commission from the Secretary of State was for the first time granted in favour of Mr Callander, as clerk of the peace within Edinburgh and its liberties, the town-clerk of Edinburgh and his deputies invariably officiated as clerks of the peace in the courts held by the Magistrates as Justices, without any other commission or appointment than their appointments and deputations as common clerks of the burgh. Not only in Edinburgh, but in every other royal burgh, the town-clerk acts *ex officio* as the clerk in every court held by the Magistrates, in virtue of all jurisdictions conferred on them by their charters, or falling to be exercised by them *ex officio*; and the burgh fiscals in the same way, with equally general appointments, act as fiscals in these various courts. But if the Magistrates of Edinburgh are, by their charters and immemorial usage, Justices of the Peace, with the right and privilege, by electing a common clerk of the burgh, of entitling him to be at the same time clerk of the peace within the liberties,—the Magistrates of Leith, according to the Statutes, have the same jurisdiction in Leith, with the same concomitant right as to the appointment of their clerk. Consuetude alone can confer jurisdiction as Justices of the Peace, and, according to the institutional writers both of England and Scotland, can give to them a jurisdiction in matters not expressly committed to them by the Statutes: much more then must it be sufficient to confer the power of appointing their own clerks, even if that appointment would otherwise have belonged to the Secretary of State as a privilege of his office, which, so far as regards royal burghs, it never appears to have done. It is said, that because the schedule annexed to the Small-Debt Act, 6 Geo. IV. c. 48, bears, “the clerk of the peace for the shire of _____ grants warrant for summoning the said defender to compare before the Justices of the Peace for the

said shire,” therefore the clerk of the peace mentioned in section 3 of the Act, must be the clerk of the peace for the shire appointed by the Secretary of State, and that no such warrant, unless granted by him or his deputies, is to be held legal. But this argument goes a great deal too far, for it strikes at the root of the jurisdiction itself, which has already been held to be good. The third section of the Act says, that the warrant of citation is to be issued by “the clerk of the peace, or any deputy by him appointed.” But the Act does not say that the clerk of the peace, here referred to, must be a clerk appointed by the Secretary of State. In truth, the denomination of “clerk of the peace,” is *in terminis* applicable to the town-clerk of Leith. He was the clerk of the peace in Leith, so far as the Magistrates had jurisdiction as Justices before the passing of the Small-Debt Act. There is nothing in these Acts to imply that, while the jurisdiction of the Magistrates as Justices was to continue, his right to act as the clerk of the peace in their courts was to cease. The objection taken by the suspender is, not that the clerk who granted the warrant of citation was not the clerk of the peace for the city of Edinburgh and its liberties, but that he was “not the clerk of the peace for the shire of Edinburgh, or a deputy appointed by him.” But the jurisdiction of the Magistrates under the charters, and the commission of the peace for the city of Edinburgh and its liberties, was, and is altogether separate from, and independent of the jurisdiction vested in the county Justices; and the clerk of the peace for the county of Mid-Lothian has nothing to do with the appointment of the clerks in the Justice of Peace Courts of the Magistrates of Edinburgh and Leith. The object of the commissions of the peace for the city of Edinburgh and its liberties, was to add a number of other Justices who might act along with the Magistrates within the city and its liberties; and, accordingly, since these commissions were issued, “two other Justices in the commission of the peace for the county of the city have usually been applied to sit along with the Magistrates in these courts.” In consequence, it became safe and expedient, if not strictly necessary, that the clerk who was to act under these new Justices, should have a commission from the Secretary of State like the clerks of other Justices appointed by commission. The present case is very different from *Cumming v. Monro*, which was the case of a summons subscribed by a person without any authority from the principal or depute-clerks, who alone were known to the Court. Here there is no question that the person who subscribes the warrant of citation is the authorised clerk of Court under the only appointment which exists, and that the recognition of that appointment as sufficient, both by the Court and the public, is coeval with the existence of the Court itself. The respondent holds a decree unobjectionable, except in so far as it is alleged that the clerk of Court *de facto* was not the clerk *de jure*,—an objection which is submitted to be groundless in itself, and not to be relevant, even if it were well founded, to void the proceedings.

At advising,

Lord Meadowbank.—This is a suspension of a decree pronounced by the Magistrates of Leith, sitting as Justices of the Peace under the Small-Debt Act, 6 Geo. IV. c. 48, and the ground of suspension is, that the warrant of citation was not signed by a clerk of the peace, or any deputy appointed by him. The words of the Act of Parliament in regard to this officer are quite precise. By the 3d section it is provided, “that all such causes shall proceed upon complaint agreeable to the form in schedule (A); and the clerk of the peace, or any deputy by him appointed, shall adject to the said complaint a warrant signed by him, agreeable to the form in schedule (A).” The 22d section provides, “That in case the clerk of the peace shall fail to attend, either personally or by a sufficient deputy, in any of the said districts, at the meetings appointed by the said Justices, of which the said clerk of the peace has had due notice, the Justices who shall attend at such district meeting or meetings, shall, and they are hereby empowered to name an interim-clerk for that district, who shall be removable by any subsequent Quarter-Sessions, and another clerk may then be appointed by the said Quarter-Sessions from time to time as they shall see cause.” In the *first* place, therefore, it appears that the Statute requires that the warrants of citation be signed by

the clerk of the peace or his deputy. And in the *second* place, it appears that if the clerk shall fail to attend at district meetings, the Justices are empowered to appoint an interim clerk, removable by the Quarter-Sessions. In the case of *Cumming v. Monro*, 19th November 1833, it was decided, that although the clerk of the peace had a right to appoint a deputy, his deputy had no right to appoint a substitute. On the same principle, if, on evidence of the failure of the principal clerk, the Justices, as empowered, appointed an interim clerk, he would have no right to appoint a deputy. The Justices may exercise their discretion in selecting a person to perform the duties of the clerk of the peace; but this power is not communicated to others. Now, what takes place here,—assuming that the Justices of the Peace for Leith have the powers of proper Justices of the Peace for the shire, and that there was evidence, of which truly there is none, that the principal clerk had had notice, and failed to attend, either personally or by a sufficient deputy,—Mr Veitch is first of all appointed clerk by the Magistrates: he dies, and there is no nomination of any individual *in terminis* thereafter as Justice of Peace clerk. Mr Anderson was appointed solely as town-clerk; but suppose his appointment to embrace also the office of Justice of Peace clerk, all that is done is to constitute him *interim* clerk on the absence of the principal clerk. He holds no deputation himself, and yet he grants a substitution to Hay. By the case of *Cumming v. Monro*, the warrant requires to be signed by the clerk of the peace or his deputy: here it is signed by Hay the substitute of an interim clerk. He is a person unknown, and his warrant worth nothing. As in the case of *Monro*, I think, therefore, that there is here no process. I am for suspending the decree.

Lord Moncreiff.—I am of the same opinion. At the advising of the case on 5th March 1841, we were all of opinion that the jurisdiction of the Magistrates of Leith, as Justices of the Peace, to pronounce the judgment complained of, was made out; and I concurred in that opinion for the following reasons: 1st, The Magistrates of Edinburgh are *ex officio* Justices of the Peace for the city of Edinburgh and its liberties, which comprehend Leith: 2d, The Dock Act, 39 Geo. III. c. 44, § 16, enacts, that the Magistrates of Leith shall have the same powers and jurisdiction in and over the town of South Leith “in all actions and causes that may come before them, as are competent to the Lord Provost and Magistrates within the royalty of Edinburgh:” 3d, The Burgh Act, 3 and 4 Will. IV. c. 77, § 30, gives the same powers more broadly, and enacts, that the Magistrates to be elected under its authority “shall have such and the like rights, powers, authorities and jurisdictions, as is or are possessed by the Magistrates of any royal burgh in Scotland:” 4th, In the special commission for the city of Edinburgh, and the liberties thereof, the Provost and Magistrates of Leith are mentioned in express terms. But although their jurisdiction may be made out, their power to nominate a clerk of their own may not. There is no incompatibility between their own appointment as Justices, and their being attended and served by the clerk specially nominated by Statute. The express rule of the Statute is, that the warrant shall be signed by the clerk of the peace, and the schedule is conform to the enactment. The clerk of the peace holds his commission from the Crown; and there is a special commission to Mr Callander to be clerk to the Justices of Peace of the city of Edinburgh and the liberties,—comprehending, among the number, the Magistrates of Leith. Now, it is to be observed, that the jurisdiction given to Justices of Peace under the Small-Debt Act is entirely the creature of Statute. Whatever other powers the Magistrates of Leith may have as Justices, in this matter they had only power under the Statute. Anderson was not the deputy of the clerk of the peace: he was nominated by the Town-council, and not by the Magistrates, who only are Justices. The 22d section of the Act confers a power to nominate an interim clerk; but although Anderson had been so nominated, he could not have appointed a deputy. The explanation given by the respondent of the occasion of Callander's appointment, makes the matter still clearer. The object of the commissions of the peace for the city of Edinburgh and its liberties, it is said, was to add a number of other Justices who might act along with the Magistrates; and in practice, two of these Jus-

tices are usually applied to, to sit along with the Magistrates in their Justice of Peace Courts. It became necessary, therefore, that the city clerk should have a commission from the Secretary of State, like the clerks of other Justices appointed by commission. But if it is admitted that Mr Callander or his deputy is the proper clerk to act when the Magistrates choose to sit along with any of the commission Justices, it is clear that he must be the proper clerk; for the clerk cannot be made to change, and depend on the Justices sitting. I am therefore of opinion that the warrant is a nullity. The case of *Cumming v. Monro* is precisely in point, and is of great authority. The judgment was pronounced by Lord Corehouse, and was afterwards adhered to by the Court. If the warrant be illegal, the practice cannot support it when challenged. I don't say any thing of the effect of such warrants upon decrees which have been already implemented; but the sooner such a practice is stopped the better.

Lord Justice-Clerk.—I concur with the opinions delivered, although I conceive the question to be one of great difficulty. I argued the case as counsel at the bar, but could not satisfy myself of the soundness of my argument, although it appears to have satisfied the Lord Justice-General, as I find from the notes of an opinion which he had written upon his papers. Still, however, I think the objection insurmountable. The jurisdiction under the Small-Debt Act is statutory; and if the clerk of Court be described in terms applicable to one officer only, and that officer not the town-clerk, then he cannot act with the Magistrates sitting as Justices under this Act. Perhaps he might officiate along with them in their other actings as Justices, although I do not say that a town-clerk is one of the clerks of her Majesty's peace. It is said that the respondent found the person who signed the warrant clerk *de facto*, although not *de jure*; and reference is made to the case of *Hardie*, under the commission of Oyer and Terminer in 1820. I acknowledge the value of the principle laid down in that case. When a party holds the only and proper office for performing certain duties, his actings may be valid, notwithstanding some defect in his appointment; but the objection here taken is, that a party holding an altogether different office from that pointed out by the Statute, has nevertheless put his hands to certain acts required by it. There seems to be some confusion in the argument drawn from the jurisdiction of the Magistrates. They may sit as Justices of the Peace under the Small-Debt Act, but it does not follow that they are to sit exclusively. If other Justices may sit along with them, then there is an end of the claim of the town-clerk to be clerk of the Small-Debt Court. He cannot be clerk where other Justices are entitled to sit and may choose to appear. But although the town-clerk be not the proper clerk, it does not follow that the Magistrates may not sit as Justices, and hold a Small-Debt Court. District courts are appointed by the Statute, but they must be held as prescribed. The Court here was either a district court or it was not. If it was not, the Magistrates were not entitled to a clerk different from the clerk of the peace. If it was, they ought to have appointed an interim clerk as provided. The Magistrates do not carry into the commission any peculiar or distinctive character. The law gives them, as Justices, a clerk of the peace, and they are not entitled to nominate another party for the performance of his duties. Looking to the special clauses in the Statute, the town-clerk cannot claim the office either of clerk of the peace or of interim clerk; he does not answer the description given of either. I am not moved by the course of practice, or that the proceedings will be vitiated. If the officer acted without authority, the nullity of his proceedings will not be obviated by the practice. We are here in a suspension of a decree not yet executed; and I do not say that the same ground of objection will avail in the reduction of decrees already implemented, or against any proceedings not timeously challenged, or in any action of damages against the town-clerk. I do not consider Edinburgh to be a separate county of itself, as some cities are in England; and I do not think it would be competent for the Crown to erect it into one. The Crown may appoint Justices for a particular part of the county; but these would only be authorised to act with the others, holding a commission over the whole shire. The decree sought to be reduced, proceeds upon a warrant signed by Mr Hay, and it humbly appears to me that

as he had no authority to act as a Justice of Peace clerk, the proceedings following upon the decree cannot be sustained.

Lord Medwyn.—If I were satisfied that I am not bound to go farther back than the 6th of Geo. IV. c. 48, I would arrive at the same opinion as your Lordships. But I feel constrained to go back to 39 Geo. III. c. 46, which was merely an extension of the powers of the Magistrates sitting in the ten-merk court, and which did not call upon them to appoint any other clerk than what they had been in use to employ. The 6th Geo. IV. was a continuing of the Act of Geo. III.; and if the town-clerk who acted in the ten-merk court acted also under that Statute, and has continued to do so hitherto undisturbed, I do not see how his actings can be invalid. The case of *Cumming v. Monro* was a null appointment, and could therefore not be homologated; whereas, the origin of the appointment of the town-clerk was a legal origin. I had prepared notes to enable me to illustrate and enforce these views, but seeing that I differ from the whole of your Lordships, my confidence in my opinion must be much shaken, and I shall not enter into farther detail.

The Court pronounced the following interlocutor:

"Alter the interlocutor complained of: Find that the proceedings in the Small-Debt Court, held by the Magistrates of Leith as Justices of the Peace, must be regulated by, and in conformity to the provisions of the Statute 6 Geo. IV. c. 48: Find that the warrant for summoning the claimer, John Harvey, to appear in the action raised at the instance of the respondent, Adam Forrest, in the Justice of Peace Small-Debt Court held at Leith, and also the decree in said action, of which suspension is sought, were signed by Alexander Hay, the depute town-clerk of Leith, acting as, and in character of clerk to the said Justice of Peace Court, in respect of his office as town-clerk of Leith, or the depute of such town-clerk: Find that the town-clerk of Leith, or his depute, is not entitled, under the above-mentioned Statute, to act as clerk to the said Justice of Peace Court, and cannot be taken to be in terms of the said Statute the clerk of the peace, or depute-clerk of the peace: Find that the proceedings complained of were therefore incompetent and invalid, and of no force or effect in law: Suspend the letters *simpliciter*, and decern: Find the defender entitled to expenses, subject to modification; and before such modification, appoint the account to be lodged," &c.

Suspender's Authorities.—Statute 1685, c. 17; 1686, c. 20. *Hutchison*, Vol. I. p. 51. *Cumming v. Monro*, 19th Nov. 1833. *Tait*, *voce* Small-Debt Court. *Holmes v. Reid*, 4th March 1829; 7 Sh. 535. *Brown v. Richmond and Co.*, 16th Feb. 1833; *Fac. Coll.* *Maitland v. Hume*, 3d July 1835. *M'Laren v. Findlay*, 12th Dec. 1835. *Hutchison*, Vol. I. p. 124.

Respondent's Authorities.—*Maitland's History of Edinburgh*, pp. 259, 260, 266. *Blackstone*, B. I. c. 7, § 3; B. III. c. 3. *Hale's History of the Common Law of England*, 6th edit. Note to p. 200. Statute 1609, c. 7; 1661, c. 38. *Ersk. I.* 4, 21. *Charles II.* 1661, c. 123. *Thomson's Acts*, Vol. VII. p. 84. *Art. of Union*, 19th and 21st. Statute 6th Anne, c. 6; 20th Geo. II. c. 43, § 26; 1587, c. 81; 1685, c. 16. *Thomson's Acts*, Vol. VIII. p. 472. *Blackstone*, B. IV. c. 19, § 8. Statute 39th Geo. III. c. 44; 3 and 4 Will. IV. c. 77. *Dowie v. Douglas*, 30th May 1817, F. C.; 1 Sh. App. p. 125. *Carne v. Kelly*, 30th Nov. 1821; 1 Sh. 178. 2 *Hawkins*, c. 8, § 10, &c. *Hutchison's Justice of Peace*, 3d edit. Vol. I. p. 291. *Mackay, Skirving and Co. v. Bond*, 19th Nov. 1813, F. C. *Dwarris on the Statutes*, pp. 712, 637. *Green's Report of Trials for High Treason, under Commission of Oyer and Terminer of 1820*, Vol. I. p. 100 to 118. *Hutchison's Justice of Peace*, 3d edit. Vol. I. Notes to p. 57. *Hale's Pleas of the Crown*, Vol. II. p. 47. 2 *Hawkins*, 37. *Tait's Justice of Peace*, p. 266. *Rex v. Sainsbury*, 4 T. R. 451. *Blankley v. Winstanley*, 3 T. R. 279. *Talbot v. Hubble*, 2 Str. 1154. *Dalton*, c. 3, p. 8, &c. 6th Geo. IV. c. 48, § 14, 15, 22, 23. *Margate Pier Company v. Hannam, Dyson, and Others*, 29th Nov. 1819; 2 Barn. and Ald. 266. *Chitty's Burn's Justice*, p. 563.

Lord Ordinary, Cockburn.—*Act. Solicitor-General (M'Neill)*, A. M'Neill; Alexander Nairne, S.S.C., *Agent.*—*Alt. Ruther-*

furd, Deas; William Lorimer, S.S.C., Agent.—T. Clerk.—[J.W.]

26th November 1841.

FIRST DIVISION.—(H. B.)

No. 26.—DR ANDREW FYFE, *Pursuer*, v. JOHN CARFRAE and SON, *Defenders*.

Prescription—Bill—Reference to Oath—Circumstances in which an oath was held negative of a reference that a prescribed bill was resting-owing, though the bill continued in the drawer's possession, and the deponent (an acceptor) could not specify in what year it was paid, or whether it was paid "in cash, or by an order on the bank, or how."

John Carfrae and Son, booksellers in Edinburgh, having purchased from Dr Andrew Fyfe the remaining stock of his "Compendium of Anatomy" at the price of £188, granted him in payment their four acceptances for £47 each, dated 7th August 1830, and payable respectively at four, six, nine, and twelve months after date. It was admitted that the first three bills were paid; but in August 1839, Mr M'Innes, Dr Fyfe's agent, made a demand on Mr Carfrae, junior, the only surviving partner of the firm of John Carfrae and Son, for payment of the last bill which remained in his possession, and which he alleged was still due. In support of the demand he referred to a correspondence relative to that bill in 1831. The correspondence commenced 15th September 1831, with a letter from Mr Mitchell for Mr M'Innes, reminding Mr Carfrae that his bill to Dr Fyfe for £47 had fallen due on the 7th August, and requesting him to retire it "to-morrow or Saturday." Mr Carfrae replied, that he understood Dr Fyfe had consented to a renewal, and begged that the arrangement might still be gone into. Owing to Mr M'Innes's absence from town a short delay took place. Afterwards, on the 2d November, he wrote as follows:

"Mr M'Innes begs to inform Messrs Carfrae and Son, that their bill to Dr Fyfe for £47, due 10th August last, will be presented for payment on Saturday next, when it is expected the bill will be paid."

Mr Carfrae again replied:

"Messrs Carfrae would feel greatly obliged if Mr M'Innes would allow Dr Fyfe's bill to stand over till the end of this month, when it will be paid with many thanks. There is another bill of Dr F.'s due on the 10th current, which we will be ready for."

The next letter contained the above demand for payment, dated 28th August 1839. Mr Carfrae, in reply, assured Mr M'Innes that he had paid the bill. The present action was raised to enforce payment. Mr Carfrae pleaded prescription, and on a reference to oath deponed, that the whole set of bills for £47 each were paid in Mr M'Innes's house:

"That he himself paid one which was not delivered, and his late father stated to the deponent that he had paid another bill to Mr M'Innes, of the set of bills aforesaid, which likewise was not delivered up: That he thinks it must have been the bill due on the 7th and 10th August 1831, from the circumstance of the deponent's having written to Mr M'Innes the aforesaid letter of 2d November 1831, and from the tenor of Mr M'Innes's letter, to which the deponent's was an answer: That he does not recollect whether any interest was demanded. Interrogated, Whether the bill which the deponent did not get up was paid to Mr M'Innes himself? Depones, That he thinks it was paid to one of his clerks. Interrogated, What was the reason why the deponent did not get up said bill?

Depones, That he was told it was not at hand. Interrogated, Whether he did not ask for an acknowledgment or receipt for the amount paid to Mr M'Innes's clerk as aforesaid? Depones, That he did not, and that occasionally he has paid bills without either obtaining them up, or any acknowledgment for the amount, in consequence of the bills not being at hand. Interrogated, Whether he recollects if the bill was paid in cash, or by an order on the bank, or how? Depones, That at this distance of time he cannot tell how the bill was paid. Interrogated, In what year the said bill was paid by the deponent to Mr M'Innes's clerk? Depones, That he cannot say when, but he still thinks it was the bill due on the 7th and 10th August 1831; and adds, that the said bill is marked paid in the deponent's bill-book, but the bill-book does not show at what time the bill was paid, although the cash-book would. Interrogated, If the cash-book corresponding with the period referred to has gone astray? Depones, That it has; and adds, that upon the dissolution of the late firm of Carfrae and Son in 1836, his late father and partner applied for the business-books of copartnership by letter, and he got three cash-books, containing, as the deponent believes, all the entries relative to the said bill,—the said three cash-books being those particularly wanted by his father: That these cash-books were never returned to the deponent, and as he did not require them for the conducting of his business, he never applied for them." Interrogated, Whether the debt libelled is resting-owing? Depones, That it is not: it was paid; and adds in farther explanation, that no demand for payment of the bill libelled for was ever made upon him until he raised an action in 1839 against the pursuer for payment of a contra account which was incurred several years after 1831: That the pursuer had also stated to the deponent more than once that he had received payment of all the bills from Carfrae and Son; and farther, that on the dissolution of the copartnership of Carfrae and Son in 1836, notice was inserted in the Edinburgh Gazette of 31st of May in that year, calling on the creditors of the concern to lodge their claims in the deponent's hands, but no claim was then lodged by the pursuer."

The Lord Ordinary pronounced the following interlocutor:

"2d November 1841.—The Lord Ordinary having considered the closed record, with the oath emitted by the defender under the pursuer's reference, and heard parties' procurators.—Finds the original constitution of the debt proved by the said oath; but on the other hand, finds that the oath does not instruct that the debt is resting-owing: Therefore, assolizies the defender from the conclusions of the libel; but, in the circumstances of the case, finds no expenses due to either party, and decerns.

"Note.—The Lord Ordinary, though by no means satisfied with the oath in this case, has been unable to draw any sufficiently marked line of distinction between it and the case of *Robertson*, 26th May 1830, to entitle him to disregard the judgment there unanimously pronounced by the Court. But for that judgment, however, he should have felt the greatest possible hesitation in deciding as he has done. For with the original constitution of the debt admitted,—the bill itself still remaining in the creditor's hands,—and no payment alleged to that creditor himself, but only to some unnamed and (for ought seen) unauthorised person, 'thought' to be a clerk of his agent's,—the defender being unable to state 'in what year,' or whether 'in cash, or by an order on the bank, or how,' and not even venturing to say positively that it was the individual bill here in dispute,—for he only 'thinks it must have been the bill due on the 7th–10th August 1831,'—the Lord Ordinary does confess that he entertains serious doubts how far there is not enough here to overthrow the legal presumption of payment implied in the doctrine of prescription, and to throw back the defender on his original liability, as still remaining undischarged.

"Accordingly, the Lord Ordinary's first and very strong impression of the case,—following the principles laid down in *Hay*, 21st June 1786 (Dict. 13,220); *Smith*, 26th November 1807 (Baron Hume, 462); *Allison*, 10th March 1841 (Fac. Coll.), and others of the like class,—was, that the pursuer was

entitled to decree. Nor does he even now feel by any means sure that the case of *Robertson* runs so entirely on all-fours with the present, as completely to bear out the judgment that has been given. At the same time, there being here a total and unexplained cessation of demand for many years after the most pressing and repeated demands of payment in the outset,—the pursuer not having lodged a claim on the estate of the company, his original debtor, notwithstanding its dissolution, and the relative notice and call upon the creditors in the Gazette,—but, on the contrary, according to the oath, having even 'stated to the deponent more than once that he had received payment of all the bills,' while, combined with this, all the said bills stand regularly marked in the defender's bill-book as 'paid,'—there being no impeachment of the authenticity of this marking, the Lord Ordinary believes that he has only substantially followed the spirit of the decision in *Robertson* in deciding as he has done.

"It is not thought, however, that this is at all a case which entitles the defender to his expenses. The pursuer, from the slovenly manner, to say the least, in which the alleged extinction of the bill by the defender was gone about, has not only lost his original debtor, but has got no one fixed with the debt instead,—neither Mr M'Innes nor his supposed clerk being in any degree affected by the result of the case upon the defender's oath."

Both parties reclaimed,—the pursuer on the merits, and the defender against the refusal of expenses.

At advising,

Lord President.—I have no difficulty in finding with the Lord Ordinary, that the debt is not resting-owing. A reference was made to oath, and we must judge of its purport. In doing so, little assistance can be gained from decisions, unless it could be shown that the oath in the present case is in all respects identical with those to which the decisions refer. This is impossible. Every particular oath must stand by itself. We must look at it and give it fair play. Now in the present case, though the defender admits that he was once liable for the debt, and is not able at the distance of ten years to give a very particular account of the circumstances connected with the payment of it, he is clear that he did pay it to some person acting for the pursuer—he believes to his agent's clerk. There is nothing in the correspondence inconsistent with this deposition, but the contrary. It appears that Mr M'Innes, the avowed agent of Dr Fyfe, makes a demand for payment shortly after the bill fell due. Mr Carfrae replies, that he understood Dr Fyfe had agreed to a renewal, and asks that this may still be done. He is again pressed for payment, and replies, that if the bill is allowed to lie over till the end of the month, it will be paid with many thanks. This was in 1831, and nothing more is heard of the matter till 1839, notwithstanding of the dissolution of the copartnership of Carfrae and Son, and (what is a most important fact in the case) an advertisement in the Gazette, calling upon those to whom the firm stood indebted to lodge their claims. Every thing goes to confirm the deposition that the debt was paid. The Lord Ordinary, however, while finding for the defender on the merits, has refused him his expenses. I confess it does not appear to me that the grounds of refusal are sufficient. In the first place, I lay no stress on the cases quoted, for I see no principle in them which can be applied so as to rule the present case; and as to the suspicion which his Lordship entertains, I cannot enter into it. If any claim had really existed, the advertisement in the Gazette could hardly have failed to make it be lodged. I would therefore adhere to the interlocutor on the merits, but alter as to the expenses.

Lord Gillies.—I concur entirely. The Lord Ordinary is right on the merits, but I cannot participate in his doubt. No claim is free from doubt; but here the oath distinctly proves that the debt is not resting-owing. The defender depones not merely that the debt is paid, but that the pursuer himself acknowledged that it was paid.

Lord Mackenzie.—I am of the same opinion. The pursuer seems to think it a sufficient ground of suspicion that the document of debt is in the hands of the pursuer. But is not this the very thing which the Statute itself supposes? Where the document has been delivered up, there is no room for the

plea of prescription—the delivery being sufficient to presume payment; but the object of the Statute was to provide for the case in which it had not been delivered, and it accordingly enacts, that after a certain period, supposing the document still to remain with the creditor, resting-owing must be proved by the writ or oath of the debtor. Here the reference is made, and resting-owing is negatived in the most marked manner. Mr M'Innes had written to say that the bill would be presented on a certain day for payment. Mr Carfrae asks delay, and begs it may lie over till the end of the month. It was thus to lie without being presented, and the deposition is, that he called at Mr M'Innes's office with payment; that Mr M'Innes chanced not to be present, and that he paid the amount to his clerk, without receiving delivery of the document. I think it highly probable that this account is true. Cross questions were put, and I don't find fault with the questions; for I do not hold that when a party depones on a reference, he is entitled to shelter himself behind a *non memini* of facts which he must know. When in the Outer-House, I felt myself entitled to disregard the conclusive part of the oath, if inconsistent with the deposition as a whole. But that is not the case here. There is no ground to presume a mistake on the part of the defender, and I think the pursuer has completely failed to prove resting-owing. Besides, he does not offer any explanation of the delay. My only doubt is, whether he ought not to have been called upon to explain, and whether his judicial declaration ought not to have been taken for that purpose.

Lord Fullerton.—I concur. I see no ground for altering on the merits, and I see still less ground for the scruple which has led the Lord Ordinary to refuse expenses. The action is not raised till ten years after the date of payment, and in circumstances which strongly discountenance the claim.

The Court *adhered* on the merits, but *altered* as to the expenses.

Lord Ordinary, Murray.—*Act. Solicitor-General, (M'Neill), Whigham; James Crawford, jun., W.S., Agent.—Alt. Rutherford, A. C. Dick; James P. Falkner, S.S.C., Agent.—N. Clerk.*—[H.B.]

26th November 1841.

FIRST DIVISION.—(H. B.)

No. 27.—ARCHIBALD CONNELL (*Common Agent in Locality of Moffat*), v. THE DUKE OF BUCCLEUCH.

Teinds, Valuation of.—Proof.—Evidence held insufficient to prove that the teinds of certain lands were included in the valuation of other lands of a different name, belonging to the same proprietor.

In the locality of Moffat, the common agent having held that the teinds of the lands of Woodfoot, a farm belonging to the Duke of Buccleuch, were unvalued, an objection was taken for the proprietor, and a record was made up by condescendence and answers. It appeared that in 1637, by a decree of valuation at the instance of the Marquis of Queensberry, the twenty-pound land of Pocornell was valued for teind at 8 bolls meal, and for vicarage at 27 lambs, 3 stone 6 lb. wool, and 13 stone 8 lb. cheese. For the Duke of Buccleuch it was contended, that this valuation included the farm of Woodfoot, and in proof it was averred, that the twenty-pound land of Pocornell consisted of the three separate farms of Crofthead, Craigbeck and Woodfoot, and had long been possessed, and were now commonly known by these names. It was further averred, that unless Woodfoot was held to be so included, there was no other designation in the titles of the Buccleuch estates to which the possession of it could be ascribed, as the only other lands in the parish of Moffat belonging to the family, were the lands of Newton and Pasgilfoot, which were separately valued, and formed no

part of the twenty-pound land of Pocornell. It was also stated, that in two former localities, the one in 1794 and the other in 1810, the teinds of Woodfoot were held to be included in the valuation of 1637.

The common agent, while admitting this to be the fact, averred that they had been so included without discussion, and *per incuriam*; and in support of his allegation, that the teinds of Woodfoot could not be included in the valuation of those of Pocornell, stated, that the farm of Woodfoot was not adjacent to lands acknowledged to be included in Pocornell, but was separated from them by interposed lands belonging to other proprietors; and, moreover, according to the averment of the proprietor himself, part of the farm of Woodfoot was situated in a different parish; that in the cess-books of the county, the lands of Crofthead and Craigbeck, which undoubtedly formed part of the twenty-pound land of Pocornell, are entered without any mention of Woodfoot; and that in the old rental-books of the Annandale estates—the earliest in date being 1707, and the latest 1724—the teinds of Woodfoot are entered by themselves at 20 lb., and those of Pocornell, Redacres, Craigbeck and Crofthead, at 110 lb.

The Lord Ordinary appointed “the Duke of Buccleuch to state in a minute the grounds on which he maintains that the lands of Woodfoot are comprehended under the lands of Pocornell or Portcornell, in the decret of valuation of 30th June 1637, and the common agent to answer the same.”

His Lordship afterwards pronounced the following interlocutor:

“17th July 1841.—The Lord Ordinary having advised the record, minute of debate for the Duke of Buccleuch, and revised answers thereto for the common agent, with the writings produced, Finds that it is not proved that the lands of Woodfoot, belonging to the Duke of Buccleuch and Queensberry, formed part of the twenty-pound land of Pocornell, or were included in the valuation 1637; therefore appoints the Duke to condescend on the rental of the lands of Woodfoot by the second box-day, and the common agent to answer the same by the first sederunt-day in November next, if he shall see cause.

“*Note.*—In pronouncing this judgment, the Lord Ordinary considered it an important fact, that the lands of Woodfoot are admitted to be disjoined from the other lands belonging to the Duke of Buccleuch and Queensberry, and it is not denied that the interposed lands of Breckonside and Woodhead, belonging to the heirs of Dr Rogerson, were valued in 1747.”

The Duke of Buccleuch reclaimed. At advising,

Lord President.—I am inclined to adopt the view taken by the Lord Ordinary. The question of fact is, whether the farm of Woodfoot forms part of the twenty-pound land of Pocornell, and was included in the valuation of the teinds of that land in 1637. It is admitted, that besides this twenty-pound land, the Duke of Buccleuch is possessed of other lands in the parish of Moffat; viz., the lands of Newton and Pasgilfoot; and it seems also to be admitted that the lands of Crofthead and Craigbeck constitute part of the twenty-pound land of Pocornell, though it is not alleged that they are included *nominatim*. It is, therefore, not incompetent to show, that the lands of Woodfoot, though not mentioned by name, may also be included in the same twenty-pound land; but it is obviously incumbent on the proprietor to make this out by proper evidence. Now, in the first place, though it is said in the condescendence, that the twenty-pound land of Pocornell has long been possessed by the Duke of Buccleuch and his predecessors as three separate farms, known by the names of Crofthead, Craigbeck, and Woodfoot, it is not stated that in any lease, ancient or modern, the farms are so described. A clause to this effect might have been im-

portant, but it does not exist; and the valuation of teinds applies only to lands described in the decret, as "the twenty-pound land of Pocornell, whereof James Johnston of Corehead is tenant of one twenty-merk land." In the *second* place, the farm of Woodfoot does not adjoin the lands which are admitted to form part of the twenty-pound land of Pocornell; but is separated from them by intervening lands belonging to other proprietors; and what is more, a portion of that farm is actually situated in another parish. This is a most material fact. In the *third* place, the cess-books of the county furnish evidence tending to show that the farm of Woodfoot is a separate tene-ment from the lands of Pocornell, for it is admitted that these lands are there valued at £400, and entered under the names only of Craigbeck and Crofthead. *Lastly*, The state of the ancient rental-books of the Marquis of Annandale, furnish strong collateral proof to the same effect; for in the rental of the teinds, Woodfoot is stated at 20 lb., and is entered by itself apart from the teinds of Pocornell, Redacre, Craigbeck, and Crofthead, which are set down at 110 lb. Taking all these facts into view, and considering that the burden of proving that the teinds of Woodfoot are included in the valuation of Pocornell, I am satisfied that the Lord Ordinary has arrived at a correct conclusion.

Lord Mackenzie.—I concur with your Lordship, and for the same reasons; particularly for this one, that when a valuation of teinds has taken place, it is incumbent on the proprietor to produce evidence specifying the particular lands to which it applies. Now, the best that can be said here is, that the evidence is not strong on either side. There is nothing but conjecture; and all we can say is, that the lands in question may have been included in the valuation, or they may not. Considering the uncertainty, I am not surprised that the proprietor has attempted the proof; but I am satisfied that he has failed.

Lord Gillies.—I am of the same opinion. I don't consider the proof clear on either side, and there is still room for doubt. There is something in the fact, that on one occasion, in a locality of the parish, the old valuation was held to include the farm of Woodfoot; but there appears to have been no discussion, and it is probable that it passed *per incuriam*. The proprietor, at the best, has produced only negative evidence, and I therefore concur in the view taken by the Lord Ordinary.

Lord Fullerton.—I concur in the proposition, that in every case of this nature, it is incumbent on the proprietor to prove by sufficient evidence that the lands in question were included in the valuation; and in no case is this more necessary than as regards this particular farm. For, in the *first* place, the name does not correspond with that of the lands in which it is said to be included; and in the *second* place, it is distinctly admitted that it lies at some distance from other lands included in the valuation, and is separated from them by lands belonging to other proprietors. These facts are not sufficient to prove absolutely that the farm was not valued; but they are sufficient to lay on the proprietor the burden of proving by the clearest evidence that it was. Instead of this, however, we have no evidence at all, unless we are to give this name to the negative presumption founded on the statement of the proprietor, that unless the farm of Woodfoot is included in the twenty-pound land of Pocornell, there is no other designation in his titles to which his possession of it can be ascribed. I am afraid, before we could adopt that statement as conclusive, it would be necessary to have the Duke's charter-chest before us, and make a thorough investigation of its contents. It is impossible to attach any importance to the fact that this valuation, which was made in 1637, was assumed, in the locality of 1694, to include the lands in question. Had the locality been of an older date, or had there been repeated localities in which this was assumed, it might have been something; but this one locality, in the absence of other proof, is altogether insufficient. I entirely agree with the Lord Ordinary.

The Court *adhered*, with expenses from the date of the interlocutor.

Lord Ordinary, Murray.—*For Common Agent*, Solicitor-General (M'Neill), Tait; *Party Agent*.—*For Proprietor*, Dean of Faculty (Wood), Baillie; Gibson and Home, W.S., *Agents*.—*Teind Clerk*.—[H.B.]

27th November 1841.

FIRST DIVISION.—(H. B.)

No. 28.—ROBERT KILPATRICK, *Raiser*, v. THOMAS KILPATRICK and OTHERS, *Claimants*.

Landlord and Tenant—Lease—Partnership—Proof.—*A joint lease of a farm is not per se a proof that the tenants are joint proprietors of the crop and stocking.*

In this process of multiplepointing the raiser, Robert Kilpatrick, in his condescendence of the fund *in medio*, credited himself with one-half of the free proceeds of the crop and stocking on the farm of Coates, in which he was joint tenant with his late father, and in support of his claim *pleaded*, that "being, under the formal contract of lease, a joint *pro indiviso* tenant along with his father, and joint *pro indiviso* proprietor of the stocking and crop, and in possession of the same, it is not competent, in this process, to call his right as tenant and joint and equal proprietor of the stock and cropping in question."

His brother and sisters, the other claimants, averred, that "at the date of the lease the pursuer had no capital, funds, or effects of any description; that the whole stock upon the farm, furniture in the dwelling-house, and every thing else on and connected with the farm and premises, belonged to his father; that the crop of 1837 had been manured, laboured, and sown at the pursuer's father's expense, and the crop itself was the property of the latter, who paid the servants' wages, expenses of reaping, and every other expense connected therewith, as well as the rent when it fell due;" and *pleaded*—"The pursuer cannot claim to have been joint proprietor along with his father, of the stock, household furniture, and other effects on and connected with the farm, without legally proving an assignation or transference to a share thereof in the pursuer's favour. No such assignation or transference is legally implied in the pursuer having a joint interest in the lease."

The Lord Ordinary pronounced the following interlocutor:

"30th June 1841.—The Lord Ordinary having heard the counsel for the parties, Finds that the objectors (the sisters of the pursuer) are not precluded by the lease in favour of the pursuer and his deceased father, jointly, or by anything else that as yet appears in this process, from showing by evidence, that, notwithstanding the joint lease, the crop and stocking of the farm belonged exclusively to the father; and with this finding appoints the case to be enrolled, in order that the parties may say how the cause is to be farther proceeded with.

"*Note*.—The pursuer, in accounting with his sisters for the property of their deceased father, maintains, that being the joint tenant of a farm along with his father, the law implies equality of share in the crop and stocking. Now, assuming this to be the general rule, the Lord Ordinary is of opinion that this is but a legal *presumption*, which it is competent to rebut by evidence; and that the averments put upon record by the sisters, who maintain that the whole belonged to their father, if proved, are sufficient to rebut it. He refers particularly to their answer to article 4 of the condescendence, and to their own statements, articles 2 and 3. According to them, the son's name was put into the lease merely to give him a vote in the county elections, while the father retained everything—the whole previously being his—beyond the mere admission of his son's name into the lease.

"Considering the relationship of the parties, and the smallness of the sum in dispute, is it not a case for extrajudicial arrangement?"

The raiser reclaimed; but the Court held that the fact

of joint tenancy could not of itself prove joint property in the crop and stocking, and, without calling on the respondents, *adhered*.

Lord Ordinary, Cockburn.—*Act*. Whigham; George Todd, jun., *Agent*.—*Alt*. Deas; John Robertson, *Agent*.—*N. Clerk*.—[H.B.]

27th November 1841.

SECOND DIVISION.—(J. W.)

No. 29.—ALEXANDER DOWNIE, *Suspender*, v. CHARLES PEEBLES, *Respondent*.

Process—*Calling*—*Decree in Absence*—*Statute 1 and 2 Vict. c. 86, § 5*.—*One of two defenders in a process before the Sheriff, advocated the cause on a decree being pronounced finding him primarily liable in the account sued for. The note was intimated to the co-defender, but his name did not appear in the partibus, nor in the calling lists, and no appearance was entered for him in the Supreme Court. Ultimately judgment was pronounced, as before, in favour of the original pursuer, the respondent in the advocacy, but reversing the order of liability between the two defenders as fixed by the Sheriff. The decree having been extracted, and a charge thereon given to the absent defender found primarily liable, a bill of suspension was presented, and passed simpliciter, without consignation of the expenses decerned for, in terms of the 1st and 2d Vict. c. 86, § 5.*

In the year 1832, Mr Downie entered into a transaction with Messrs James and Alexander M'Gregor, merchants in Glasgow, under which he received from them an *ex facie* absolute disposition to certain property belonging to them at Kelvin Haugh, near Glasgow; and on the other hand, granted them a back-bond or deed of obligation, binding himself to reconvey the subjects on payment of a certain sum of money therein mentioned, and of all other sums which might be due to him by Messrs M'Gregor, either for goods or cash advances. Peebles and Orr, writers in Glasgow, were employed on the part of Mr Downie in carrying through the transaction, and in 1837, an action was raised before the Sheriff-court of Glasgow, at the instance of the respondent, against Mr Downie and the trustee on the sequestrated estate of the Messrs MacGregor, concluding against them, conjunctly and severally, for the sum of £148. 0. 4½, being the amount of the account incurred to them in negotiating the transaction of 1832. After considerable litigation in the Inferior-court, the Sheriff pronounced two several interlocutors altering the judgment of the Sheriff-substitute, decerning against the trustee on M'Gregor's estate for payment of the account as taxed, and for the expenses of process, and decerning also against Mr Downie as *subsidiarie* liable therefor, and that after the trustee had been discussed. The suspender acquiesced in this judgment, but Mr Johnston, the trustee on the sequestrated estate of the Messrs M'Gregor, advocated it to the Court of Session. The advocacy bears to be—"Note of Advocacy for William Johnston, accountant in Glasgow, trustee on the sequestrated estate of James and Alexander M'Gregor, formerly power-loom manufacturers at Kelvin Haugh, near Glasgow, against Charles Peebles, writer in Glasgow." The note, however, was intimated to the suspender, and the following doquet, subscribed by his agents, was put on the service copy produced in process:—"Glasgow, 2d January 1840.—We hereby hold this note of advocacy as duly intimated to us. (Signed) CHAS.

PEEBLES."—"MacLachlan and Steele for Mr Downie." But the name of the suspender neither entered the *partibus*, the calling list, nor the rolls of Court. Additional notes of pleas in law were lodged for Mr Peebles and Mr Johnston, but no appearance was entered for the suspender in the process. After considerable discussion, the Lord Ordinary, on 16th March 1841, pronounced an interlocutor, as before, finding both parties liable to the respondent; but in respect of the special circumstances of the case, finding the complainer, Mr Downie, liable primarily, and M'Gregor's trustee subsidiarily, and accordingly decerning against them in this order, for the amount of the account sued for, together with the respondent's expenses of process both in the Inferior-court and in the Court of Session. The accounts of expenses having been taxed, the Lord Ordinary, on 16th July 1841, pronounced final decree, giving effect to the previous judgment. The respondent then extracted the decree, and gave a charge to the suspender, who thereupon tendered payment of the principal sum and interest contained in the account, but he declined to pay the expenses of process, as they were incurred in a process to which he had never been made a party. The tender being refused, a note of suspension was presented, praying alternatively, to suspend the charge, and whole grounds and warrants thereof; or at all events, on consignation in the hands of the clerk of the sum decerned for in name of expenses, to repon the complainer against the said charge; or to do otherwise in the premises as shall seem just.

The Lord Ordinary having considered the note of suspension and answers, and heard counsel thereon, passed the note on consignation of the expenses decerned for, in terms of the Act 1 and 2 Vict. c. 86, § 5.

The suspender reclaimed, and prayed the Court to remit to the Lord Ordinary to pass the bill *simpliciter*. The suspender admitted that the note was duly intimated, and was thus in the same situation as a summons duly executed, but it was contended that the calling is as requisite as the execution (Erskine, IV. 1, 8), to make the summons a depending process. No extract could legally be given out against the suspender, whose name was not in the *partibus* (Dar. p. 168), and therefore the 1st and 2d Vict. c. 86, § 5, could not contemplate the payment of expenses of process as a condition of being reponed against a decree in absence pronounced in circumstances such as the present.

It was answered by the respondent, that although the decree might be liable to reduction, yet if the party sought his remedy under the Statute, he must observe the conditions it prescribes.

Lord Meadowbank.—The object of the Statute was to diminish expense, and to admit of a party being reponed against a decree in absence by means of a suspension. But here the suspender was no party to the suit, and a decree might as well have been pronounced against any one in this Court as against him; and is he to have no remedy but by paying the whole expenses incurred by other parties? The Statute, in my opinion, never could contemplate this.

Lord Medwyn.—Is this a decree in absence according to the meaning of the Statute? It is plain that it could only mean the payment of expenses incurred by the absence of a party who was bound to be present, which in this case he was not.

Lord Moncreiff.—I am of the same opinion, that this is not a decree in absence in the sense of the Statute. There was a process in the Inferior-court, and with the decree pronounced

in it the suspender was satisfied; but another party, also a defender, brings an advocacy,—the principal burden being laid upon him. Intimation was made to the suspender, but he had no occasion to move, not being called, and his name not appearing in the *partibus*. Can one party go and ask decree against another who is cited but not called? The judgment is altered, and then it is attempted to be enforced, unless the suspender pays the whole expenses;—is that just? There was no process in which decree in absence could be pronounced against him.

Lord Justice-Clerk.—In order to obtain a valid decree in absence, the process must be regularly in Court against the party who does not choose to appear.

The Court altered, and passed the bill *simpliciter*.

Lord Ordinary, Cuninghame.—*Act.* Anderson; William Bowie S. Campbell, W.S., *Agent.*—*Alt.* Rutherford, Penney; Gibson-Craigs, Dalziel and Brodie, W.S., *Agents.*—*T. Clerk.*—[J.W.]

27th November 1841.

SECOND DIVISION.—(J. W.)

NO. 30.—PATRICK MILNE, *Advocator, v.* CHARLES MELVILLE, *Respondent.*

Jurisdiction.—*Burgh.*—*Dean of Guild.*—*A party pulled down and proceeded to rebuild in a certain form a gable between his own premises and those of his neighbour, both situated within burgh. The neighbour instituted a process against him before the Bailie Court, and obtained a decret ordaining him to restore the gable, as far as practicable, to its original state.—Held that the Court of the Magistrates was competent to entertain the action, and that the jurisdiction of the Dean of Guild was not privative.*

The advocator is proprietor of a house situated within the extended royalty of Dundee. The respondent is proprietor of the immediately adjoining house; and the gable which divides the two houses is alleged to be mutual.

In the autumn of 1837, the advocator having had occasion to increase the height and breadth of his house with the view of enlarging an extensive flax-spinning mill, took down the old gable; but in the course of rebuilding it, having made certain encroachments upon the property of the respondent, an application was presented to the Magistrates of Dundee, praying for interdict against the advocator's "interfering farther with the petitioner's property, and building on it, or on the site of the gable wall taken down as aforesaid," and to have the advocator ordained "to rebuild the said gable wall and chimney-tops, and in general, to put the petitioner's house in the same state in which it was previous to the operations complained of," reserving all claims of damages.

After various proceedings, the Magistrates, on 24th March 1838, ordained the advocator to restore the wall as nearly as possible to its original state, and remitted to Mr William Scott, superintendent of public works, to see this done at the advocator's expense. The remit not having been executed to the satisfaction of the respondent, was afterwards recalled, and the Magistrates, 11th July 1838, decerned generally against the advocator to restore the wall, as far as practicable, to its original state. On the 16th July, a second application was presented to the Magistrates, on which a record was made up and a proof led, after which the Magistrates pronounced the judgment now under advocacy, the result of which is to find that a portion of the foundation of the new gable has been made six

or eight inches thicker than the foundation of the old gable, which additional thickness the Magistrates hold would be an encroachment on the respondent's cellars if he should ever excavate them, and therefore, that this extra thickness must be removed; that in building the side-walls, which form the extension of the breadth of the gable, the advocator has encroached at the one end upon ground which is to be presumed to belong to the respondent, and that at the other end, the advocator's wall interferes with the respondent's eaves-drop, and, therefore, that the advocator must take down the whole building complained of; and interdict is at the same time granted against the advocator as craved, and the advocator is found liable in expenses.

The advocator brought the judgment under review by a note of advocacy; and it having occurred to the Lord Ordinary that the application by which the present action originated, ought to have been presented to the Dean of Guild of Dundee, and not to the Magistrates, additional pleas, and afterwards minutes of debate, were ordered upon that point.

By an Act passed on the 31st August 1831 (1 and 2 Will. IV. c. 66, § 6, 7), for extending the royalty of Dundee, it is provided (§ 6), that the Magistrates and Council of the burgh should have the same

"jurisdiction, powers, and authorities over the enlarged territory, as are at present, or might have been enjoyed or exercised by the Magistrates and Council, ordinary and extraordinary, of the ancient burgh within the same, whether at common law or under any Act or Acts of Parliament, local or general, royal charters, or otherwise." (§ 7), "That the jurisdiction of the Dean of Guild over the territory annexed to the ancient burgh, shall not be privative or exclusive of the jurisdiction of any Court of law, now competent to exercise jurisdiction over the same, and nothing herein contained shall be construed to compel any party or parties to apply to the Dean of Guild Court for leave to make alterations on property within the next territory, or for any other object or purpose connected with the same."

Pleaded for the advocator—

That the question between him and the respondent was one peculiarly calculated for the cognizance of the Dean of Guild. That if, as the respondent alleges, he ought to have had a warrant from the Dean of Guild Court before commencing his operations, this would only make it the more clearly competent and proper for the respondent to have complained to the Dean of Guild that the advocator was proceeding illegally, and without a warrant. The only point admitting of discussion, therefore, seems to be, whether the jurisdiction of the Dean of Guild in the matter referred to, was exclusive of, or merely cumulative with, the jurisdiction of the Magistrates? The words of Lord Bankton are,—“This Court has likewise the sole jurisdiction in regulating buildings within borrows, whether in repairing or taking down and rebuilding old buildings, or erecting new ones,” in doing which they are to take care that neither the streets be obstructed, “nor the property of neighbouring heritors encroached upon.” And the words of Mr Erskine are,—“It belongs to the Dean of Guild to take care that buildings within borough be agreeable to law, neither encroaching upon private property nor on the public streets.” The authorities, it was contended, are to the same effect, while those relied on by the respondent belong to one or other of the following classes: 1st, They are cases in which it is not stated whether there was a Dean of Guild in the burgh or not, and in which no question of jurisdiction was raised: Or, 2d, They are cases in which there lay some personal exception to the Dean of Guild, as not being a suitable and disinterested judge.

Pleaded for the respondent—

That the jurisdiction of the Dean of Guild, as now exercised, is entirely consuetudinal. No doubt he had originally a statutory jurisdiction by 1593, c. 180, in certain mercantile and

maritime cases, but that has long since gone into desuetude, and been entirely lost. He is more properly an executive officer charged with the duty of enforcing the regulations of a certain department of police, than a judge appointed to hear and determine disputes relating to private and individual rights and interests. In this respect, his powers and duties are similar to those of the Roman *ædile*. At the same time, it is not denied that, independently of his *ædile* powers, he has been also in the use of exercising a jurisdiction in certain matters of private right. Thus, where a private individual is about to erect a new building, or to pull down an old one, or to make serious repairs or alterations on any existing erection, it has been the practice, before commencing such operations, to apply for the necessary warrant and authority to the Dean of Guild. And if the respondent, in his application to the Magistrates, had asked for any warrant of lining betwixt his and the advocator's subjects, or had he asked for a warrant of building, or of pulling down, or of altering, or of repairing, or, in short, if he had asked for a warrant of any description, whereby and in virtue of which his own or his neighbour's state of possession could be inverted or affected, it might perhaps have been contended that he was bound to apply to the Dean of Guild. But truly he applied for no warrant; all he asked and obtained, was a judgment to the effect that the advocator was not entitled to proceed with his unwarranted operations, and was bound to restore the state of possession to what it was before these operations had been commenced. In a matter so purely possessory, the court of the judge ordinary, that is, the ordinary Bailie Court within burgh, was the proper court in which to apply for redress. At any rate, the Dean of Guild has no private or exclusive jurisdiction in such a question as the present, and it was equally competent for the respondent to apply to the Magistrates in their ordinary Bailie Court. The Dean of Guild is himself just one of the Magistrates of a burgh, elected along with the others, and having certain duties allotted to him. The inherent and radical power, however, is in the Magistrates generally. Accordingly, the ancient brieve of lining was directed, not to the Dean of Guild, but generally to the provost and bailies of the burgh. In the case of the Magistrates of Stirling v. the Sheriff-depute of Stirlingshire, where it was decided that the Dean of Guild had a jurisdiction in questions of neighbourhood within burgh, exclusive of the Sheriff, the action of declarator was brought, not at the instance of the Dean of Guild alone, but at the instance of the Dean of Guild, Magistrates, and Council generally of the burgh. From the report it would appear that the action concluded to have it declared, not that the jurisdiction pertained to the Dean of Guild alone, but to the pursuers generally, "and their successors in office:" and so accordingly the Lords found. From the reported cases, it will be found that such questions have been indiscriminately brought in the Dean of Guild Court, in the Court of Session, in the ordinary Burgh or Bailie Court, and in the Sheriff Court; and were it otherwise, it would lead to very singular results; for it is matter of notoriety that in several of the burghs—for example, in the important burgh of Dumfries—no Dean of Guild Court has ever been known to exist. Neither the Sheriff nor the Magistrates can determine a question of heritable right or property, but they are competent to regulate the interim possession. On the same principle, and assuming that the Dean of Guild can alone grant a warrant for building or pulling down, repairing or altering, that can never derogate from the power of the Magistrates, in their ordinary Burgh Court, to stop operations which have been commenced without a warrant, and to ordain that the state of possession shall not be inverted or illegally encroached on.

The Lord Ordinary pronounced the following interlocutor:

"*8th June 1841.*—The Lord Ordinary having considered the revised minutes of debate in the jurisdiction of the Magistrates of Dundee, in the process now under advocacy,—in respect of the importance and general application of the question in practice in the different burghs in Scotland, in which there are Dean of Guild Courts established—Makes *avizandum* with the case to the Lords of the Second Division, and appoints printed copies of the revised minutes, original petition to the Magistrates, and of the record in the Inferior Court, and of the principal inter-

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locutor of the Magistrates under advocacy, dated 13th May 1840, to be printed and boxed *quam primum*, in order that the case may be reported.

"*Note.*—The Lord Ordinary has taken this case to report, in order that the opinion of the Court may be obtained as speedily as possible on a question of great importance in practice. It relates to the competency of instituting and carrying on actions relative to the proper boundary and position of *party-walls* in houses in the course of rebuilding within burgh, before the Court of the Magistrates, when there is a *Dean of Guild*, to whose jurisdiction questions of this sort are generally held exclusively to belong.

"In the process in which the present question occurs, there has been a proof, and a most voluminous litigation before the Magistrates of Dundee; but, of course, if the Court be incompetent, all this must go for nothing. As the Lord Ordinary, therefore, entertained very serious doubts of the jurisdiction of the Magistrates in cases of this description, and was apprehensive that the parties might be turned round on this objection, even at a later stage of the proceedings, he thought it most expedient for all interested to have the competency of the original action ascertained before further expense is incurred in discussing the merits in this Court. He accordingly directed the question of jurisdiction to be argued in minutes, which are now submitted to the consideration of the Court.

"The revised minutes present a brief but very clear and satisfactory exposition of the authorities applicable to the point at issue. From the first, the Lord Ordinary has had a strong impression, that if Deans of Guild have any peculiar or private jurisdiction at all, a question such as that now at issue must belong to that Court. The sole question here was, whether the defender (advocator) was entitled to pull down and rebuild, in a certain form, a gable between his own premises and that of his neighbour, the pursuer. Now, though there are many cases in which the line of distinction between questions peculiar to the Court of the Magistrates and that of the Dean of Guild, may be but slenderly marked, yet the present cannot be viewed as a case of that nature. If the Dean of Guild has any peculiar jurisdiction at all over buildings within burgh, it seems difficult to suppose, *a priori*, that the present should not fall within it.

"The foundation and origin of that jurisdiction are not very clearly traced. Lord Stair does not allude to it; but almost from the time of his Lordship downwards, the books are filled with cases showing that all new buildings within burgh, and alleged encroachments thereon, are *peculiar* to the Dean of Guild Court in towns where there is such a Magistrate. The Act 1698, c. 8, restraining the height of houses in Edinburgh, refers to the Dean of Guild as the only Magistrate in use to grant warrants for buildings; and the authority of Bankton and Erskine, quoted in the papers, is explicit to the same effect.

"There is no doubt some apparent fluctuation or conflict in the authorities, which will be found to arise from one or other of the following circumstances:—*1st*, In many burghs of Scotland there is no Dean of Guild, and that accounts for the decisions in the cases of Kirkcudbright and Nairn, referred to in the revised cases. *2d*, In other burghs the Dean of Guild has *by custom* lost, apparently *non utendo*, his peculiar jurisdiction over buildings, and that may explain the decision in the late case from Ayr, quoted in the papers. In the report of the municipal commissioners on the burgh of Ayr in 1835, it was stated, that 'there is a Dean of Guild Court held *occasionally* within burgh, but it is not imperative on persons building within the town to apply for a warrant from the Dean of Guild; and it is only when disputes arise that a court is held.' *3d*, In sundry cases, particularly in small burghs, the Dean of Guild has been disqualified, from an *interest* in the suit, from giving judgment. *4th*, In questions occurring in extended royalties, such as in those relative to operations in St James' Square and West Maitland Street of Edinburgh, the Sheriff's jurisdiction, from the nature of the annexation, is not excluded. Accordingly, in the present case, from the clause in the Statute annexing the district in which the advocator's property is situated to the royalty, the previous jurisdiction of the Sheriff was undoubtedly *reserved* (see clause in minute for Charles Melville, p. 18), though the ordinary Magistrates could not claim any, unless they would have possessed it in a similar cause within

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the ancient royalty. *Lastly*, In a few cases the objection to the jurisdiction of the Magistrates seems to have been waived or overlooked *per incuriam*.

"Apart from these peculiarities, the great bulk of our authorities, for above 150 years, do, it is thought, very clearly establish that all questions as to the right erection of buildings and boundary-walls within burgh are peculiar to the Dean of Guild. It is sufficient to refer to the cases reported in the Dictionary under the head of 'Jurisdiction' of Dean of Guild, 'Property,' and 'Public Police.' In addition to the cases quoted in the minutes, reference may be made to the early cases of Wilson in 1688, and Hall in 1698, reported in the Dictionary *vocs* 'Property,' p. 12,775, to show that the Dean of Guild was the Magistrate to whom such questions as the present were there held appropriate.

"It deserves consideration, however, whether there be any weight in the specialty founded on by the pursuer in support of his action—that the complaint here was to enforce a *previous decree* of the Magistrates respecting the gable in dispute. But if the objection now raised to the jurisdiction be well founded, the same doubt would occur as to the competency of the former process before the Magistrates which has been urged against the present action. Again, if the decree of the Magistrates in the first suit was entitled to effect, it may be questioned if it should not have been produced in a complaint to the Dean of Guild, and his interference demanded to enforce the erection of the gable, in conformity with the rights of parties, as ascertained by the prior decree, if that was pronounced in a competent process.

"The Act annexing the territory in which the buildings are situated to the burgh of Dundee certainly provides specially, 'that nothing herein contained shall be construed to compel any party or parties to apply to the Dean of Guild Court for leave to make alterations on property within the annexed territory.' That enactment clearly exempts parties in the extended royalty of Dundee from the necessity of applying for warrants, if they keep strictly within their own boundaries, and that clause of the Statute also may meet a part of the complaint of the pursuer against the advocator, that he commenced operations here without a warrant; but it conferred *no new jurisdiction* on the ordinary Magistrates of the burgh, and did not authorise an application to a different jurisdiction than the Dean of Guild, if any neighbour thought the party proceeding to build without warrant was erecting a wrong wall beyond his own boundary. As the Dean of Guild would have been the only burghal Magistrate competent to take up such a complaint in the ancient royalty, the Lord Ordinary does not at present see on what ground or authority the other Magistrates acquired any jurisdiction over such cases in the extended royalty."

At advising,

Lord Medwyn.—This is a question of jurisdiction, as to whether the application by the respondent was properly made to the Magistrates of Dundee, or ought not rather to have been made to the Dean of Guild. By the 6th section of the Act passed for extending the royalty of Dundee, the same powers are conferred upon the Magistrates and Council over the enlarged territory, as they had exercised over the ancient burgh. But the 7th section provides, that the jurisdiction of the Dean of Guild, whose powers were extended along with those of the Magistrates and Council, he himself being one of their number, should not be privative against those of the Sheriff. In 1837, Milne takes down a gable said to be mutual; the conterminous proprietor presents an application to the Bailie Court, and obtains decree ordaining Milne to restore the gable as it was, and a remit is made to the superintendent of public works to see this carried into effect. The interlocutor seems to have been misunderstood; and on a second application by the respondent, the remit was recalled, and the decret on the first process pronounced. Melville, conceiving that the advocator was proceeding in defiance of the judgment of the Court, presented a second petition with the view of having it determined whether Milne had obeyed the former decret. Milne said he had acquiesced; but the result was the pronouncing the interlocutor under review. The advocator says that he was entitled to proceed with his alterations, in terms of the 7th section of

the Act, without applying to the Dean of Guild for a warrant; and no doubt he might if he did not interfere with the property of his neighbour; but he could not touch a mutual gable without an application to the proper authorities. If he had made such an application, then the respondent would have had an opportunity of answering, and any difference would have been settled before the operations began. A good deal of discussion is introduced into the respondent's minute, as to the origin of the office of Dean of Guild. Questions of this sort formed no part of his original jurisdiction. By the Act 1593, c. 180, he was constituted judge "in all actions and matters concerning merchand; betuixt merchand and merchand, and betuixt merchand and mariner, quibilk actions aught not nor suld not byde delay; Bot be expedie be the Deane of Gild and his counceill summarilie, as men chosen and appoynted zierlie be the counceill of the burgh, maist apt and able to judge and decerne in all actiones concerning merchandes, as said is." The Act 1594 gives power to the Provost and Bailies to order the repair of decayed lands within burgh, "be ane condigne inquest of the neighbours thereof;" and the Act 1663, c. 6, anent ruinous houses in royal burghs, ordained the Provost and Bailies of the burgh to cause warn and charge all persons having right to buildings that have been waste three years, build or repair them within year and day thereafter, or else to sell them to others. The only mention made of the Dean of Guild in this Statute is, that purchasers of houses sold under the Act, and the owners of which were absent or unknown, are required to consign the price in the hands of the Provost, one of the Bailies or Dean of Guild. The brief of line was not addressed to the Dean of Guild, but to the Magistrates and Council; and in the case of Lermont, 1673, the power of the Council of Edinburgh to grant liberty to a proprietor to oversailzie his close, and cast a trans over it, was recognised. While I think that the Dean of Guild must take care that buildings within burgh be according to law, I don't think his powers can be extended farther. Erskine says:—"It belongs to the Dean of Guild to take care that buildings within the borough be agreeable to law, neither encroaching on private property, nor on the public streets or passages; and that houses in danger of falling be thrown down." These appear to be merely police regulations. As to the eaves-drop, in order to show that it is a branch of majesterial functions, where there is no Dean of Guild, Erskine says,—where it is not fixed by usage, the Dean of Guild, or other Magistrate who is charged with the police, appears to be trusted with a discretionary power of directing the buildings within burgh, subject to the review of the Court of Session. The only privative jurisdiction which I conceive the Dean of Guild enjoys, is the giving out jedges and warrants. In none of the cases quoted was the objection taken to an application to the *Bailie Court*. In the late case of *Alexander v. Cooper*, 16th December 1840, the interdict was applied for from the Sheriff; and it was pleaded that the Dean of Guild was the only competent Judge; but this plea was repelled. The question here is, whether, the advocator at his own hand having proceeded to pull down a mutual gable, the respondent was excluded from applying for redress to the Burgh Court? Where such a wrong is done, I think it is not incompetent to apply either to this Court or to the Burgh Court; and I know of no case deciding that the Dean of Guild alone could give redress.

Lord Meadowbank concurred.

Lord Moncreiff.—I regret there should be a difference of opinion among us in this case; but after repeated consideration of it, I have come to be of the opinion of the Lord Ordinary, that there was no jurisdiction in the Bailie Court to entertain the application of the respondent. The point raised is, whether in the burgh of Dundee, where there is a Dean of Guild, the Magistrates can entertain such a question? In the *first* place, had they jurisdiction in the old royalty? In the *second* place, if they had not, does the Act extending the royalty give them jurisdiction over the annexed territory? As to the *first* question, I regret that the objection should have arisen in this form; but although it was not taken in the Inferior-court, now that it has arisen, I must say it is one of very great importance indeed. In the present state of the law, it is said that the Dean of Guild has no exclusive jurisdiction, except as to the giving out of jedges and warrants. But on what

authority does his privative jurisdiction in these matters rest, except upon consuetudinary law? The authorities go to prove that he has not only privative jurisdiction in warrants, but in the subject-matter of these warrants. Lord Mackenzie says in the case of Donaldson, that the jurisdiction of the Dean of Guild is peculiar, and exclusive of other inferior magistrates in cases which fall under it. It relates, he adds, to questions of neighbourhood. Bankton says, this Court has likewise the sole jurisdiction in regulating buildings within borrows, whether in repairing, or taking down and rebuilding old buildings, or erecting new ones. They are to take care that the streets and passages of borrows be not thereby prejudiced or obstructed, nor the property of neighbouring heritors encroached upon. In these passages, the Dean of Guild's jurisdiction is described as peculiar, not with reference to the application for warrants only, but to the subject-matter of them also; and he may entertain complaints even against parties doing things without any warrant. The jurisdiction of the judge ordinary is talked of; but by the case of Stewart, the Dean of Guild was found to be judge ordinary in this matter. The interlocutor in that case, while it dismisses the action, "reserves to the pursuer to ascertain his rights in the tenement in question in the Court of the Dean of Guild as judge ordinary, according to the rules of law." This jurisdiction is not of very ancient standing, and in Stair's time did not exist,—hence the Burgh Court is necessarily spoken of when claiming jurisdiction as against the Sheriff; but the matter here is within burgh; and the question is, is not the Dean of Guild Court the proper Burgh Court for entertaining such applications? If, at the present day, such a petition were presented to the Magistrates of Edinburgh, they would say, go to the Dean of Guild, through whom we act. Questions have arisen between burghs and the Sheriff, as in the case of Stirling; but that was a very peculiar case. The Magistrates, the Town-council and Dean of Guild all came forward to vindicate their authority in the declarator, and the decree necessarily bore, that the power was in the Magistrates, Town-council and Dean of Guild; but it did not touch their authority among themselves. On this general ground I see no difficulty. If there be no peculiar jurisdiction in the Dean of Guild within burgh, then this is decisive; but I always understood that the reverse was the law. The case of Ayr settles nothing in a question between the Dean of Guild and the burgh. The application there was made to the Sheriff, and no objection was taken to his jurisdiction. Here the question arises as to the foundation of a party-wall, and is peculiarly under the cognisance of the Dean of Guild: it is a possessory process. The applying or not applying for a warrant cannot alter the jurisdiction: the subject-matter settles the jurisdiction. I come now to inquire, whether the Act of Parliament makes any difference in this case from the general law? The Act, in my opinion, confirms the general law, and leaves the matter entire. The 6th section—(quotes)—gives jurisdiction to the Magistrates, including the Dean of Guild, over the enlarged territory, as ample and in like manner as possessed by them within the ancient royalty, subject only to the provision in the 7th section, that the jurisdiction of the Dean of Guild over the territory annexed shall not be privative, or exclusive of the jurisdiction of any court of law now competent to exercise jurisdiction over the same. Is there not an implication here,—nay, is there not a declaration that the jurisdiction of the Dean of Guild was privative within the ancient royalty, and would have been so over the extended, but for this exception in favour of the jurisdiction of the Sheriff and others, to which alone it relates? This confirms his privative jurisdiction over every other but what was then existing over the territory annexed: "And nothing herein contained shall be construed to compel any party to apply to the Dean of Guild Court for leave to make alterations on property within the annexed territory, or for any other object or purpose connected with the same." Is it not implied by this, that the Dean of Guild had exclusive jurisdiction for other purposes than mere buildings; and is not the clause inserted in order that even in these his jurisdiction should not be exclusive of the Sheriff? If we had his jurisdiction privative against the Magistrates within the ancient royalty, can we so construe this clause as to enlarge the jurisdiction of the Magistrates in the annexed territory?

The whole clause assumes the privative jurisdiction of the Dean of Guild; and it was to prevent this in the extended royalty that the clause was inserted.

Lord Justice-Clerk.—I have again considered the opinion I had formed, and I lay aside entirely the Statute, which leaves things just as they were as to the state of the law within burgh. I shall only add, that upon the general question I agree with the opinion of Lord Medwyn.

The Court *repelled* the objection to the jurisdiction, and remitted to the Lord Ordinary, reserving the claim for expenses till the issue of the cause.

Advocate's Authorities.—Statute extending royalty of Dundee, August 1831. Bankton, IV. 20, 2, 5. Ersk. I. 4, 24; II. 9, 10. Christie v. Wilson, 4th June 1825; 4 S. and D., 71. Stewart v. Blackwood, 3d February 1829; 7 S. and D., 362. Farquhar, 7th December 1838; D. B. and M., New Series, Vol. I. p. 171. Magistrates of Stirling v. Sheriff of Stirlingshire, 14th December 1752; M. 7585, and F. C. Sel. Dec., No. 25, p. 28. Donaldson v. Pattison, &c., 14th November 1834; F. C. Stewart v. Blackwood, 3d February 1829; 7 S. and D., 362. Bank. IV. 2, 16. Ersk. I. 2, 6, 27, 30. Clark v. Robertson, &c., 8th August 1783; M. 7532. Lawrie and Pinkerton, 31st January 1812; F. C. Edington and Sons v. Astley, 5th December 1829; 8 S. D. B., 192. Note to Ivory's Ersk., p. 91. Scouler, 24th January 1832; 10 Shaw, p. 241. Jack, 12th June 1833; 11 Shaw, p. 711.

Respondent's Authorities.—Statute 1593, c. 180; 1594, c. 226; 1663, c. 6. Act of William, 30th August 1698, c. 8. Ersk. B. I. t. 4, § 3, 21, 24. Stair, B. IV. t. 3, § 13. Lermon, June 1673; Brown's Sup., Vol. III. p. 16. Magistrates of Stirling v. Sheriff-depute of Stirlingshire, November 1752; M. 7584. Ersk. B. I. t. 2, § 7. Clark v. Gordon, 8th July 1760; M. 13,172. Cicely and King v. Borthwick, July 1806; Hume's Rep., p. 257. Scouler v. Pollok, 24th January 1832; 10 Shaw, p. 241. Jack v. Lyall, 12th June 1833; 11 Shaw, p. 711. Sandy and Others v. Innes and Others, 15th February 1823; 2 Shaw, p. 221. Murray v. Johnston and Others, 4th December 1834; 13 Shaw, p. 119. M'Lean v. Donald, 4th February 1840; D. B. M., Vol. II. p. 528. Hazle and Others v. Turner, 22d May 1840; D. B. M., Vol. II. p. 886. Allan v. Watson and Others, 17th June 1828; 6 Shaw, p. 980. Ross v. Baird, 3d February 1829; 7 Shaw, p. 361. Williamson v. Hill, 14th January 1831; 9 Shaw, p. 269. Speirs v. Buchanan and Others, 21st February 1823; 2 Shaw, p. 237.

Lord Ordinary, Cuninghame.—*Act. Deas.* Brown and Miller, W.S., *Agents.*—*Alt.* Rutherford, Macfarlane; Greig and Morton, W.S., *Agents.*—*F. Clerk.*—[J.W.]

27th November 1841.

SECOND DIVISION.—(J.W.)

No. 31.—ROBERT HENDERSON ROBERTSON and MANDATORY, *Pursuers*, v. JOHN RUTHERFORD, *Defender*.

Sale—Title—Reservations and Restrictions.—*The proprietor of several feus disposed of them by a missive of sale, without specifying that his title contained a reservation of mines and minerals in favour of the superior, and also certain restrictions as to the kind of buildings to be erected on part of the ground—Held that the purchaser was not bound to take the subjects with these restrictions.*

Process—Record, Opening of.—*After avizandum had been made with the debate, it was stated that the buyer actually knew of the existing limitations of the title at the time of the sale, but no such averment was on the record. On a reclaiming note, a minute was allowed to be lodged before answer, specifying what was averred and offered to be proved in support of the statement, in the view of opening up the record.*

Vide ante, Vol. XII. p. 672. In obedience to the interlocutor pronounced on the 18th July 1840, the pursuer produced his titles, when it was found that

they contained the following reservations and restrictions:

"Reserving always to me," (viz., Mr Hunt of Pittencrieff, the superior,) "and my heirs and successors, the whole coal, and all other mines and minerals under the ground of the said lands, and full power to work, win, and away-carry the same at pleasure; and to make waggon or other roads, sink pits, drive levels, and do every thing necessary for the good of the same; upon payment of the feuar's damage above ground, at the sight of two neutral men to be mutually chosen," &c. "Declaring that the said John Kinnell" (viz., the original feuar) "and his aforesaid, shall not have on the front of the said feu any buildings whatever, other than dwelling-houses alienably; which, except the necessary entries, shall occupy the whole front, and shall be built in a straight line with the front of those already built on the line of street on which this piece of ground is situated: Nor shall the said John Kinnell, or his foresaid, be at liberty to erect, or have any nuisance whatever on said piece of ground," &c.

On the 18th March 1841, the following interlocutor was pronounced:

"The Lord Ordinary having heard the counsel for the parties, and considered the process, sustains the fourth defence, viz., that the pursuer is not the owner of the subject sold, and cannot give a title to it; assoilzies the defender, and decerns: Finds the pursuer liable in expenses; appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same, and to report.

"*Note.*—The objections taken by the defender to the title tendered by the pursuer, or rather, to the insufficiency of the title to convey the whole of the subjects sold, are, 1st, That the minerals do not belong to the seller: 2d, That the superior, by whom these minerals have been reserved, has a right to make roads, and to sink pits in the lands: 3dly, That there is restriction against building any thing but dwelling-houses along the front next the street. The facts on which these objections rest are admitted.

"Now, the Lord Ordinary is of opinion that the defender is not bound to take the subject with these restrictions; or in other words, that the only title which the pursuer can give, being one in which these restrictions are contained, does not convey the subject sold. There is no question here about any insignificant denomination of value, nor about the subject being affected by *known* burdens *naturally attaching to it*. The restrictions are essential; and not such as the purchaser was bound to be aware of. The only difficulty arises from the pursuer having offered '*my property*,' and the offer being accepted in the same terms. But these words must be held to have been used only demonstratively, otherwise it must be held that the pursuer could have enforced payment of the price, *whatever* the restrictions might have been. There is no averment on the record that the defender knew of the existing limitations; and the price which he paid seems to render such knowledge improbable. But though the pursuer has no such averment in the record, he stated at the bar *the day after avizandum* had been made on the debate, that the defender did know of their existence. The Lord Ordinary put it to the defender, whether he would consent to the record being opened, but he refused; and whatever the Court may do, the Lord Ordinary does not think that, after a full debate and avizandum, he can totally change the complexion of the case by a compulsory alteration of the record."

The pursuer reclaimed, and prayed the Court

"to alter and recal the interlocutor complained of; to repel the defences which have lately been stated to the title of the pursuer to the property in question; or, at least, to allow the pursuer a proof that the defender was aware of the restrictions and reservations mentioned in the note of the Lord Ordinary, when he entered into the bargain libelled."

At advising on the 30th June 1841, the Lords, before answer,

"Appoint the pursuer to lodge a minute, specifying what he avers and offers to prove in support of his statement, that the

defender actually knew of the reservation of mines and minerals, with power to work the same; and also of the restrictions as to building contained in the pursuer's titles, when the defender purchased the property in question."

In terms of this interlocutor the pursuer lodged a minute, stating, that ever since Mr Hunt of Pittencrieff, more than twenty-five years ago, began to feu out his lands in Dunfermline, he had uniformly inserted in all his feu-charters the same reservations and restrictions as those contained in the titles of the pursuer to the subject in dispute: That about one-third of the town of Dunfermline now stands on feus so acquired from Mr Hunt; and that the reservations and restrictions are as notorious in that place, as that certain parts of the town are held in burgage and not in feu: That, independent of the general notoriety, the defender had peculiar opportunities of knowing the terms of Mr Hunt's feus, in consequence of his late father having feued various pieces of ground from Mr Hunt: That in 1830 an action was raised as to the use of the water flowing through the subject in question, and the title-deeds of no fewer than thirty-seven of Mr Hunt's feuars were produced; and the defender took the chief charge and interest in the proceedings relative to the action: That the spinning-mill belonging to the defender, and situated on the same water, is held under the same tenure, and also the dwelling-house occupied by him: That before he set out for London in April 1839, the defender called on his agent, who happened also to be the agent for the pursuer, and inquired particularly as to whether the pursuer's title to the several feus was good and sufficient; and although the feu-duty, amounting to £31. 5s., was not mentioned in the missive of sale, no objection on that ground has been stated. In regard to the restriction as to any buildings except dwelling-houses being erected next the street, a wall had been built across the ground, separating that which was to be occupied for the use of the mill from that which was to be feued out for dwelling-houses, and it was plainly seen that no buildings for the accommodation of the mill could be extended to the street.

At advising of this date, the Court was unanimously of opinion that the facts and circumstances averred were not sufficient to bring home personal knowledge to the defender, and accordingly refused the reclaiming note, and *adhered*, with additional expenses.

Authorities.—Urquhart, 29th June 1833, and 7th June 1835. Patton, 11th March 1825.

Lord Ordinary, Cockburn.—*Act.* Solicitor-General (M'Neill), Mure; James Johnston Darling, W.S., *Agent.*—*Adv.* Rutherford, Marshall; Andrew Smith, W.S., *Agent.*—T. Clerk.—[J.W.]

1st December 1841.

FIRST DIVISION.—(H.B.)

No. 32.—ROBERT GENTLE, *Nominal Raiser*, v. GEORGE IZAT and ALEXANDER THOMSON, *Claimants*.

Bill of Exchange.—*A competition between the drawer and acceptor of a bill for possession of the document, after payment by the acceptor, partly out of his own funds and partly out of a composition obtained from other bills ranked on the drawer's estate—decided in favour of the acceptor.*

Bankrupt.—Sequestration.—Composition.—*Observed, that after a composition has been carried through on the understanding that the debts were justly ranked, the bankrupt is not entitled*

to impugn the ranking on grounds which must have been known to him when the ranking was made.

George Izat, ship-owner, Kincardine, drew the following bill on his brother-in-law, Alexander Thomson, merchant in Leith :

" *Kincardine, 17th July 1839.—£285 Sterling.—Two months after date, pay to my order at the Manchester and Liverpool District Bank in Liverpool, two hundred and eighty-five pounds Sterling value in account of shares in Manchester and Liverpool Bank.*"

Thomson accepted, and Izat discounted the bill with Mr Robert Gentle, agent at Kincardine for the Glasgow Union Banking Company. At this time Thomson was in the employment of Alexander Reid and Company, merchants, Leith, and the above bill, with many others on which Izat stood as drawer or acceptor, appears to have been for their accommodation. During the currency of the bill, the estates both of Izat and of Reid and Company were sequestered. Previous to the sequestration, Reid and Company had indorsed to Thomson two bills, accepted to them by Izat,—the one for £360, and the other for £230. For these bills Thomson ranked as a creditor on Izat's estate. Izat at first objected to the ranking, but afterwards withdrew the objection, and wrote a letter expressly consenting to it. When the bill for £285 became due, Thomson was unable to retire it, and entered into an arrangement, by which he assigned to the Glasgow Union Bank the bills for £360 and £230, with his ranking on Izat's estate, and also twenty-eight shares of stock in the Manchester and Liverpool District Bank. The proceeds of these shares, amounting to £186 odds, and two dividends from Izat's estate, produced a sum, which, after paying the £285 bill, left a balance of £23. 1. 10. This balance was transmitted to Thomson's agent in Leith, but the bill still remained in Mr Gentle's possession. In these circumstances, Izat, after obtaining his discharge on a composition of 5s. per pound, brought a multiplepinding in Mr Gentle's name, and claimed 1st, "possession of the bill in question, to be retained by the claimant till he is fully indemnified by Mr Thomson for the foresaid payment made from the claimant's estate on account of the bill;" 2d, "payment of the said balance of £23. 1. 10. Sterling." He was afterwards allowed by the Lord Ordinary to alter his claim, by leaving out the words printed in italics, and substituting for them the following words,—"be enabled to follow out his claim of indemnification against Thomson or others."

Thomson claimed "that the bill for £285 be delivered up to him, and that the payment of £23. 1. 10., if still objected to, be sanctioned by the Court, at least that it be held as not competently questioned in this process." The object of the claimants was, to rank for the amount of the bill on Reid and Company's estate.

Izat *pleaded*—1. The acceptance in question not having been granted as an accommodation to the respondent, Mr Thomson's claim to it on that ground is altogether groundless. 2. This acceptance having been paid partly with funds drawn from the respondent's estate, while the acceptance was not intended or applied for the respondent's accommodation, the respondent ought, *pro tanto*, to be indemnified for such payment from his estate, and to have possession of the bill, in order to secure his indemnity. 3. Nothing has

occurred in the respondent's sequestration inconsistent with this claim. 4. The nominal raiser is responsible for the sum of £23. 1. 10., and the respondent is entitled to payment of that sum in terms of his claim.

Thomson *pleaded*—1. The claimant's acceptance being an accommodation by him to the drawer, Mr Izat, and being now paid, ought to be delivered up to the claimant; and Mr Izat is not entitled to object to such delivery. 2. The claimant's acceptance being paid with funds provided by the claimant, and assigned to the bank for that purpose, ought now to be delivered up to the claimant. 3. The claimant being regularly ranked as a creditor on Mr Izat's estate, and Mr Izat's composition and discharge having been carried through on that footing, Mr Izat cannot now maintain any plea inconsistent with that ranking. 4. The composition from Mr Izat's estate on the two bills for £230 and £360, being drawn by the bank as assignees of the claimant, Mr Thomson, and applied by the bank, as directed by their assignation, in extinction of the bill for £285 then in its hands, the payment by Mr Thomson's debtor must be held equivalent to payment by the cedent himself, and the bill must be held to be virtually in Mr Thomson's possession, and any claim competent to Mr Izat would fall to be made not by way of reclaiming the bill itself, but of the sums drawn under the composition-contract. 5. The sum of £23. 1s. 10d. not being in the hands of the nominal raiser, cannot be the subject of competition in this process; and that sum has been properly paid to a person for behoof of the claimant.

The Lord Ordinary pronounced the following interlocutor:

" *3d July 1841.—The Lord Ordinary having heard the counsel for the parties, allows the claimant, George Izat, to put upon the record a restriction of his claim as suggested by the Lord Ordinary, and in which this claimant expressed his acquiescence at the bar; and prefers the claim of the said George Izat as thus restricted, and decerns: Finds him entitled to expenses, under deduction of any extra expense which the opposite party can show to have been occasioned by the claim not having been sooner restricted; and remits the claimant Izat's account of expenses, when lodged, to the auditor to tax and report.*"

" *Note.—The Lord Ordinary thinks it right to say, that at present he cannot imagine what extra expense has been produced. Nothing was offered by the competing claimant at all.*"

Thomson reclaimed. At advising, the claim to the balance of the bill was reserved, and Izat offered still farther to restrict his claim, by confining it to the delivery of the bill, "till he is enabled to follow out his claim of indemnification against others," leaving out the words "against Thomson."

Lord President.—I think we ought not to accede to this limitation, but that we ought to alter the interlocutor, and prefer Mr Thomson. Here he accepts a bill for £285, and pays it by the sale of certain bank shares, his own property, and the composition paid by two bills, of which Izat was the acceptor. Izat expressly consented to the ranking of these two bills on his estate, and thus pledged himself to the Court and the public that they constituted just claims on his estate. The composition-contract was carried through on this understanding, and Izat cannot now be listened to when he seeks to impugn it. In the same way he might impugn all the claims ranked on his estate, and give a different complexion altogether to the state of his affairs, after having induced his creditors, on the faith of its accuracy, to accept of a composition of 5s. per pound. This

would never do. We must hold that the ranking was good, and that Izat was truly debtor in the sum drawn by means of it from his estate. At all events, before he can claim delivery of the bill, he is bound to repay Thomson the £186 which he paid to account of the bill from his own property in bank shares. As to the effect of the ranking of the bill on the estate of Reid and Company, we cannot now decide; but I am quite clear that the *ipsum corpus* of the bill belongs to Thomson.

Lord Gillies.—I have arrived at the same conclusion, and nearly on the same grounds. If Izat's statement is true, Reid and Company were the true debtors in the bills ranked on his estate. It is true that, by accepting them, he was legally responsible, but after paying them, he was entitled to go against Reid and Company for the whole amount. Now, why was not this fact stated by Izat to his creditors? Instead of stating it, he writes a letter expressly consenting to the ranking of these bills on his estate. Was this fair to the creditors? The sum might have been of an amount that would seriously have affected the ranking, and shown that the composition was far short of what the creditors were entitled to receive. This attempt of Izat to deny the fairness of the ranking, cannot now receive any countenance. If he wishes to obtain delivery of the bill, let him first pay the proportion of it which Thomson actually paid out of his own bank shares, and then rank on Reid and Company's estate for the whole amount. What the effect of that ranking may be we are not now called upon to decide.

Lord Mackenzie.—I take the same view. Thomson appears to have paid the bill partly out of his own funds and partly out of a composition drawn from Izat's estate. This composition was drawn by virtue of two bills in which Izat was acceptor. This plainly and distinctly implies that Izat was the debtor in these bills. If he was not the debtor, why did he allow them to be ranked? If they were merely assigned in security of Thomson's debt, why were they ranked on Izat's estate as he were the proper debtor? We cannot open up that question now. Thomson has in this way paid the bill, and is entitled to possession of it. Whatever he may be able to make of it, or what effect it will have if he claims upon it on Reid's estate, and in a competition with Izat, is a different question, which we are not called upon to decide. In certain supposable states of the facts, very difficult questions may arise; but with these we have nothing to do at present. All we are called upon to decide is, whether Thomson is entitled to delivery of the bill; and I think he is.

Lord Fullerton.—I am of the same opinion. If Thomson has paid the bill, he is clearly entitled to delivery of it. We must here hold that he has paid it. The payment was made partly out of his own funds, and partly out of Izat's estate, as a composition on bills in which Izat stood acceptor, and must be presumed to be debtor. It was said that Thomson was bound to indemnify Izat for the amount drawn from his estate; but this point is now given up, for an offer is made to withdraw this claim of indemnification. Holding, then, that the payment made from Izat's estate is a good payment, there is nothing farther in the cause; for it is quite clear that the only pretext for raising the process of multiplepoinding was to make out a claim against Thomson. As to the effect of ranking the bill on Reid's estate, there is nothing in the record concerning it, and of course it is impossible for us to go into it.

The Court pronounced the following interlocutor:

"Alter the interlocutor of the Lord Ordinary reclaimed against: Find that the claimant, Alexander Thomson, is entitled to the possession of said bill for £285, and prefer him thereto accordingly, and decern: Find the claimant, George Izat, liable in expenses, and remit to the Lord Ordinary to proceed."

Lord Ordinary, Cockburn.—*For Izat, Thomson, Hector; John Meiklejohn, W.S., Agent.—For Thomson, Rutherford, Monro; William Alexander, W.S., Agent.—For Nominal Raiser, W. P. Dundas; Andersons and Trotter, W.S., Agents.—N. Clerk.*—[H.B.]

1st December 1841.

SECOND DIVISION.—(J.W.)

No. 33.—WILLIAM BERRY, Pursuer, v. JAMES WILSON, Defender.

Process.—Jury Trial.—Application of Verdict.—Salmon-fishing.—*It being found by the verdict of a jury, that A was possessed of the right of fishing for salmon, mooring the boats, and drawing the nets employed therein, "on or opposite, or adjacent to the lands of B," and that B had executed certain operations whereby the exercise of said rights was obstructed—Held that the issues and the verdict were conclusive as to the measure of the right, and that the operations must be altered or done away, so far as they cause any obstruction to the right of fishing and accessories thereof, as established by the general terms of the verdict.*

Servitude.—Road.—Foot-Road, Public.—*It being found that a foot-path between two public points, through the property of B and others, had been wrongfully shut up—Held that it must be again opened; that the right was in the land, and could not be limited in any part of the way to a passage along the top of a sea-wall.—Opinion, That it was within the powers of the Court to shift a public foot-road, if, when so altered, it was equally good and in the original line.*

Process.—Jury Trial.—Application of Verdict.—Servitude.—Road.—*It being found that A had "possessed or used a cart-road" through the lands of B, to a certain point—Held, in respect of the special terms of the verdict, that this was a private road, and subject to the regulation of the Court, and that A's right was sufficiently secured by a new turnpike-road, and a road from thence to the termination of the original road,—the new line being not more than twenty-two yards round.*

The nature of the subject of dispute between the pursuer and defender, and the rights sought to be found and declared, will sufficiently appear from the following issues in the cause:

"It being admitted that the pursuer is proprietor of the lands of Tayfield, and also proprietor of the lands of Causewayhead, formerly the property of Robert Dalgliesh of Scotsraig, with the right of a salmon-fishing called Greenside, in the river or frith of Tay:

"1. Whether the pursuer, and his predecessors and authors, proprietors of the said salmon-fishing, have, for forty years and upwards, or for time immemorial, in the exercise thereof, been in the possession of the right of fishing for salmon, mooring their boats, and drawing their nets employed therein, on or opposite, or adjacent to the lands of Craighead, the property of the defender; and whether, during the years 1832 and 1833, or either of them, the defender executed certain operations on or near his said property, whereby the pursuer was obstructed or impeded in the exercise of his said rights, or any of them, to the loss, injury, and damage of the pursuer?

"It being admitted that a foot-road existed from Newport to Ferry-port-on-Craig, through the property of the defender and others:

"2. Whether, during the said years 1832 and 1833, or either of them, the defender wrongfully shut up or obstructed the said foot-road, to the loss, injury, and damage of the pursuer?

"3. Whether, for forty years and upwards, or for time immemorial, prior to the year 1832, the pursuer, or his predecessors and authors, have possessed or used a cart-road from Newport, through the said lands of the defender, to a point opposite Dryburghhole; and whether, during the said years 1832 or 1833, or either of them, the defender wrongfully shut up or obstructed the said cart-road, to the loss, injury, and damage of the pursuer? Or,

"Whether the pursuer, or his authors, consented to, or acquiesced in the said operations on or near the said property of the defender?

"Whether the pursuer consented to, or acquiesced in the

shutting up of the said cart-road and foot-road, or either of them?

" Damages laid at £500."

The jury returned the following verdict:

" 14th July 1838.—Find for the pursuer upon the whole issues, but find no damages due."

On the 29th February 1839, the Court disallowed a bill of exception presented by the defender, and also discharged the rule formerly granted to show cause why the verdict should not be set aside, and a new trial granted. Subsequently the verdict was applied, and a remit made to the Lord Ordinary to proceed in the cause. On the 15th June 1839, he pronounced the following interlocutor:

" The Lord Ordinary having heard parties' procurators on the remit from the Inner-House, before answer remits to Mr George Buchanan, civil-engineer in Edinburgh, to visit the subjects in dispute, and to report to the Lord Ordinary *quam primum*, in what manner the verdict of the jury ought to be carried into effect, with the least prejudice to the rights and lawful interests of the parties respectively; with power to him to hear the parties, and to call for such evidence as he may consider necessary."

From the testimony of the witnesses adduced and examined before him by the parties, Mr Buchanan reported that the pursuer's rights were only exercised at two points or stations on the shore, viz., Drybraehole, which is a high-water, and Craighead Rock, which is a low-water station. And proceeding upon this assumption, he proposed that at Drybraehole, either the wall erected by the defender should be levelled to the extent of eighteen yards, so as to admit of the nets being drawn, and the boats hauled up and moored, or that a bulwark should be constructed in the form of an inclined plane, and which would serve as a slip or shott for drawing and drying the nets, and mooring the boats. The second station at Craighead Rock, he reported, was noways affected by the defender's operations, but Craighead Bay, to the westward of the defender's house, had been used for mooring the boats. As the defender, however, offered to clear out the ground at Drybraehole, and make it equally convenient with Craighead for the launching of the boats and drawing them up; and as the situation is in other respects eligible, he was of opinion that if this were done, there would be no occasion for another station at Craighead. Should it be found, however, by the Court, that independent of these circumstances, the pursuer has still a right, from former usage, to a mooring station here; it would be necessary, in order to give effect to that finding, to lower in some degree about twelve yards of the sea-wall, so that the boats might be easily hauled over it, and then to set apart a space of twelve yards long by six yards wide, for mooring the boats and drying the nets. In regard to the foot and cart-roads, he proposed to take advantage of the turnpike-road from Newport to Ferry-port-on-Craig, as far as it is available, and forming, as proposed by the defender, a new road from this to the station at Drybraehole. Should the station at Drybraehole, he concludes,

" be found a sufficient mooring place, so as to render the one at Craighead unnecessary, then there is no occasion for any further access along the shore than this road to Drybraehole. But should it be held that a mooring station is required at Craighead, then an additional access will be necessary for it; and I

am of opinion that a foot-path is quite sufficient, and that it may go either along the top of the defender's wall, westwards to his west march, where it joins the pursuer's property, or it may go up the bank along the present road, from the house to the turnpike. In regard to the obtaining of access to the shore as formerly at all points, this could not be done without demolishing the defender's walls, and otherwise throwing back the property into its original waste state; and I do not consider this to be necessary for the interests of the fishing, nor consistent with the terms of the remit."

A note of objections having been lodged by the pursuer to Mr Buchanan's report, a remit of new was made to him by the Lord Ordinary; and from his second report it appeared, that the access to Craighead, which he proposed should be by a foot-path along the top of the defender's walls, would not be very convenient, owing to the steepness of the rocks at Kempstane, and would not be passable at or near high-water.

The pursuer objected to this second report also, on the ground,—1st, As unjustly, in the face of the verdict, the rights of the pursuer, and practice, restricting the pursuer's right of fishing to two places only, in place of giving effect to that right as general, opposite the whole lands in question; and, 2d, As unjustly limiting the right of road along the coast, and excluding the pursuer, in the face of the right established by the verdict, from access along the coast, for the purposes of fishing, and for other lawful and necessary purposes.

The Lord Ordinary pronounced the following interlocutor:

" 22d June 1841.—The Lord Ordinary having heard counsel for the parties on the pursuer's objections to the second or supplementary report of George Buchanan, civil-engineer, and having resumed consideration thereof, and also of the original report of the said George Buchanan, with the objections thereto, productions and whole process,—Repels the whole of the objections to both or either of the said reports, and approves of the general tenor thereof, in all their articles and heads; and finds, in conformity therewith, that the pursuer is not entitled to any other cart or foot-road through the lands of the defender than is there provided or pointed out, nor to break through or level down any part of the said defender's sea-dyke or other enclosures, except as is therein allowed or directed, and hereinafter provided: But finds, 1mo, That besides the particular stations at Drybraehole and Craighead Rock, the pursuer is entitled to carry on his fishings in Craighead Bay, or *ex adversa* of any other part of the defender's lands, in which he may find it eligible and possible to carry them on without farther interference with the enclosures, or grounds of the defender, than that to which he is hereby restricted: Finds, 2do, That he is entitled, if he shall require it, to have a place provided, at the expense of the defender, for hauling up or mooring his fishing-boats, and for spreading or drying his nets, as near to the place formerly used for those purposes in the neighbourhood of the bothy, also formerly used by the fishermen, as can be arranged without serious inconvenience to the defender; and for this purpose, to have a part of the said defender's sea-wall taken or levelled down, as described at the bottom of page seven of the said original report: But finds that the pursuer is to have no right to the bothy originally used by his fishermen, or to any similar structure, or to any farther encroachment in this quarter, within the enclosures of the defender: Finds, 3tio, That the pursuer is entitled to choose which of the two plans for improving the fishing station at Drybraehole respectively, described at pages four and five of the said original report, and delineated on the sketches marked 1 and 2, therein inserted and referred to, he would prefer to have executed at the expense of the defender; and appoints him, within ten days from this date, to state in a short minute for which of them he makes his election: But finds that he is, in either case, entitled

to have the cart-road delineated on the said sketch, No. 2, from the turnpike down to the shore, executed and provided for him at the expense of the said defender: Finds, 4to, That the pursuer is in like manner entitled to have access to the mooring station in the bay, and near the offices of the defender, by either of the lines of foot-road specified on the last page of the original report, and more particularly described at page of the second or supplementary report, which he may select or prefer, and appoints him to state his decision upon this point also in the minute above directed, to be given in by him in ten days from this date; and, before farther answer, appoints the cause to be enrolled, that parties may state what decernitures may be necessary to give effect to those findings, and also to be heard on the question of expenses."

The pursuer reclaimed, and prayed the Court to recal the interlocutor,

"and to find that the pursuer is entitled to have the cart-road leading along the top of the sea-braes through the defender's property to Drybraehole, and communicating with the foot-path towards Ferry-port-on-Craig, kept up along the line of the said sea-braes, in such manner as may be least inconvenient for the defender in the said line; further, to find that the pursuer is entitled to free right of access along the banks of the Tay, opposite to the defender's property, at all times of the tide, and to the necessary and proper use of the said banks for the purposes of his fishings in said river, and that not only for hauling up or mooring his fishing-boats, or spreading and drying his nets, as found by the interlocutor reclaimed against, but also for the purposes of carrying on his operations of fishing generally; and to that effect, to have the defender's embankments and obstructions removed, in so far as inconsistent with the exercise of these rights."

At advising,

Lord Justice-Clerk.—Parts of the case require special attention. The action is a declarator containing three conclusions: 1st, A right of free access along the banks of the river for the purposes of fishing: 2d, The use of the bank for the fishers; and, 3d, A cart-road and foot-path through the property of the defender. We must be guided by the issues; for two remarks are to be kept in view: 1st, That when the issues are fixed, and have a distinct meaning, it is incompetent to go back upon the record for the purpose of explaining them even at the trial: 5 W. and S. p. 384. In this case, therefore, we must take the issues as framed. 2d, After a verdict has been returned and applied, it is equally incompetent to look into the notes of the Judge, in order to limit or restrain the rights established by the verdict. If no bill of exceptions had been presented in this case, the Judge's notes could not have been called for, nor was he bound to preserve them. When the verdict is applied, the matter becomes final. A party may always ask for a verdict to define his rights in distinct terms, and this is different from a special verdict. That not being done, and the verdict subsisting, the rights of the pursuer must be taken on the issues and verdict. The first issue is, whether he had a right of salmon-fishing "on or opposite, or adjacent to the lands of the defender?" Here the issue is quite general, and the verdict is equally so. It was competent to the defender to have objected that the verdict affirmed too much; but that is now excluded, and there is no longer a question in law as to the extent and measure of the pursuer's right of fishing, for the verdict finds it without any limitation. In the second place, it finds that the operations executed by the defender, obstructed the exercise of fishing, and thereby affirmed their illegality. The interlocutor is correct, in so far as it finds that the pursuer may exercise his rights any where, *ex adverso* of the lands of the defender; but in so far as it places the exercising of them under restrictions, it is limiting the verdict. The third finding is inadmissible. The pursuer is entitled to have the station at Drybraehole cleared of all obstructions: nor can any of his rights be limited to that station merely, for the convenience of the defender. The defender made the alterations complained of at his own hand. The value of the fishing we cannot enter into, but it is a right which is entitled to be protected as much as the proprietor's land; and the use of the shore belongs as much to the pursuer as to the

defender. In regard to the foot-road, the issue admits that a foot-road existed between two public points, and it is not said that it belongs to the defender. The only question put to the jury was, whether that road was wrongfully shut up? We must not confound the right of access to the banks, implied in a right of fishing, with this foot-road. It is not an accessory of the fishing, but a public foot-road, to which the defender had no right, and over which we have no control. It must therefore be left patent: Mercer and Reid, 1st February 1840. As to making it go over the defender's sea-wall, the right was on the bank; and if that gave way, the right was still in the land, and must be maintained on dry ground, safe for women and children. When passing a villa, the Court, in its discretion, might allow an artificial line, if patent and convenient. In regard to the cart-road, it is a private road, and probably only of use to the pursuer, as subservient to his right of fishing; but the issue does not so put it. The possession and use is quite general. Still it is a private road, and we have power to regulate it in such a way as to be least burdensome to the defender, while it preserves the pursuer's right of access to Drybraehole. This, I think, is sufficiently secured by the plan proposed in the interlocutor. I am therefore of opinion, that we must recal the interlocutor, and find that all obstructions to the pursuer's rights of fishing, the mooring of boats, and drawing of nets, must be removed; that the foot-path must be again opened along the banks; and remit to the Sheriff to see these findings carried into effect. Something was said about evidence having been led before the reporter, and its effects; but this could not preclude the pursuer from standing upon his rights as ascertained by the verdict.

Lord Medwyn.—I concur with your Lordship as to shutting up of the cart-road, and in so far must approve of the interlocutor. In regard to the foot-road, I think the pursuer entitled to one also; but I differ as to the nature of his right. I don't know, and it nowhere appears, that this was a foot-road common to the public. I look on it as a servitude; and if this is preserved to the pursuer, we are entitled to regulate it so as to be as little burdensome as possible to the proprietor. The other and more material point is, as to whether the verdict be the measure of the right, and we can look at nothing else, so that every obstruction must be removed. I confess I feel some doubts as to this view.

Lord Moncreiff.—I don't think I differ materially on the general principle stated. The issues and verdict must be taken as conclusive, but I am not so clear that we must not look at the summons, beyond which the verdict cannot go. First, in regard to the fishing, it is a right of property, but the drawing of nets and mooring boats is a servitude on the adjoining lands, in which the pursuer has no right of property. As to the extent of the right of fishing, if the fact be, that though the pursuer has had the right without limitation, yet if there are only certain points where he could exercise it,—if he gets that, he gets all he is entitled to; and it would be in *emulationem vicini* were he to pretend to keep other points open, where clearly he could do so to no profitable purpose. I don't agree with the interlocutor in restricting his right to draw nets only to Craighead. As to the second issue,—if the foot-road means a public foot-path unconnected with the fishings, it is true that we cannot shut it up, but we may regulate it so as to be as little burdensome to the servient tenement as possible. We may shift it (Kilkerran), if we do it so as to be equally good, and in the line. As to the cart-road, I think the pursuer gets enough if he gets the road proposed in the report and interlocutor.

Lord Meadowbank.—I concur with the Lord Justice-Clerk in thinking the foot-path public, and not limited to the fishings; and I don't know any authority for holding that this Court can alter such a foot-path.

Lord Medwyn.—The summons concludes for the use of this foot-path as a servitude, for the use of the pursuer and his tenants, and the occupiers of his lands.

The Court pronounced the following interlocutor:

"Recal the interlocutor complained of: Find that the obstruction caused to the right of fishing for salmon, with the right to moor boats, and draw nets on, opposite, or adjacent to the lands of the defender, by the operations of the defender, must be removed, and that these operations must be altered or

done away, so far as they cause any obstruction to the right of fishing, and the accessories thereof, as established by the general terms of the verdict: Find that the foot-road from Newport to Ferry-port-on-Craig, which the verdict finds was wrongfully shut up, must be again opened, and cannot be limited, in any part of the way from Newport to Craighead Bay, to passage along the top of the sea-wall; and with these findings remit to the Sheriff of Fife to inspect the ground, and to report in what way he would propose to give full effect to the verdict of the jury, and this judgment of the Court, without regard to any other matter or procedure in the cause,—the said Sheriff to have in view, that the pursuer is entitled to have access at all times of the tide along the shore or rocks; and also that if such access from Craighead Bay to Drybraehole is made sufficient, safe, and convenient for foot passengers, on the outside of any bulwark or wall which the defender may construct, the same may form the foot-road along that part of the defender's grounds: *Quoad ultra*, find that the pursuer is entitled to have a cart-road from Newport to Drybraehole, through the defender's lands; but in respect of the special terms of the issue and verdict as to this road, Find that the pursuer's right is sufficiently provided for by the plan of a cart-road delineated on the sketch, No. 2, by Mr Buchanan, from the turnpike down to the shore, to be executed and provided for him at the expense of the defender; and having considered the reclaiming note for the defender, refuse the same."

Lord Ordinary, Jeffrey.—*Act. Forsyth, Robertson; James Adam, S.S.C., Agent.*—*Alt. Anderson; George Lyon, W.S., Agent.*—*F. Clerk.*—[J.W.]

2d December 1841.

FIRST DIVISION.—(H. B.)

No. 34.—MRS THOMAS WATMORE, Suspendor and Pursuer, v. THOMAS BURNS, Charger and Defender.

Arbitration—Judicial Reference—Process—Observed by a majority of the Court, that the award of a judicial referee has the privileges of a decree-arbitral, and cannot be opened up on the ground of error.

In conjoined processes of suspension and count and reckoning, after a protracted litigation it was agreed "to refer the whole points at issue between the parties to Thomas Scott, Esq., accountant in Edinburgh, suggested by the defender, reserving only the question of expenses to be decided by the Lord Ordinary or the Court." The Lord Ordinary "interponed his authority to the judicial referee contained in the within minute, and remitted to the judicial referee there named to consider the points at issue between the parties and to report." Before the report was lodged, Mrs Watmore's husband (the original pursuer) died, and an objection was taken, that in consequence of the death, the reference, like an arbitration, had fallen. This objection having been repelled both by the Lord Ordinary and the Inner-House, the referee lodged his report, and the Lord Ordinary gave judgment in terms of it. Mrs Watmore reclaimed, on the ground that she had not been heard before the judgment was pronounced; and the Court remitted to the Lord Ordinary to hear parties "on the terms and import of the judicial award." Thereafter, his Lordship pronounced the following interlocutor:

"17th July 1841.—Having heard counsel for the parties upon the terms and import of the judicial award, and having read and considered said award, of new interpones his authority to the award and report of the judicial referee; and in the process of suspension, in terms of said judicial award, finds the letters and charge orderly proceeded to the extent of £99. 9s. 11d. Sterling, being the balance found due to the charger by

the judicial referee as at 11th November 1838, with interest from that date till payment, and decerns,—it being understood, that in terms of said report, the suspender must relieve Mr Burns of his responsibility for the bond for £800, mentioned in said judicial award: And in process of count and reckoning, also in terms of said judicial award, assoilzies the defender from the whole conclusions of the summons, and decerns: Farther, appoints parties to be ready to debate on the question of expenses at next calling, as reserved in the minute of reference, to be disposed of by the Lord Ordinary."

Mrs Watmore reclaimed, and prayed the Court to find "that the report of the accountant does not exhaust the reference, and is contrary to law." At the advising she *pleaded* in support of the note, that the defender having, for the alleged purpose of operating his relief, taken possession of a farm held in lease by her husband, he was liable, in terms of her first plea in law, "not only in the value of the lease," but also "in compensation for the loss of the profits of the farm." The referee, however, had refused to allow these profits, and had merely charged the defender with the estimated rent. By so doing he had failed either to exhaust the reference, or to decide according to law.

Lord President.—I can find no difficulty here. What objections are they which have been stated to the report of the referee? They are only to the merits. They regard the accuracy of the report. It is said he did not take this or that into view. But he did proceed, after the most deliberate consideration, to ascertain what was due to the defender in 1827,—to set against that the value of the lease, and to bring out in the defender's favour a balance of £99. I admit that this is an action of count and reckoning; but was there not a judicial reference of the action? The referee makes this report, and it is impeached on no other ground than the merits. I see no principle on which we can deal with the report in the way proposed by the pursuer. We cannot open it up. I therefore think that the interlocutor should be adhered to.

Lord Gillies.—I concur in the conclusion to which your Lordship has come, on this ground, that I do not think any sufficient objection has been stated to the report. But must we now treat this as a decree-arbitral? It is the report of a judicial referee. We cannot touch a decree-arbitral. It is different with a referee's report. A reference does not take the case out of Court. It is a mere step of process. But I think no sufficient objection has been stated to the report. I do not believe the claimer has sustained any loss by the course taken.

Lord Mackenzie.—I concur with your Lordships. I doubt whether the objection, even if it could be competently entertained, is a good one. The summons does not conclude for the actual profits of the farm (this would have been very unreasonable), but for a sum for the loss of the profits. That is a reasonable conclusion, and I do not know that a calculation of a fair subrent is an improper mode of ascertaining what should have been the consideration. I see no room therefore for the objection. But suppose that the report is inaccurate in this respect, I do not think it can be opened up. There I differ from Lord Gillies. I think a judicial reference is an arbitration, and that the result of the award of the referee, though it may be in form different from a decree-arbitral, cannot be opened up on the ground of error. We cannot inquire into the referee's report as into that of an accountant, which we may correct in so far as in any way erroneous. Though the referee should have gone wrong on evidence of fact or in law, still his decision is final, provided it be upon the matter referred to him. Here the amount due by the one party or the other was referred, and I do not think we can open up the report.

Lord Gillies.—If it were an arbitration, it must have fallen by the death of the party.

Lord Mackenzie.—In that respect, indeed, it differs from an ordinary arbitration, for it is not essential to a submission that it shall fall by the death of the party; but it agrees in this, that the decree does not stand subject to the review of the Court.

I do not however think the objection a good one, even though it were competently stated.

Lord Fullerton.—I rather agree with Lord Mackenzie as to the effect of the report of a judicial referee. And indeed the question was so treated by the pursuer's counsel, who objected to the report only on the ground that it did not exhaust the reference. I see no foundation for the objection. For debiting the defender with the estimated annual value of the lease, is just the way which the reporter takes of extinguishing the balance in his favour. And I may remark that it is a fair enough way. The stocking of the farm is placed to the defender's debit, and I do not think the reporter could justly have found him liable in the whole profits of a farm which was cultivated with his own stock. It was right that he should take merely what was calculated to be a fair subrent. At any rate, this is not such an error as to entitle us to open up the report.

The Court *adhered*.

Lord Ordinary, Cockburn.—*For Reclaimer, Penney, Rhind; J. Davidson, S.S.C., Agent.*—*For Respondent, More; W. and D. Allester, W.S., Agents.*—[H.B.]

3d December 1841.

SECOND DIVISION.—(J. W.)

NO. 35.—HENRY MONTEITH, Pursuer, v. JOHN PATTISON and OTHERS, Defenders.

Caution—Prescription, Septennial—Statute 1695, c. 5.—A B, by his daughter's marriage-contract, conveyed certain heritable properties in name of tocher, in favour of certain trustees. The contract contained no obligation to infest, or precept of sasine, but the party bound himself forthwith to grant a valid disposition with all necessary clauses. Having failed to fulfil his obligation, an action at the instance of the trustees was raised against him for enforcing it, and inhibition was used on the dependence. Sequestration supervened; and the cautioners for payment of his composition, in consideration of the action and inhibition being discharged, became bound with him in a bond for the sum of £1830 Sterling as an equivalent for the value of the properties conveyed in the contract. The cautioners bound themselves in the bond "as cautioners, sureties, and full debtors with and for the said A B;" and it was provided, "that the said principal sum shall be payable within seven years after the term of Martinmas 1808, and at farthest, on the term of Martinmas 1815." No demand for payment was made until 1827; and in an action of declarator at the instance of the surviving trustee of one of the cautioners, it was found that the cautionary obligation had been extinguished by the septennial prescription.

The present action was brought by the pursuer, Mr Monteith, as surviving trustee of the late Robert Thomson, senior, of Glasgow, for the purpose of having it declared by decree of the Court, that a cautionary obligation, in which Mr Thomson was bound, has been extinguished by force of the septennial prescription.

The circumstances giving rise to the cautionary obligation in question are these:—

In the year 1803, John Pattison, junior, merchant in Glasgow, was married to Rebecca Monteith, daughter of John Monteith, manufacturer there. A marriage-contract was executed on 2d April 1803. By this contract, John Monteith, the father of the lady, conveyed, "in name of tocher to his said daughter," in favour of certain parties as trustees, certain heritable properties therein specially described. The purpose of the trust was, that the property should be held for the benefit of the spouses in liferent, and of their children in fee. The deed also provided as follows:

"And further, the said John Monteith hereby binds and obliges him, and his heirs and successors, to pay to the said Rebecca

Monteith and John Pattison, junior, her promised husband, such a sum or sums of money as, with the value of the foresaid houses and cellars, which are hereby fixed and ascertained to be £1500 Sterling, shall be equal in amount and value to her just and equal share of the whole, or of the sum total of the sums and provisions made, given, and provided, or to be made, given, or provided by the said John Monteith, in favour of his daughters; that is to say, in case the said John Monteith shall make provisions in favour of five daughters, he shall make provision to the said Rebecca Monteith and her promised husband, equal to one-fifth part of the said whole provisions, and so in proportion, declaring that the provisions made by the said John Monteith in favour of the issue or husbands of any of his other daughters, shall be reckoned the same as made in favour of his daughters themselves; and further, declaring that in reckoning the amount of the said provisions, no interest shall be calculated on the foresaid sum of £1500 Sterling, or on any of the sums advanced by the said John Monteith, to or for any of his daughters during his own lifetime."

There was no obligation to infest, or precept of sasine, contained in this contract. But the deed declared, that

"the said John Monteith obliges himself, his heirs and successors, forthwith to grant, execute, and deliver a valid, ample, and formal disposition of the premises, in the terms aforesaid, containing all clauses necessary and requisite."

Mr Monteith could not fulfil the obligation in the contract, to convey the houses themselves, in consequence of having granted prior rights to others. Accordingly, in 1804, the trustees under the marriage-contract raised an action against Mr Monteith, reciting the obligations undertaken by him in that contract, and concluding that he should be decerned and ordained to convey and make over in terms thereof, and failing his doing so,

"either to make payment to the said trustees of the sum which had been fixed and ascertained to be the worth and value of the said subjects, to be laid out by them on good and sufficient heritable property, for the purposes of the trust, or to lay out and invest the sum himself in such heritable property, at the sight and to the satisfaction of the said trustees, in whose names the titles thereto should be made up and taken in trust for the purposes therein specified."

On the dependence of this action the trustees used inhibition, which was completed on 18th September 1804. In 1807, Mr Monteith found it necessary to apply for sequestration of his estates; and in the course of the same year he was discharged under a composition-contract for 7s. 6d. in the pound. The pursuer and Mr Thomson became cautioners for the payment of the composition.

The trustees under the marriage-contract neither demanded nor received payment of any of the instalments, but trusted to their security. The last instalment under the composition-contract became due on 22d October 1808; and the composition being thus paid, it was proposed to arrange the claim, and get rid of the action and diligence of the defenders. The result was the granting of the bond which is the subject-matter of the present action. It is dated 8th December 1808, and is for the sum of £1830, viz., the sum of £1500, fixed by the marriage-contract as the value of the houses undertaken to be conveyed, and interest thereon to Whitsunday 1807, deducting the terms' rents which had been drawn by the defender. The bond begins by narrating the marriage-contract of 1803, and the circumstance of an action having been raised for enforcing the contract, and of inhibition having been

used on the dependence of that action,—both of which it was provided were now to be discharged. The obligatory clause was as follows:

“ Therefore I, John Monteith, as principal, and we, Henry Monteith of Monkland, and Robert Thomson, senior, manufacturer in Glasgow, as cautioners, sureties, and full debtors with and for the said John Monteith, have bound and obliged us, as we hereby do bind and oblige us, both principal and cautioners, and our heirs, executors and successors whomsoever, all jointly and severally, renouncing the benefit of discussion, to content and pay to the said John Pattison, junior, &c., as trustees and fiduciaries, &c., all and whole the principal sum of £1830 Sterling, as an equivalent for the value of said houses and interest on the same, from the term of Whitsunday 1808, with the lawful interest of the said accumulated principal sum of £1830 Sterling, from and after the said term of Whitsunday 1808, until the term of payment after written; and which interest shall be payable at the term of Whitsunday yearly, beginning at the term of Whitsunday 1809, and so on until payment of the said principal sum; and the said principal sum shall be payable within seven years after the term of Martinmas 1808, and, at furthest, on the term of Martinmas 1815, without delay, with one-fifth part of said principal sum further in name of liquidate damages, expenses and penalty, in case of failure, attour the said principal sum itself, and the lawful interest thereof aforesaid, and also the lawful interest thereof from and after the said term of payment, until payment.”

When the bond became payable the money was not called up; but after a second bankruptcy of Mr Monteith in 1827, an action was brought against the present pursuer personally. This action was taken out of Court by a judicial reference, and decree was pronounced against him for one-half of the principal sum, with interest. The present declarator was brought by him, as the only surviving trustee under the family settlement of his co-cautioner, Mr Thomson, and concluded to have it found that Mr Thomson's obligation had been extinguished by the septennial prescription.

It was *pleaded* in defence—1. The bond libelled did not fall under the septennial prescription, in respect it was not an original bond for borrowed money, or for any obligation thereby constituted for the first time, but was corroborative of, and subsidiary to, an obligation previously undertaken by the principal debtor in the marriage-contract, and for which action had been raised, and diligence in security had been used. 2. The bond libelled on did not fall under the septennial prescription, in respect it was granted, and bears *in gremio* to have been granted in consideration of the diligence of inhibition used on a depending action being discharged, and the cautioners, therefore, were already bound as cautioners in the recal of an inhibition. 3. The cautioners in the bond were not entitled to the benefit of the septennial prescription, because it was not, *quoad* them, a pure gratuitous cautionary obligation, in respect that they were already bound as cautioners in the principal debtor's sequestration for 7s. 6d. in the pound of the claim, and obtained a discharge of the inhibition which had affected their debtors' heritable subjects.

The Lord Ordinary pronounced the following interlocutor:

“ 17th July 1840.—The Lord Ordinary having heard the counsel for the parties on the closed record and whole process, and made *avizandum*, In respect that the bond now in question is (in the precise terms of the Act 1695, cap. 5,) ‘a bond for a sum of money,’ in which the pursuer is expressly bound as cautioner ‘for and with the principal debtor,’ and that the said

bond is the first bond or contract ‘for a sum of money’ granted to the creditor by either of those parties, repels the defences, and finds, declares, and decerns, in terms of the conclusions of the libel; finds expenses due; allows an account thereof to be given in, and remits to the auditor for his taxation and report.

“ *Note.*—The Lord Ordinary can find no sufficient authority for holding that the benefit of the Statute is confined to cautioners who bind themselves with the principal in *bonds for borrowed money*, and thinks that such a limitation would be inconsistent with the precise terms in which it is expressed. The defender, indeed, seemed to rely much more upon his second objection, that this was truly a *corroborative* bond, or mere renewal, in so far as the principal was concerned, of his original obligation in the marriage-contract; but the Lord Ordinary cannot so consider it. The essential difference is, that that obligation was strictly *ad factum præstandum*, or to convey and settle certain specific houses; whereas this is to pay a certain sum of money at a certain term. It is a mistake to say that there is any *alternative* obligation to pay money in the marriage-contract. The only proper obligation in that contract is, to convey and settle the houses; and their reference to the value which occurs in another part of that deed, is not at all of the nature of an alternative obligation. If the party had remained solvent, he could not have compelled the intended disponees to have accepted that value instead of the houses themselves, nor could they have obliged him to pay it. There can be no doubt, accordingly, that if cautioners had been bound along with the principal in that original obligation to convey houses, they would not have had the benefit of the Statute, as not being concerned in a *money* obligation; and it seems to follow on the same principle, that the pursuer, as cautioner in the first *money* obligation, must have had that benefit to which he could not possibly have been entitled by any earlier binding for or with the principal. That the new money obligation is a *surrogatum* or equivalent for the former *ad factum præstandum*, would seem to be of no importance in such a question, as will appear, it is thought, very plainly by merely reversing the case which has occurred. Suppose the first obligation had been for a sum of money, but without cautioners, and that, *ex intervallo*, there had been substituted for this, and expressly as a *surrogatum* or equivalent, an obligation with cautioners to make over certain houses, or to do any other thing, could it possibly be maintained that such cautioners, though *ad factum præstandum* only, should yet be within the Statute, because the obligation to which they acceded was a *surrogatum*, for one which would have entitled them to that benefit if they had acceded to it? As to the notion that the bond should be excluded from the benefit of the Statute, because it was granted, in part, for the discharge of an action for implement of the marriage-contract, and of an inhibition raised on that dependence, and was, therefore, it was said, a *quasi* judicial bond, it seems enough to say that it bears expressly to have been granted in place of the obligation in the marriage-contract, and that the action for implement of that contract necessarily fell (with all its dependent diligence) by its acceptance.

“ Neither does it seem to afford any better ground for excluding the operation of the Statute, that the interference of the cautioners may not have been purely gratuitous, and that they might have ends of their own to answer by their principal getting rid of the specific obligation *ad factum præstandum* in the contract. In very many, and probably in most cases, where cautioners join, even in original bonds for money instantly borrowed and advanced, they have ends to answer, and advantages to gain for themselves, by thus contributing to supply the wants of the principal. But if they be truly cautioners only, and do not themselves receive the advance on their own account, they are clearly within the Statute. In the present case, the cautioners certainly were not previously liable for the £1830 which they then engaged to see paid by the principal, and had not received any of the considerations for which either that sum, or the conveyance of the houses, had been engaged for by that person. The only thing which at first gave rise to some hesitation in the mind of the Lord Ordinary was, that they were previously bound, as cautioners, under the principal's composition-contract for seven shillings per pound of his debts. But upon consideration, the answer seems to be conclusive

that the bond evidently had no reference to that cautionary obligation; that it was not released nor suspended by the bond being granted, and that it may accordingly be still enforced (if it is not yet implemented) against the pursuer, after he has been relieved, by the preceding interlocutor, of his specific obligation to pay £1830 on or before the term of Martinmas 1815."

The defenders reclaimed; and on 6th February 1841, the Court, at the desire of both parties, appointed them to state their arguments in revised cases.

Pleaded for the pursuer—

That the obligation in the contract is plainly an obligation *ad factum præstandum*, or to convey the houses themselves. The bond of 1808 was therefore plainly not a corroboration, but an innovation of the marriage-contract. The parties themselves had it in view that the septennial prescription should apply, so far as the obligation of the cautioners was concerned. For it is impossible, on any other supposition, to account for the reference contained in the bond to a period of seven years, as the period beyond which payment of the bond should not be postponed. The pursuer, and the late Mr Thomson, were expressly bound as cautioners on the face of the bond, and it is necessary for the defenders to bring their case under one or other of the exceptions to the general rule of the Statute. Mr Erskine gives a summary of these exceptions (B. III. t. 7, § 23):—"This Act," he says, "being correctory of our former law, hath received a most limited interpretation. Hence, a bond granted by several persons, conjunctly and severally, though it contained a clause of mutual relief, was adjudged not to fall within the Statute, because the Act was to be understood of those bonds only in which one or more of the co-principals became bound to relieve all the other obligants. Nor bonds of corroboration, because in these the granter is neither bound as cautioner, nor has a clause of relief in his favour,—he being entitled to relief only *ex lege*. In the same manner, one who had, by a missive letter, promised to pay a debt due by another, was found not entitled to the benefit of the Act, because the missive was in effect an obligation corroborating the debt. The Act itself seems to exclude all judicial cautioners, as, in suspensions, cautioners for the faithful discharge of an office, and cautioners *ad factum præstandum*, because the Act is confined to persons engaged for others in bonds or contracts for sums of money. Neither does it extend to the relief competent to cautioners against one another, which, like other rights not limited, subsist for forty years." The Statute is not limited to bonds for borrowed money, but applies to all bonds and contracts whatever which involve money obligations. Even where an obligation *ad factum præstandum* itself merges into a money obligation, there the Statute is held to apply. It is contended that the bond must be held in the same predicament as if it had been a judicial bond granted in Court for the loosing of inhibition; but in point of fact, it was an extrajudicial bond. And the effect of the inhibition was extinguished by the supervening sequestration. That the obligation was undertaken by the cautioners for some benefit derived to themselves is not true; but even if it were, this is no relevant ground for excluding the application of the Statute. It is said that there was an antecedent obligation upon the principal debtor, and therefore that the bond falls under the exception of bonds of corroboration; but the bond was not a corroboration: it was an innovation of the original debt. There are two ways in which a cautioner may interpose. The one is by his becoming a co-obligant along with the principal debtor in one common deed, to which they both are parties. The other is by his afterwards interposing his suretieship in a separate and subsequent deed. In the first case the Statute applies, because its express terms bear reference to cautioners "binding and engaging for and with another, conjunctly and severally, in a bond or contract for a sum of money." In the second case, although the party is not the less a cautioner than in the other, yet still he is not a cautioner interposing according to the literal terms of the Statute. The principle which pervades the whole of the decisions is, that a party, however truly cautioner, has not the benefit of the prescription if he is not bound in the same deed with the principal

obligant, but becomes cautioner by a subsequent obligation; and this for the technical reason, that the words of the Statute, which are to be strictly interpreted, only comprehend the case of cautioners bound in the same deed with the primary debtor. But there is no trace of its being made the ground of the exception, that the obligation was, with reference to the principal debtor himself, not an original but renewed obligation. The great majority of cases in which cautionary obligations intervene, are not cases of original debts, but of antecedent obligations; and it is generally for the purpose of procuring indulgence in discharging these, that the additional security of the cautioner is granted.

Pleaded by the defenders—

In the application of the Statute two rules are admitted: *First*, It is fixed by all authorities, that "this Act," to use the words of Mr Erskine, "being correctory of our former law, hath received a most limited interpretation." *Second*, Although the Statute speaks generally of cautioners bound in "bonds and contracts for sums of money," it is admitted that it does not comprehend all bonds and contracts for sums of money, but that a bond, of which this is the character, may nevertheless be excluded from the benefit of the Act. The object of the Statute was to give relief to cautioners interposing their credit to enable others to raise funds, in a transaction by which the creditor, at one and the same time, advanced his money, and received the obligation of his debtor and his cautioner; and therefore it has always been held to apply only to bonds for borrowed money. But however purely the obligation may be a money obligation, the cautioner is to have the benefit of the Statute only, "providing that he have either a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at his receiving of the bond." This implies and means a transaction in which the intended creditor has the power of refusing to become a creditor, if a proposed co-obligant shall be tendered only as a cautioner. The point of time to be regarded, is that at which the creditor can make his choice whether he will or will not advance his money. But this element cannot possibly be present except in an original transaction of borrowing and lending, or in the original constitution of a debit and credit in some shape or other. A cautioner interfering for a party who is already bound, never can be in the case of the Statute. His obligation is only a corroborative security to benefit a debtor who is already bound, and these are not the cautioners whom the Act of Parliament had in view. Under the marriage-contract, Mr Monteith was debtor in payment of the value of these houses, four years before this bond was granted. Not only were the trustees the creditors in the debt, long before it assumed this form, but it had been made the subject of action, and was secured by diligence, which the cautioners recognised to be good and binding, and bargained should be discharged. The bond itself expressly recognises it as a debt which had been due, and bearing interest, from Martinmas 1803 downwards; the cautioners acknowledge it to have been so; they consent that the arrears of interest on the £1500 shall be accumulated into a principal sum, and added to the principal sum of £1500, and that the whole shall carry interest from the date of the bond. It is maintained that the exception of corroborative securities extends only to cases where—the principal debtor having been previously bound without a cautioner—the cautioner subsequently becomes bound by a separate deed in which the principal does not renew his own obligation: But this is admitting that a cautioner, to have the benefit of the Statute, must be a person who was bound as such in the original constitution of the obligation. The principle which lies at the bottom of the exclusion, is not merely that the subsequent cautioner is not bound "for and with another" in the same deed, but a much broader principle, viz., that such a cautioner is not a party "at the time of delivering the bond,"—is not a party to the constitution of an original obligation,—the only state of things that the Statute contemplated. Independently of this, the bond in question was in fact and substance a cautionary obligation in a marriage-contract, and it is undoubted that cautioners for the implement of conditions in contracts of marriage, have uniformly been excluded from the benefit of the Statute, whether the obligation was to settle land or to pay money. It is said the bond was an innovation of the marriage-

contract. But innovation is a voluntary contract, by which a creditor, having it in his power to proceed against one debtor, and enforce one obligation, voluntarily accepts a different debtor, and a different obligation. No such thing took place here. The defenders had it not in their power to compel a conveyance of the houses; that had been impossible from the beginning. They did not therefore voluntarily exchange that power for something else, and of a different kind, in which case there might have been some pretext for the plea of innovation. Neither was there any novation as to the debtor, for John Monteith was the party bound from the beginning. Farther, the bond bears expressly to have been granted in consideration of diligence against the debtor having been recalled and discharged. And there cannot be a doubt, that bonds of caution granted in order to procure the recal of legal diligence, have always been held to be excluded from the benefit of the Statute,—whether it be caution in a suspension, or in losing of arrestment, or recal of inhibition. That which excludes such bonds from the benefit of the Statute, is not the indifferent circumstance of their being judicial bonds; they are so excluded on account of one common character, which necessarily belongs to them all, viz., that from their very nature, the cautioner does not interpose in the original creation of the relation of creditor and debtor, but becomes a corroborative security for implement of an obligation which already exists, or is held to exist. *Lastly*, The bond was not, on the part of the cautioners, gratuitous, but one for which they themselves received value; and it does not appear to be susceptible of doubt, that when the Act of Parliament was limiting the risks to which men may expose themselves by becoming bound for the debts of others, it had in view only those whose obligation, as in a question between them and the creditor, was entirely gratuitous.

At advising,

Lord Moncreiff.—I am of opinion that the interlocutor is right. When a party is bound expressly as cautioner in the bond, a clause of relief in the bond, or a bond of relief apart, personally intimated, is not required. The pursuer, therefore, is entitled to relief under the Statute. In the *first* place, I see no authority for limiting the application of the Statute to bonds for borrowed money: these are merely general terms. A man borrows money, when in certain circumstances he keeps it, just as much as when he receives money at the granting of his bond. Suppose an executor is bound to pay a legacy, but instead of doing so, grants his bond, would not the cautioner in the bond have the benefit of the Act? Or, suppose a factor, in settling accounts with his principal, grants a bond for a fixed sum as the balance, the cautioner would be under the Statute: yet these are bonds granted for pre-existing obligations. In the present case, the bond is the first money-obligation even of the principal; it is a new and substantive obligation. It is said that the point of time to be regarded, is that at which the creditor can make his choice whether he will or will not advance his money. But I don't think an onerous consideration is necessary to an application of the Statute. Suppose the principal had granted the bond gratuitously to a near relation, having cautioners bound with and for him, would they not be free after the lapse of the seven years? The decisions in *Balvaird* and *Monro* show that the Statute is not confined to cases of original obligations merely. The second objection stated is, that the Act does not apply to bonds of corroboration; but that rule depends on the cautioner not being bound with and for the principal. *Secondly*, This is not a bond of corroboration in any sense of the term. The first obligation was discharged, and it is impossible to corroborate what does not exist. In the *third* place, It is said that there is an exception from the Statute, in the case of cautioners in marriage-contracts, because in these the term of payment is not definite. But this is not a cautionary obligation in a marriage-contract. *Thomson* had nothing to do with the marriage-contract, or with anything but his own bond. In the *fourth* place, It is said the bond falls under the exception of judicial cautionary. But the inhibition was discharged by supervening sequestration, according to the case of *Holmes*. At all events, if the defenders took the bond in place of the inhibition, they took it subject to the septennial limitation, and it is their own fault if they did not enforce payment within the seven years. Besides,

they got a great deal better security than they could have had under their diligence. In the *fifth* place, It is said the cautioners had some interest in granting the bond; but there is no relevancy in this. The claim against them for payment of the composition is not *hujus loci*. The grounds of the exceptions stated by the defenders would render the Statute entirely nugatory; and all the decisions tend to show that the Court has already gone far enough in restraining its application.

Lord Meadowbank and *Lord Medwyn* concurred.

Lord Justice-Clerk.—The Act 1695 seems to have been somewhat misunderstood from the passage in *Erskine*, III. 7, § 23, where he says, that "this Act being correctory of our former law, hath received a most limited interpretation." Now, not one of the illustrations given by *Erskine* fall within the terms of the Statute. They are all beyond the Statute, and the Court could not enlarge it, so as to reach them. The person pleading the Statute must be within its terms, which are perfectly clear and specific, "that no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bond or contracts for any sums of money, shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution; and that whoever is bound for another, either as express cautioner, or as principal or co-principal, shall be understood to be a cautioner to have the benefit of this Act, provided that he have either a clause of relief in the bond, or a bond of relief apart, intimated personally to the creditor at his receiving of the bond." There is not an expression in the Statute susceptible of two meanings; and hitherto there is no case in which the Court has refused the benefit of the Act, which was not manifestly beyond its reach. As to the pleas urged by the defender, I agree with the opinion of *Lord Moncreiff*. The present case is clearly within the Statute, and we cannot deny the party the benefit of it.

The Court adhered with expenses.

Pursuer's Authorities.—*Holmes v. Reid*, 4th March 1829; 7 Sh. 535. *Ross*, 11th Dec. 1709; Dict. 11,014. *Douglas*, 20th Nov. 1792; Dict. 11,032 and 11,045. *Yuille*, 27th Nov. 1827; *Shaw*, VI. p. 137; House of Lords, 5 W. and S., p. 436. *Ersk. 3. 7, § 23*. *Monro v. Bain*, 22d July 1741; Dict. 11,017. *Elchies v. Caution*, No. 10. *Robertson v. M'Kinlay*, 3d Dec. 1736; Dict. 11,010. *Stewart v. Campbell*, July 1726; Dict. 11,010. *M'Ranken v. Schaw*, 4th February 1714; Dict. 11,034. *Muir v. Ferguson*, 17th January 1728; Dict. 11,014. *More v. Forbes*, 16th February 1710; Dict. 11,011. *Scott v. Rutherford*, 8th February 1715; Dict. 11,012. *Caves v. Spence*, 4th Dec. 1742; Dict. 11,020, 11,024. *Gordon v. Tyrie*, 16th Nov. 1748; Dict. 11,025. *Hogg and Company v. Holden*, 9th July 1765; Dict. 11,029. *Tait v. Wilson*, 8th Dec. 1836; *Shaw*, XV. p. 221. *Balvaird v. Watson*, 18th Jan. 1709; Dict. 11,005.

Defenders' Authorities.—*Balvaird v. Watson*, 18th Jan. 1709; Dict. 11,005, 11,006. *Millers v. Scott*, Dict. 11,027; *Bankton*, II. 12, 30; *Bell*, p. 357. *Caves v. Spence*, 1742; Dict. 11,021. *Lady Henrietta Gordon v. Tyrie*; Dict. 11,026. *Stewart v. Campbell*; Dict. 11,010. *Stewart v. Patrick*, 23d Feb. 1813; F. C.

Lord Ordinary, Jeffrey.—*Act. Solicitor-General (M'Neill)*, *Penney*; *Gibson-Craigs*, *Dalziel* and *Brodie*, W.S., *Agents*.—*Alt. Rutherford*, *Russell*; W., A. G., and R. Ellis, W.S., *Agents*.—F. Clerk.—[J.W.]

3d December 1841.

SECOND DIVISION.—(J.W.)

No. 36.—ROBERTSON v. MASON.

Proof.—Process—Clerk, Subscription of—Oath *de fideli*—A proof having been led before one of the Sheriff-Commissary, it was objected, 1st, that the report did not bear that the oath *de fideli* had been administered to the clerk; and, 2d, that he did not sign the proof along with the commissioner. Both objections were repelled.

This was a case reported verbally to the Court by Lord Cockburn, and involved two objections to the report of a proof by Mr Jardine, one of the Commissary Sheriffs—1st, That the report did not bear that the oath *de fideli* had been administered to the clerk; and, 2d, That he did not sign the proof along with the commissioner.

Robertson.—As to the first objection, it is not a nullity. The Sheriff is a statutory officer, and is not bound to employ any particular clerk, or any clerk at all. Under the former practice, the reports generally bore that the clerks were sworn, although, in point of fact, they very seldom were so. The Statute makes no reference to clerks whatever. In regard to the second objection—In the case of Macfun, 1836, the proof was not signed by the commissioner, and the Court allowed the commissioner to call the witnesses before him and read over to them their depositions, and then authenticate the proof.

Paterson.—The proof has not been regularly taken, and the clerk does not sign along with the commissioner. If the report did not bear that the witnesses had been sworn, the omission would be fatal; and in the case of Baxter (3 Shaw), where the proof was not signed by the commissioner, the Court remitted to take the oath *de novo*.

Lord Justice-Clerk.—The want of the signature of the commissioner to the proof cannot be known till after it is out of his hands; but here the objector was present, and might, and ought to have objected to the oath *de fideli* not being administered to the clerk.

Lord Meadowbank.—The clerk having been appointed, the presumption is, that every thing was done rightly. It is said he did not sign the proof; but he may do so now.

Lord Medwyn.—There is nothing on record as to the appointment of the clerk; but being appointed, we are to presume that he was appointed regularly. As to the want of his subscription, it is of no consequence. It is necessary that the Commissary should subscribe; and had he neglected to do so, he might still authenticate the proof.

Lord Moncreiff.—The more regular practice is, to enter on the record that the oath *de fideli* was administered to the clerk; but to say that the omission of this implies a nullity, is a very different matter. If, when appointed, the party was present, and did not object, it is too late to go back now.

Lord Justice-Clerk.—The objection to the want of the clerk's subscription is groundless. If the proper officer sign the proof, that is sufficient. As to the oath *de fideli* not being administered, I go wholly upon the ground that, the parties being present, and the objection not stated at the time, it is incompetent to state it now.

Lord Ordinary, Cockburn.—*Act. Robertson.*—*Alt. Paterson.*—[J.W.]

4th December 1841.

SECOND DIVISION.—(J.W.)

No. 37.—GEORGE MELVIN, *Suspender*, v. THE PRESIDENT and GOVERNORS of GORDON'S HOSPITAL, Respondents.

Public Officer.—Schoolmaster.—The master of a private charity, incorporated by royal charter, had the office conferred upon him only from year to year, or during pleasure—Held that the governors might dispense with his services at the annual election of office-bearers.

In 1729, Robert Gordon, merchant in Aberdeen, executed a deed of mortification of his whole property in favour of the Provost, Bailies, and Town-council of Aberdeen, and the four town's ministers, and their successors in office, for ever, for erecting and maintaining an hospital, under the title of Robert Gordon's Hospital, for entertaining and educating indigent male children and male grandchildren of decayed merchants and brethren of the guild of the burgh. In this deed he appointed certain rules and statutes to be observed in the management of the hospital. By the second he provides, that

"the saids Governors shall have power to make farther by-laws and rules for the better administration of the said hospital and affairs thereof, the same being noways derogatory to what is declared to be fundamental, nor to the rules and statutes now adjusted, (except the same shall be altered in manner after prescribed.)"

In 1772, the Governors were incorporated by royal charter. The 9th section of the original deed regulates the election of the master. It enumerates various occasions on which the Governors are specially enjoined to depose or censure him; and it farther provides, that if the master shall marry, his office shall *ipso facto* become void. The deed, however, beyond this, contains no limitation of the discretion of the Governors in regulating the tenure of the office as may appear to them best for the interests of the institution. In particular, it does not confer on the master any right to hold his office *ad vitam aut culpam*.

The first master appointed to the institution was Mr George Abercrombie, who was elected in 1750. In 1790, Mr Anderson, then master of the hospital, resigned. Before electing his successor, the minutes bear, that the President and Governors resolved unanimously that a master shall be elected for one year only; thereafter they unanimously elected Mr Alexander Thom to be master of the hospital for one year. At the annual general meeting in November 1790, the President and Governors continued Mr Alexander Thom as master of the hospital till the third Monday of November next year.

At a meeting on the 4th April 1791, it was moved, "that it be clearly established by regulation, that in future the master, schoolmasters and housekeeper, as well as all the other office-bearers of the hospital, be elected annually on the third Monday of November, and that for one year only. The same was for some time deliberated upon, and unanimously agreed to, and ordered to be under consideration of the two next general meetings."

Accordingly, on the 21st of November 1791,

"the President and Governors having taken under their consideration the motion made on the 4th of April last, and which was then unanimously agreed to, and was again under consideration of the old Governors this forenoon, and then unanimously agreed to, and having now fully deliberated thereupon, they

unanimously statute and enact, that in future the master, school-masters and housekeeper, as well as the other office-bearers of the hospital, be elected upon the third Monday of November yearly, and that for one year only."

This form of re-election was observed at each annual general meeting from 1791 down to the date of the suspender's appointment, on the 3d September 1832. The minute of election bears, that

"the President and Governors did, and hereby do, name and elect the said Mr George Melvin, as having the majority of votes, to be master of the hospital until the third Monday of November next, when the annual election of office-bearers, on the members of the new council coming in, takes place."

On the third Monday of November, the suspender was continued, along with the other office-bearers, till the third Monday of November following. In November 1833, in consequence of some investigations at that time pending, which were not concluded until the December following, the office-bearers were continued only during the pleasure of the President and Governors; and this form of re-election has been observed annually ever since.

From 1833 to 1841 the Governors found it necessary to institute several inquiries into the discipline of the house, and on the 16th of August last, it was resolved to dispense with the services of the suspender and the two resident teachers in the ensuing November. Intimation was accordingly given to the suspender, and in consequence the present note of suspension and interdict was presented.

Pleaded for the suspender—

1. That by the common law of the country, and apart from the provisions in the deed of mortification, the master of a great educational establishment incorporated by royal charter like Gordon's Hospital, holds his office by law on a permanent footing, and is only removable on reasonable cause shown to the Court for his dismissal: *Adam v. the Directors of the Ayr Academy*, July 7, 1815, reported in note to *Gibson v. Directors of the Tain Academy*, Shaw, 14, p. 710; *Mason, Shaw* 14, p. 343; *Clark v. the Directors of the Irvine Academy*, November 30, 1838, Shaw, 9, p. 97. 2. Farther, it has been decided, and is the law of the country, that even if the terms of his appointment bore that he was to be removable at pleasure, such a condition is illegal, and contrary to public expediency, and would be held *pro non scripto*; reasonable cause of dismissal being equally required in both cases: *Adam v. the Directors of the Ayr Academy*, July 7, 1815. 3. In the present case, the deed of mortification, in addition to the ordinary presumption of law, makes the appointment of the master a permanent one, by the clear distinction which pervades its provisions in regard to the inferior officers, &c., of the establishment, who are to hold their offices at the pleasure of the Governors, or who are declared removable when they think proper, and the case of the master, as to whose appointment there is no such provision, and as to whose removal it is declared that he may be deposed in certain specified cases of proven immorality, negligence, or incompetency, and that only in a particular form and under certain qualifications. 4. The deed of mortification prescribes and contemplates no annual re-election of the master; the reference in the section to the election of the treasurer being limited to the manner of the original election, i. e., by a simple majority as distinguished from any other proportion of votes. 5. But even if, by usage, the form of an annual election has come to be matter of practice, the situation of the master is still a permanent one, and he is entitled to be re-elected, except reasonable *culpa* can be shown against him, in terms of section 9 of the deed of mortification: *Kempt v. the Magistrates of Irvine*, Mor. 13,136. 6. The attempt to make the appointment of the suspender one to be held at the pleasure of the Governors, would have been equally contrary to the common law and to the deed of mortification and royal charter. But farther, no

such limitation being contained in the original appointment of the suspender, it was *ultra vires* of the Governors to alter the footing on which he had been appointed to the situation, or to declare, in prejudice of his vested right, that it was held to be at their pleasure only. 7. The Governors having attempted, under an erroneous view of their powers, to dismiss the suspender, expressly on the ground that they are entitled to do so at their own pleasure, and having neither proved that the suspender has been guilty of any of the offences which warrant deposition, in terms of the deed of foundation, nor even exhibited any charges against him, so as to give him an opportunity of investigating them and proving his innocence, ought to be interdicted from so doing; and it is irregular and incompetent for them, on the supposition that they have not the legal power to dismiss the suspender at pleasure, to come forward in Court with any charges against him which they have declined to state, when called upon to do so extrajudicially.

Pleaded for the respondents—

1. Under the original deed of mortification the founder did not confer on the master of the hospital any right to hold his office *ad vitam aut culpam*, nor did he in any degree limit or control the discretion of the Governors in regulating the tenure of the office as should seem to them best for the interests of the institution. 2. Even if the original deed of mortification had expressed an intention on the part of the founder that the master should hold *ad vitam aut culpam*, this regulation was validly altered, in terms of the powers contained in the deed of mortification and the royal charter, by the Statute passed in 1791, by which the President and Governors resolved that in future the office-bearers of the institution should be elected for a year only, and which has been uniformly adhered to ever since. 3. At all events, the suspender having been elected, in the first instance, only until the November following, and having been re-elected annually first for one year, and thereafter at the pleasure of the Governors, and having accepted the office, and continued to act under it in the full knowledge of all the conditions affecting it, the respondents were fully entitled to adopt the proceedings complained of, and the suspender cannot competently interdict them from filling up the office of master of the hospital in any way they may think proper on the 15th of November current. 4. By the common law of Scotland, a party holding the situation of the suspender is not a public officer, nor is there any presumption in law that he holds his office *ad vitam aut culpam*: *Gibson v. Directors of Tain Academy*, House of Lords, 2d March 1840, (*ante*, Vol. 13, p. 3.) 5. It is absolutely necessary, for the proper regulation of such institutions, that those having charge of them should have the power of changing the officers employed under them when they become convinced that their continuance is prejudicial; and it is sufficient in any view to warrant them in doing so, that there exist grounds which appear to them reasonable for rendering such proceedings necessary. 6. The prayer of the suspender being neither founded in fact or in law, and the subsisting interdict being highly prejudicial to the interests of the institution, the interdict ought to be recalled, and the note refused *simpliciter*.

The Lord Ordinary reported the cause to the Inner-House, and annexed to his interlocutor the following note:

"This is an important question to the parties; but after the Lord Chancellor's speech in moving judgment of affirmance in *Gibson v. Directors of the Tain Academy*, (1 Robinson's Ap. Ca. 16), there does not seem much difficulty as to the law of the case.

"It must now be taken for settled, that in private charities like the present, nothing either of the character or privilege of *public officer* attaches to a party in the suspender's situation;—and also, that no distinction is to be drawn in this respect from the mere circumstance that there has been obtained a charter of incorporation. So much, indeed, was conceded at the debate; the suspender admitting, in reference to the authority referred to, that he could no longer maintain the high ground which, while not yet aware of its import, he had taken in some of the pleas appended to the note of suspension.

" This then brings the case at once within the rule of Mason, 23d January 1836. In other words, it reduces the question to a mere ordinary question of *private contract* between master and servant. The terms of the contract may no doubt have been such as to give the suspender his office on a tenure *ad vitam aut culpam*. But on the other hand, it may equally have been such as to confer the office upon him only from year to year, or during pleasure. This raises a pure question of fact; for the moment the office ceases to command privilege as a public office, the notion upon which some of the older authorities rest, that it must be held *pactum illicitum* and *contra bonos mores* to bargain for a limited term of endurance, falls to the ground.

" Now, what was here the actual contract, is an element of the case which admits of no dispute. The suspender was, on 3d September 1832, elected 'to be master of the hospital until the third Monday of November next, when the annual election of office-bearers, &c., takes place.' So that there was not only an express limitation of the term of service in the first instance, but a direct intimation to the suspender, that his continuance in office was thereafter to form part of 'the annual election' of office-bearers. Accordingly, at the annual election on 19th November 1832, the Governors 'continued, and hereby continue,' the suspender as master of the hospital, in like manner as they continued the teachers and various other office-bearers, 'all until the third Monday of November' in the succeeding year. And so there was a regular act *re-electing* the suspender in every after year, the only difference being, that, from 1833 downwards, the office was given 'during the said President and Governors' pleasure only.'

" Nor is this all:—for the same system of annual election had existed, and been in uniform and invariable observance, at all events, since 1790. On 28th June of that year, the Governors 'resolved unanimously that a master shall be elected for one year only.' On 4th April 1791, it was unanimously agreed, 'that it be clearly established by a regulation, that in future the master, schoolmasters and housekeeper, as well as all the other office-bearers of the hospital, be elected annually on the third Monday of November, and that for one year only.' This was unanimously confirmed by a statute or bye-law, to that effect, passed at a subsequent meeting on 21st November 1791. And the practice has continued, without a single exception, ever since.

" The suspender attempted to raise a question, as if such a regulation was *ultra vires* of the Governors, and at variance with the spirit and terms of the original deed of foundation. But even if it had been so, however much such a consideration might have been agitated by those having a legal interest in the trust, it could never, it is thought, have availed the suspender, in an endeavour like the present, to extend his individual contract beyond the express limitation embodied on the face of it. If, indeed, the suspender's appointment had been conceived in vague and general terms, without bearing in *græmio* any such positive limitation, he might perhaps, with more plausibility, have argued on the deed of foundation, as lying at the root of the matter, and as constituting what he had principally relied upon as the basis of his contract, or at all events, what he was in *dubio* entitled to refer to, in explication of whatever there might be indefinite or ambiguous in its terms. This, so far as their authority on the general point is not overruled by the *Tain* case, appears to have been in some measure the shape of the question in the cases of the *Inverness* and *Ayr Academies*. But where, as in the present case, there exists no dubiety whatever,—where, on the contrary, the contract expressly gives an appointment only from year to year,—and where there is no maxim of public policy to render such a stipulation unlawful on public grounds,—the suspender can never be allowed, in a mere question of private contract, to question the authority of the parties with whom he had so contracted, and this to the effect of imposing upon their official successors a different contract altogether from what had ever been intended or agreed to in any quarter.

" But, after all, there is nothing in the deed of foundation, as the Lord Ordinary reads it, that seems to afford the least ground for the suspender's argument. It may be very true that the founder did not intend that there should be a yearly removal of the party holding the office of master. Indeed it is

only reasonable to assume, that as one of the ordinary securities for the welfare of the institution, he looked forward to the master's being continued in office for something like a permanency. But any permanency thus anticipated was not a permanency *as of right*, or upon which the master was entitled to insist, independently of the Governors. It was entirely a permanency *of probability and expediency*, and rested exclusively upon this, that the Governors, acting with a sound discretion, were not likely to withhold the requisite act of *re-election* in the case of such an officer, so long as they were satisfied that the interests of the institution did not demand it.

" Besides, the deed of foundation confers upon the Governors the most unlimited power to *alter* the original statutes of the institution, except in certain specified fundamental articles, of which this is not one. And thus, had the deed of foundation been even other than it is, the legality of the annual election must have come at all events to be settled by the statute to that effect in 1790 and 1791. The suspender stirs a doubt, how far this statute was regularly enacted in reference to the formal requisites stipulated in section 20 of the deed of foundation. But while it may be questioned how far there is any solidity in the criticism, viewed in its strongest aspect, it is thought to be a sufficient answer in every view, that the statute has now been in uninterrupted observance for upwards of fifty years, and—being unquestionably within the power of the Governors—has thus become fortified by prescription.

" Upon the whole matter, the Lord Ordinary, had he been himself to dispose of the case, would have had no hesitation in refusing the suspender's note and recalling the interdict. But as it seems better for all concerned that such a question should receive, as speedily as possible, the authoritative judgment of the Court, it has been thought right to take the case at once to report."

At advising,

Lord Meadowbank.—I mistook the law in the case of *Tain*. Considering that the office of a schoolmaster required a person of good character, I thought he would have retained his situation *ad vitam aut culpam*. The case of *Tain*, however, was decided otherwise in the House of Lords; and unless the founder say expressly that his will is that his masters shall hold their situations permanently, we have no power to prevent their being dismissed.

Lord Moncreiff.—It is not for us to speculate upon expediency. No doubt there are many good reasons for the permanency of a schoolmaster's appointment. But when cause does arise for removal, we cannot interpose to prevent the Governors exercising their discretion. This may arise from circumstances which they are not bound to state in a court of law, and which may not be in the least disparaging to the party dismissed. The case of *Tain* is clear, and I think it was ruled according to the sound principles of law.

Lord Justice-Clerk.—As this individual does not plead the character of a public officer, but is merely a party chosen to do a particular duty, he must show that the Governors employed him under certain conditions and restrictions, in order to control their discretion in dismissing him. We cannot inquire into the grounds of their doing so.

Lord Medwyn concurred.

The Court refused the bill.

Rutherford stated that no expenses were asked.

Lord Ordinary, Ivory.—*Act*. Dean of Faculty (Wood), Moir; Gordon and Barron, W.S., *Agents*.—*Alt*. *Rutherford*, Moncreiff; John Jopp, W.S., *Agent*.—*Bill-Chamber Clerk*.—[J.W.]

4th December 1841.

SECOND DIVISION.—(J. W.)

No. 38.—JAMES THORBURN, *Pursuer*, v. JAMES CHARTERS, *Defender*.

Process—Jury Trial—Issues—Servitude—Possession—Burgh, Inhabitant of.—*The proprietor of a tenement situated in a certain part of a royal burgh set forth, that he and his predecessors, as well as the inhabitants generally, residing in that neighbourhood, had had right of access to a mill-dam from time immemorial, for the purpose of drawing water therefrom. In pursuing a declarator of his right, it was found that he was entitled to an issue embracing not only his own possession, but also that of the other inhabitants of the neighbourhood.*

The pursuer stands infest in a house in the burgh of Dumfries; and having raised a summons, setting forth, that “from time immemorial, and until the last few years, the proprietors, tenants, and occupiers of the said tenement, and inhabitants generally of that neighbourhood, have possessed and enjoyed constantly, and without interruption, the right and privilege of access to, and taking water from, a mill-dam” on the premises of the defender, for domestic and other purposes; that within the last few years, the defender had obstructed the access to the mill-dam, and that therefore the right of the pursuer should be found and declared, and the defender ordained to remove the obstructions which he had erected for preventing its exercise;—the following issue in the cause was prepared by the issue clerks:

“Whether, for forty years and upwards, or for time immemorial preceding the 1823, the pursuer and his predecessors and authors, proprietors of a house in Mill Hole or Mill Street of Dumfries, or their tenants, have been in the use of drawing water from a mill-dam or mill-run, in or near said street, and whether, since the said time, the defender wrongfully obstructed the pursuer, or prevented him from drawing water from the said mill-dam or mill-run?”

The pursuer objected to the issue as framed, and proposed the following:

“Whether, for forty years and upwards, or for time immemorial preceding the 1823, the pursuer and his predecessors and authors, proprietors of a house in Mill Hole or Mill Street of Dumfries, or their tenants, and the other inhabitants of the said street or neighbourhood, have been in the use of having access to, and drawing water from a mill-dam or mill-run, in or near said street, and whether, since the said time, the defender wrongfully obstructed the pursuer and others aforesaid, or prevented them from having access to and drawing water from the said mill-dam or mill-run?”

The Lord Ordinary made avizandum with the issue to the Second Division of the Court, and annexed the following note to his interlocutor:

“The pursuer, James Thorburn, claims a right to use the water of a mill-dam on the premises of James Charters, on the ground, as set forth in the summons, that he and his predecessors in the tenement libelled on, ‘as well as the inhabitants generally residing in that neighbourhood of the town of Dumfries, have had right of access to the said mill-dam from time immemorial, for the purpose of drawing water therefrom.’ &c. &c.

“In this process a record has been prepared, and the parties fully heard before the issue clerks, who have returned an issue, confining the inquiry to the possession of the pursuer and his predecessors in the tenement libelled on, and thus excluding the possession of the inhabitants of the neighbourhood, and third parties. The issue is annexed for your Lordships’ perusal.

“To this the pursuer objects, that the issue does not exhaust his libel,—that he specially founded in his summons on the possession of the inhabitants of that neighbourhood in the town of Dumfries,—and that a similar issue to that now proposed

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by him was given by the Second Division of the Court in the late keenly contested cases of *Mercer v. Reid*, 1st February 1840, and *Mercer v. Rutherford*, 18th February 1840, in both of which an issue was allowed as to the use of a road by the pursuer, ‘and the other inhabitants and portioners of the village of Bridgend.’

“To this the defender answers, that the issue in cases of the present description was authoritatively settled by the House of Lords in the case of the Duke of Hamilton and Aikman in 1832; in which case a party, who alleged that he and his predecessors, and others, inhabitants of the town of Hamilton, had been in use to take sand and gravel from the river Avon, was allowed an issue by this Court to that effect (8 Shaw and Dunlop, 943); but that judgment was reversed on appeal, and the case remitted, with a special finding, ‘that the respondent has only a title to insist in this action as one of the inhabitants of Hamilton, or as owner of certain lands therein, to the effect of having it found by a jury, whether or not he has a right of servitude to take sand and gravel from the pond in question, in right of and for the use of his own property.’—See Shaw’s Supplemental Appeal Cases for 1832–33, p. 12.

“The issue clerks have adhered to the precedent in the Duke of Hamilton’s case, and limited the inquiry to the possession of the pursuer. The Lord Ordinary, though concurring with the issue clerks, feels it his duty to report the case to the Court, not only that it may be considered by the Judge who is to preside at the trial, but that a question of very frequent occurrence in practice may be reviewed by the Court.

“There can be no doubt that this Court did not intend, in Mercer’s case, to depart from the decision of the House of Lords in the prior case of the Duke of Hamilton: And as the latter case was not even quoted in Mercer’s case, it was probably viewed, both by the parties and the Court, as a question of a different nature, and depending on different rules of law. The one related to a servitude of gravel—a right peculiarly attached to heritable property; the other to a right of road—a subject which notoriously may either be a public or private servitude, as immemorial usage shall establish.

“The pursuer, however, pleads, that his case falls precisely within the principle of the road; and as it was found in the noted case of Dysart, in the House of Lords (Dict. p. 14,519), departing from a precedent of their Lordships to the contrary in the case of Kelso (p. 2340), that a servitude may be constituted over a green for bleaching in favour of the whole inhabitants of a borough, it is argued that the pursuer is entitled to maintain a similar plea. But on recurring to the case of Dysart, it will be found that the servitude was claimed there by the magistrates for behoof of the community, and in that form it was sustained; and the later cases of St Andrews and Burntisland afford examples of the form in which such servitudes, when established, may be made effectual by inhabitants, as suspensions were sustained at the instance of the inhabitants against the magistrates, as administrators of the common property, to stop certain projected alienations of a bural common, inconsistent with the long established servitudes of the inhabitants. These questions were tried in a form altogether different from the present.

“At the same time, it perhaps would not be safe to lay it down, that a public servitude may not be vindicated or protected at the instance of the individual inhabitants more immediately interested in its maintenance. But the pursuer does not go the length of maintaining that this was, in the proper sense of the term, one of the public wells of Dumfries. If he did, the case would fall to be tried in some form that would enable the defender, if successful in his averments, to be free of the burden for ever. The present is not an action of that description, and therefore it is thought that the pursuer can only establish his own right, and prove the use of the water for his own tenement.

“The defender proposed an issue as to homology, which does not seem to have been urged before the issue clerks. The Court will of course hear parties on that point when the case is before them upon the principal issue.

“On conferring with the issue clerks, the Lord Ordinary finds that the reason for giving no issue to the defender as to homology was, that there was no plea, and only a very brief

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and questionable statement, in point of relevancy, to justify an issue as to homologation."

Argued for the pursuer—That he was entitled to found on the possession of the other inhabitants, to the effect of establishing his own right. The case of the Duke of Hamilton and Aikman (6 W. and S. App. p. 64), drew the distinction between an inhabitant and owner, as to the right to found upon the possession of others, in prescribing a right of servitude. It was there ruled, that if Aikman insisted in such a right as inhabitant, he could found upon the possession of the other inhabitants, but if he insisted in his character of owner, he could only found upon his own possession. Where burghs are on the increase, the proprietor of a new house never could prescribe such a right, except by the possession of others. The case of Mercer v. Rutherford, 18th February 1840, is precisely in point, and establishes the pursuer's right to the issue which he proposes.

Answered—The question here is not as to the proof competent to be adduced at the trial, but merely what is to be put into the issue. A royal burgh possessed of a dominant tenement, may prescribe a servitude for the use of the inhabitants generally, and the magistrates may claim it for behoof of the community. But each individual, when he comes into Court separately, must prescribe his own right. The possession of the other inhabitants he may found on as evidence, but not as prescribing his right of servitude.—(*Lord Justice-Clerk*. It is settled that it is incompetent to lead evidence at the trial of the possession of the other inhabitants, if the issue be not broad enough to cover it).—The case of the Duke of Hamilton determined, that where a party claimed as owner, he could only found upon his own possession. Here the pursuer libels as proprietor, and it is needless to enter into his rights as an inhabitant.

Lord Moncreiff.—If allowed to establish his right as an inhabitant, I don't see how he can be prevented from proving it by the possession of others; and the case of Mercer is precisely in point.

Lord Justice-Clerk.—I am surprised there should be any question as to the proper issue here, for such cases have been of late very frequent; and the issues were precisely such as the one proposed by the pursuer, which is the proper issue for trying the question. The pursuer is not entitled to ask decree for the other inhabitants, but he may adduce proof of their possession, and found upon it in support of his own right. The Lord Ordinary is under a mistake when he supposes that the case of the Duke of Hamilton and Aikman was not under the serious consideration of the Court in fixing the issues in Mercer v. Rutherford.

Lord Meadowbank and *Lord Medwyn* concurred.

The Court approved of the issue proposed by the pursuer.

Lord Ordinary, Cuninghame. — *Act*. Solicitor-General (M'Neill), Miller; Archibald M'Neill, W.S., *Agent*.—*Alt*. Dean of Faculty (Wood), Pyper; J. B. Gracie, W.S., *Agent*.—*Jury Clerk*.—[J. W.]

4th December 1841.

SECOND DIVISION.—(J.W.)

No. 39.—JAMES BARCLAY, *Appellant*, v. WILLIAM MUIR, *Respondent*.

Bankrupt Act, 2 and 3 Vict. c. 41, § 54.—Sequestration—Trustee, Competition for—Review—Appeal—One of the competitors for the office of trustee on a sequestrated estate lodged with the Sheriff-clerk a notice of appeal against the deliverance pronounced on the same day by the Sheriff-substitute, and, three days thereafter, he also lodged a bond of caution subscribed by himself and cautioner.—Held that the note of appeal was incompetent.

In a competition between the appellant and respondent for the office of trustee on the sequestrated estate of Alexander Ross, some time innkeeper in Forfar, and now residing at Craigs, by Falkirk, the Sheriff-substitute pronounced the following deliverance:

"Falkirk, 3d November 1841.—Having heard parties' procurators in terms of last interlocutor, and thereafter advised the cause, finds that James Barclay is admitted to have acted as trustee for the bankrupt under a private trust: Finds that his interest is adverse to that of the other creditors; therefore, sustains this objection to his election as trustee in this sequestration: Repels the whole objections to the election of William Muir; and in respect it was stated that Thomas Carnaby refused to accept, declares William Muir, merchant, Leith, to have been duly elected trustee on the sequestrated estate of Alexander Ross, some time innkeeper at Forfar, now residing at Craigs, by Falkirk, in terms of the Act 2 and 3 Victoria, chap. 41." (Signed) "J. W. DICKSON."

Mr Barclay appealed, and, along with his note, produced the following certificate by the Sheriff-clerk:

"I, Sheriff-clerk depute of the eastern district of Stirling-shire, certify, that on the 3d day of November current, Mr James Barclay, writer in Forfar, a competitor for the office of trustee on the sequestrated estate of Alexander Ross, some time innkeeper in Forfar, now residing at Craigs, by Falkirk, lodged with me a notice of appeal against the deliverance pronounced of that date by the Sheriff-substitute in said sequestration; and I farther certify, that upon the 6th day of November current, the said James Barclay also lodged with me a bond of caution, subscribed by himself and Mr Lewis M'Kenzie, writer in Forfar, as cautioner for him." "P. MURDOCH."

Objected by the respondent, that the note of appeal was incompetent, in respect that the bond of caution had not been lodged within two days after the deliverance of the Sheriff, in terms of the 54th section of the Act.

Answered—That the cautioner proposed and accepted at the meeting of creditors was resident at Forfar; and although the Statute bears that the bond of caution shall be lodged along with the notice of appeal, this does not mean that the notice must be accompanied by the bond. If the bond be lodged timeously, it is sufficient, provided the notice be lodged within two days after the deliverance. But here there is truly no deliverance. The 47th section of the Act provides, that the Sheriff shall state in a note the grounds of his decision, and this note shall form part of the process. Here there is a deliverance, but no note. The appellant was entitled to wait for the issuing of the note before lodging his bond, and if it had been issued on the 4th November, his bond would have been in time.

Lord Moncreiff.—The Statute is express, that the bond must be lodged within two days from the date of the deliverance.

Lord Justice-Clerk.—I think the appeal is bad; and I am also of opinion, that it is incompetent to state the grounds of an appeal, when there is no appeal before us.

Lord Meadowbank and *Lord Medwyn* concurred.

The Court *refused* the note as incompetent, and modified the expenses to six guineas.

Act. Rutherford, Brodie; Gibson-Craigs, Dalziel and Brodie, W.S., *Agents.*—*Alt.* Neaves.—*N. Clerk.*—[J.W.]

7th December 1841.

FIRST DIVISION.—(H. B.)

No. 40.—GEORGE LYON, *Pursuer*, v. ARCHIBALD BUTTER and THOMAS ELDER BAIRD, *Defenders*.

Bill of Exchange—Blank Stamp—Notice—*A party signing and delivering a blank bill becomes responsible, as acceptor, for any amount that the stamp will cover, and is not entitled to notice either of the amount for which it has been filled up, or of its not having been duly retired.*

On 4th February 1837, Macritchie, Bayley and Henderson, addressed the following letter to Mr Fergusson, W.S., agent of Mr Butter of Fascally:

"We mentioned to you lately the bill which Mr Lyon held by Mr Butter of Fascally and Mr Baird, and which Mr Lyon had sent us to get payment of. Mr Baird, at the time, wished us to delay writing you or Mr Butter about it, till he should himself communicate with Mr Butter, and which he told us he had done; but as we have heard nothing farther on the subject, we will feel obliged by your bringing the matter before Mr Butter. The bill is dated 31st July 1833, payable at Martinmas then next, for £932. 19s. 6d., and we personally know that the money was advanced by Mr Lyon. Mr Lyon will in the meantime rank on Mr Baird's estate, if such is Mr Butter's wish."

The following is a copy of the bill:

"P. £922 5 4
In. 10 14 2

£932 19 6

Edinburgh, 31st July 1833.

"Conjunctly and severally, against Martinmas first, pay to me, or order at the Bank of Scotland's office, Edinburgh, the sum of nine hundred and thirty-two pounds 19s. 6d. Sterling, for value received."

(Signed) "GEORGE LYON.
"A. BUTTER.
"THOMAS ELDER BAIRD.

"To Archibald Butter, Esq. of Fascally, and Thomas Elder Baird, Esq., advocate, Forneth."

Mr Fergusson wrote in answer, that Mr Butter had "not the most distant recollection of the transaction;" but that Mr Baird had stated "his positive recollection of Mr Butter signing this bill as a blank bill at Fascally." Mr Baird had further stated, that the bill "was only got for a temporary accommodation of three months or so at farthest;" that "he received none of the contents," and "does not know how they were applied." It was agreed "to rank Mr Lyon, in the meantime, for principal and interest on Mr Baird's estate, reserving all questions as to Mr Butter's liability entire, until it be seen what the ultimate deficiency amounts to." Ultimately, Mr Butter denied his liability for the bill, but offered to consign the amount till the question was judicially decided.

Mr Lyon accordingly raised an action against Mr Butter and Mr Baird, concluding for payment of the principal sum contained in the bill, with legal interest from the term of payment, under deduction of £323. 18s. 10d. received to account from Mr Baird's estate.

In his condescendence Mr Lyon averred, that in 1833 Mr Baird was indebted to him in a sum of £800, lent on a bill granted by him and Mr Leake; that he was likewise indebted to him in another sum of £100, which had become due at Candlemas 1833, on an heri-

table bond for £5000, and that Macritchie, Bayley and Henderson, who were agents both for himself and Mr Baird, having agreed to accept of the joint acceptance of Mr Baird and Mr Butter for the amount; Mr Baird produced a 12s. 6d. bill stamp duly signed by these gentlemen, and the bill was accordingly filled up with the sum of £932. 19s. 6d., being the amount of the above debt, with interest to the date.

Mr Butter averred, that after the blank stamp was received, Mr Bayley "made the bill, which is holograph of him, in the form in which it now appears. Mr Bayley was, in 1833, and still is the agent of the pursuer as well as of Mr Baird. He has had the entire management of the affairs of both of these gentlemen. Mr Bayley not only knew that the defender was merely a cautioner for Mr Baird, but also that his name was adhibited to the stamp only as a temporary accommodation, and not as a voucher of debt which was to subsist beyond two or three months; and hence, in writing out and dating the bill "Edinburgh, 31st July 1833," Mr Bayley made it payable at the following term of Martinmas, or three months and a few days after date, when it was to be taken out of the circle." Mr Butter also averred, that "when the bill fell due at Martinmas 1833, it was not noted or protested by the pursuer or his agent, nor was any intimation made to the defender that it had not been retired by Mr Baird, while, if Mr Bayley or the pursuer had timeously intimated that the bill had not been retired, the defender could then, with perfect ease, have operated his relief against Mr Baird, whose credit and circumstances were then, and for nearly two years afterwards, perfectly good and undoubted. No such intimation was made to the defender at any time prior to the month of February 1837, upwards of four years after the date of payment of the bill."

The pursuer *pleaded*—1. The defender is resting—owing to the pursuer the sum sued for in virtue of the bill libelled on. 2. The defender cannot be exempted from paying that debt on the pretence that he received no value for joining Mr Baird in the acceptance, in respect not only that there is no evidence of the truth of that allegation, but that, as the pursuer received the bill from Mr Baird for full value, the allegation is irrelevant. 3. The defender cannot be exempted from paying the debt, on the pretence that he did not receive notice of the non-retirement of the bill by his co-acceptor, in respect that it was the defender's duty, as an acceptor of the bill, to make inquiry as to its retirement if he wished for any such information, and that the pursuer was not bound to give any such notice.

The defender *pleaded*—1. As the pursuer gave no value for the bill libelled on, he has no title to insist in the present action of payment. 2. Even if the pursuer did give value in any form for the bill, as Mr Bayley, who acted as his agent and manager of the whole business, as well as the agent and manager of Mr Baird, knew perfectly that the defender was not truly debtor in the bill to any extent, but had interposed his name as Mr Baird's cautioner merely, it was incumbent on the pursuer, or on Mr Bayley who had been intrusted with the management as aforesaid, to have intimated the dishonour of the bill when it fell due to the defender, and to have noted and protested it, whereby the defender would not only have been

timeously informed of Mr Baird's failure to pay, but might have operated his relief against that gentleman or his estate; and because of the failure to intimate the non-payment and dishonour of the bill by the proper debtor, the pursuer has lost all right of recourse against the defender. 3. If the pursuer ever did give any value for the bill, he did not do so at the date which it bears, nor until after Mr Baird's affairs became embarrassed, and then only by some arrangement with Mr Bayley, in whose hands the document all along lay, when he was perfectly aware that the defender was a party to it merely as a cautioner for his brother-in-law Mr Baird. And therefore, in the knowledge of that fact, and after Mr Baird's bankruptcy, at least after his affairs had become embarrassed and been put under trust, the pursuer and Mr Bayley were not entitled to negotiate any transaction in relation to this bill, or then to endeavour to fasten, by means of it, an obligation of debt against the defender, whose right of relief against Mr Baird had then been rendered useless. *Lastly*, The defender is not resting-owing the amount of the bill libelled on, and therefore, and on the other grounds stated, he is entitled to *absolvitor* from the conclusions of the summons, with expenses.

The Lord Ordinary pronounced the following interlocutor:

"December 16, 1840.—The Lord Ordinary having heard counsel on the closed record, and thereafter considered the whole process,—before answer, appoints the pursuer and defenders, and also the pursuer's agent who filled up the bill libelled on, to appear before the Lord Ordinary on the day of to be judicially examined upon the circumstances, in so far as consistent with their knowledge respectively, which took place when the said bill was subscribed, delivered, filled up, and retained by the pursuer's agent from its date till the raising of the present action; the parties to bring with them all letters, or copies of letters, written by or to any of them respecting the said bill prior to the date of the action.

"*Note*.—The defender moved for a proof at large, but the Lord Ordinary hardly thinks that there are any allegations on record to justify that course. On the other hand, the judicial examinations may afford the Judge an opportunity of ascertaining the precise state of the facts more fully than the record yet discloses.

"He conceives that the very unusual nature of the transaction, according to the statement of both parties, entitles the Court to order the judicial examination now proposed. In this case a bill for a large sum was signed in *blank* by the defender Mr Butter; it was delivered to Mr Baird, and filled up by the pursuer's agent; and these proceedings apparently took place *remotis arbitris*. The case thus admits of no proof, except what may be obtained from the parties themselves, and the pursuer's agent; but as it appears in every view to be one of novelty and difficulty in point of law, it is desirable that the whole facts should be sifted and ascertained in the most authentic and satisfactory form, before any decision on the merits is pronounced."

Mr Lyon reclaimed, and the interlocutor, in so far as it appointed him to be judicially examined, was altered; but no reclaiming note having been presented against the examination of his agent, Mr Bayley appeared before the Lord Ordinary, and being judicially examined, declared as follows:

"That in the years 1832 and 1833, the copartnery of Macritchie, Bayley and Henderson, of which the declarant was a partner, was the law-agents of the pursuer Mr Lyon: That the said copartnery did no law-business for the defender Mr Butter: That the declarant is also the brother-in-law of the defender Mr Thomas Elder Baird; and the bill libelled on, bearing date

31st July 1833, for £932. 19. 6., being shown to the declarant, he was requested to state the circumstances under which the said bill was filled up by the declarant. Declares, That in the spring or summer of 1833, Mr Baird stood bound to the pursuer Mr Lyon for £800, with a certain amount of interest thereon, for which he and James Leake, one of his tenants, had given their bill in favour of the pursuer, which was held by the declarant as agent for the latter; and the declarant told Mr Baird that it would be necessary to provide funds for retiring that bill, which was then past due: That Mr Baird then asked the declarant whether he could procure a loan of £1000, or thereby, to pay the said bill, and certain other claims then due by him on his (Mr Baird's) and Mr Butter's joint security: That the declarant said he thought it very likely that he could procure the money: That some time afterwards, and as the declarant believes on 31st July 1833, the day on which the bill bears date, Mr Baird brought to him the said bill stamp with the name of Mr Butter upon it: That the declarant is not sure if Mr Baird's name was then subscribed thereon, but if it was not, it was subscribed on that day when the bill was filled up: That the bill stamp was not otherwise filled up when first brought to the declarant: That the declarant filled it up with his own hand, as it now appears, addressing it to Mr Butter and Mr Baird as joint acceptors, and making it payable at the Bank of Scotland's office, Edinburgh, against Martinmas then next: That the pursuer, Mr Lyon, was not then present; and though the declarant always intended that the pursuer, Mr Lyon, should subscribe the bill as drawer, he does not recollect at what precise time he signed it, nor whether he did so before Mr Baird's bankruptcy: That the declarant's impression is, that Mr Lyon was in England at the date of the bill, and that he subscribed it at one of his visits afterwards to Edinburgh, as he at that time generally resided in Scotland: That the declarant is certain that Mr Baird was present when the bill was filled up, as before mentioned, but Mr Butter was not present. Declares, That Mr Baird made no explanation to the declarant at the time he gave him the said stamp, as to the circumstances under which Mr Butter had put his name on the said stamp: That Mr Baird did not inform the declarant that Mr Butter was his debtor in the amount of the sum for which the bill was filled up. Declares, That the amount of the bill, when completed, was applied in paying debts of Mr Baird, as set forth in articles 2 and 6 of the pursuer's consignment. Declares, That the declarant made no communication to the defender, Mr Butter, of the amount for which the said bill was drawn, or of the time when, and the place where, the bill was filled up as payable. Declares, That the declarant intended at the time, that the loan should be a permanent loan, to be given the debtors for some years. Declares, That he gave no notice to, and made no demand on, Mr Butter or Mr Baird when the bill fell due at Martinmas 1833: That the declarant's copartnery were at that time the law-agents of Mr Baird. Declares, That neither the declarant nor his copartnery made any claim on Mr Butter or Mr Baird, at Whitsunday or Martinmas 1834, for the interest on the said bill: That it was understood between Mr Baird and the declarant, at the time of the loan, that if the interest was paid once a-year, it would be sufficient; and by the term of Martinmas 1834, Mr Baird was on the eve of executing his trust-deed. Declares, That in making up a state of Mr Baird's affairs relative to his trust, along with Mr Baird, the declarant was led to understand that Mr Baird was to take this debt on himself; at least the declarant, on making inquiry at Mr Baird as to this debt, was led to believe that he was then to include it among the debts due by himself, though he also led the declarant to believe that there were unsettled accounts between him and Mr Butter: That when Mr Baird and the declarant were making up the said state, the declarant's impression was, that there would be a considerable reversion remaining to Mr Baird and his father, who had joined in the same trust, after liquidating the whole debts of the trustees; and it was under that impression that the declarant delayed making any demand on the defender Mr Butter: That Mr Baird requested the declarant to make no demand till he (Mr Baird) should see Mr Butter; and accordingly the declarant, without giving any promise to Mr Baird, postponed making any claim on Mr Butter: That the declarant is quite satisfied that the pursuer, Mr Lyon,

made no intimation to, or claim upon the defender, Mr Butter, respecting this bill; but the declarant had frequent conversations with the pursuer on the subject. Interrogated, at what time the declarant first made a claim on the defender, Mr Butter, or his agent, for payment of the said bill, or informed him of the amount and terms in which it had been filled up? Declares, and answers, That he made no communication to the defender respecting the bill till recently before the letter written by the declarant or one of his partners, on 4th February 1837, to Mr Butter's agent: That at a personal interview between the declarant and the latter, the declarant informed him of the amount of the bill, and the term when the same was payable: That by this time the declarant anticipated that there would be a considerable deficiency in Mr Baird's funds. Interrogated, on the suggestion of Mr Butter's counsel, Whether any interest was ever paid or placed to Mr Lyon's credit in reference to the said bill? Declares, That there was not: That the declarant rendered states to the pursuer, Mr Lyon, of his accounts periodically, and these states showed that no interest had been paid by either of the obligants on the bill libelled on."

The Lord Ordinary pronounced the following interlocutor:

" 13th July 1841.—The Lord Ordinary having heard counsel on the record, and thereafter examined judicially Mr Isaac Bayley, agent for the pursuer, and resumed consideration of the whole process, with his declaration, Finds it established by the admissions or statements not denied upon record, as well as by the said judicial declaration, that the amount of the bill libelled on was, prior to the date thereof, owing to the pursuer by Mr Thomas Elder Baird as *principal debtor*, and that the pursuer had not previously any claim against the defender Mr Butter: 2do, Finds, that in July 1833, the pursuer having previously urged the principal debtor, Mr Baird, either for payment or security for the said debt, Mr Baird brought to the pursuer's agent, Mr Bayley, a bill stamp, with the names of the defender and Mr Baird subscribed thereon, and that otherwise the paper on which the said stamp was impressed was entirely *blank*: 3to, Finds it neither alleged, nor offered to be proved by the pursuer, that the defender, Mr Butter, was indebted to Mr Baird in the amount of the said bill; or otherwise, that Mr Baird made any representation to that effect to the pursuer or his agent: 4to, Finds that the said blank stamp was filled up by Mr Bayley, the pursuer's agent, on or about the 31st July 1833, as a bill intended to be subscribed by the pursuer as *drawer*, and making Messrs Baird and Butter joint acceptors for £932. 19. 6., payable at the Bank of Scotland's office in Edinburgh at Martinmas 1833; and the bill accordingly was afterwards subscribed by the pursuer as *drawer*: 5to, Finds that the said bill was so filled up by the pursuer's agent, outwith the presence of the defender Mr Butter; and that he sent no notice to the defender of the drawer's name, *sum* filled up, or of the *time* and *place* where the bill was payable: 6to, Finds, that when the said bill fell due at Martinmas 1833, it was not presented at the place of payment, or to either acceptors, and it was not paid or provided for by the principal debtor, while it is not alleged that that party was at that time, or for nearly a year afterwards, insolvent or in bad credit: 7mo, That when the said bill fell due as aforesaid, it was not protested for non-payment, and no notice was given by the pursuer to the defender, in any shape, that such a bill was in existence and held by the pursuer, and lying over unpaid; but that on the contrary, such notice appears to have been withheld or delayed at the request of Mr Baird, the principal debtor: Lastly, Finds that the first notice given to the defender Butter, by the pursuer or his agents, of the *date*, *amount*, and *non-payment* of the bill libelled on by the principal debtor, was on a certain day in the end of January or beginning of February 1837, being *three years and a-half* after the date of the bill, and more than *three years and two months* after the term of payment, and that, prior to that time, the principal debtor had become irretrievably *bankrupt*: Finds, under these special circumstances, that the pursuer is not now entitled to recover the amount of the bill libelled on from the defender, Mr Butter: Therefore, sustains the defences, and absolves him from the action: Finds no expenses due to either party, and decerns.

" *Note*.—The Lord Ordinary has found that the pursuer is not now entitled to recover payment of the large balance libelled on from Mr Butter, the only defender for whom appearance is made, from a strong conviction that the claim against him cannot be maintained on those principles of law and of essential justice which ought to receive effect under the singular combination of circumstances in which it is now brought forward. At the same time, the Lord Ordinary is sensible that the case may be viewed by many Judges as one of great difficulty, from the weight of certain precedents in the law of bills in England, which at first sight may appear adverse to the defender's plea. As bills are *juris gentium*, these authorities deserve great consideration in every question of this sort. But while it is doubtful whether the precedents referred to can be adopted in Scotland, from the peculiar rules of our law as to the duties and rights of creditor and cautioner, it is thought that no preceding case on record is sufficient to support the claim of the pursuer, either in England or Scotland, under the specialties which here occur.

" It is a trite point in law, that an innocent third party, who onerously acquires a bill brought to him filled up and complete, cannot be met by any plea founded on the wrong or misdemeanour of another party who may have filled up a blank stamp in peculiar terms not known to the subscriber, and without the knowledge or privity of the indorsee. But the present is not a case of that description, as the blank condition of the writ, when it passed out of Mr Butter's hands, was visible to the pursuer or his agent (who acted throughout for his behoof) as they filled it up, and placed the pursuer himself in the position of drawer. In the next place, though it has been long established in law, that notice of non-payment need not be given to an acceptor; and it is farther provided by the Act 1st and 2d Geo. IV. cap. 78 (which a late author, on probable grounds, treats as applicable to Scotland, Thomson on Bills, p. 427), that the holder of a bill, made payable at a certain place, is not bound to present it there, unless it be made a condition of the acceptance that the bill be payable there, and not otherwise. Yet it seems necessary, in order to bring any case within these rules, that the acceptor should be informed, or have the means of knowing, in some way, the amount of the bill, and when and where it has been made payable, as his obligation to provide for it rests on the assumption that these facts are well known to all acceptors. The rules of law, now referred to, therefore must, in reason and justice, be reversed, when a party, who has taken delivery of a blank stamp, and placed himself in the position of the *drawer* thereof, is necessarily aware of the ignorance of the party whom he has made acceptor, of all the circumstances necessary for his discharge or relief from the obligation when due, and nevertheless does not inform, but rather withholds all communication of them to the acceptor. Hence, under the very peculiar circumstances of this case, it is difficult to resist the plea, which obviously arises to the defender, Mr Butter, that when the pursuer or his agent took possession of the blank writ, and filled it up with an obligation by the defender in favour of the pursuer for the large sum which it now bears, they were bound, either then or when the bill fell due, to give the pursuer that information which was absolutely necessary to enable him to provide for the bill, and to take proper measures for his own relief; or otherwise, they were bound to take steps at their own instance to compel the principal debtor to discharge the obligation when it fell due.

" In giving effect to this principle, under the specialties which here occur, it is not supposed that the security of the public in bills which have been put into circulation in the ordinary course of trade, will be in the least degree relaxed or put to hazard. The present decision is inapplicable to the case of bills at first signed *blank*, and delivered in a completed state to onerous indorsees. But when documents come into the hands of third parties visibly as *blank writs*, and when they fill them up and take benefit from them, it would be too much to hold that they are absolved from all duty towards the over-confiding subscribers, and are entitled to keep them ignorant, for an indefinite time, of the nature and terms of the contract which has been superinduced on their subscription. This would be virtually finding, that, in proportion as a party was unprotected, and had reposed exuberant confidence in his neighbour, parties

cognisant of the trust, and profiting by it, could expose the obligant to great additional hazard, by withholding from them that information absolutely necessary to enable them to secure their relief. Such a plea would be repugnant to the first principles of law and equity.

"Farther, the specialties of the present case would, on the principles of the common law of Scotland, afford another plea to the defender, Mr Butter, entitled to great weight in equity. It seems quite incontestable, upon the state of the facts explained by Mr Bayley in his judicial declaration, and indeed admitted on record, that Mr Butter was a mere cautioner to the pursuer. This seems to be indisputable, as the pursuer admits that, before he got delivery of the blank bill, he had no claim on Mr Butter,—his original debt having been composed entirely of advances to Mr Baird. The pursuer, therefore, was peculiarly called on, when he filled up the blank bill, to give the surety such information as was necessary to enable him to operate his relief when the bill fell due, or, at all events, to do himself what was necessary for protection of the surety. Instead of that, Mr Bayley declares that, even when Mr Baird was so far embarrassed as to be obliged to grant a trust for behoof of his creditors, Mr Baird 'requested the declarant to make no demand till he (Mr Baird) should see Mr Butter, and, accordingly, the declarant, without giving any promise to Mr Baird, postponed making any claim on Mr Butter.' It is apprehended, that when the party who has filled up a blank stamp with a date, sum, and place of payment, wholly unknown to the subscribing cautioner, and has omitted to apprise that party, even on the embarrassment of the principal debtor, of the nature and particulars of the obligation, he is barred, on all the principles of law uniformly recognised in Scotland between creditor and cautioner, from afterwards maintaining any claim against the cautioner.

"But the Lord Ordinary hesitates to proceed on that ground exclusively, keeping in view certain precedents in the law of England, which, if fairly applicable to Scots bills, would be decisive against the plea. It appears that of late the question has been repeatedly mooted in England, whether the holder of a bill giving time to the drawer, when he is the principal debtor, liberates the acceptor, known to the holder to be a mere surety? This seems to have been a *questio vexata* in English practice for the last thirty years; and the fluctuations in the opinions of the different Courts on the point, is well exhibited by Mr Thomson in his last edition, pp. 365–66. The decisions in all the cases referred to, however, manifestly proceeded on the assumption that the cautioner-acceptors, charged for the bills, always knew at least the sum, date, and place of payment of the bills sued for, and with such knowledge allowed them to lie over. But the plea of Mr Butter, in the present instance, is of a different and more cogent nature, when he pleads that the holder who filled up the blank bill gave him no information, till after the principal debtor's bankruptcy, either that he had drawn such a bill, or that it was left unpaid at maturity.

"It is obvious, however, that the present case is not that of a principal debtor who has drawn a bill accepted by the cautioner for his accommodation. The drawer here was himself the creditor, and the principal debtor and the cautioner were made joint acceptors. In such a case, some doubt appears to have been entertained at one period in England, whether the drawer could give time to the one acceptor, who is principal debtor, without the consent of the other joint obligant, who is a mere surety. But certainly the law seems now to be settled by a late case (*Price against Edmonds*, 10 B. and Cr., 578), and other authorities, that the giving time by a drawer in England to a joint acceptor who is principal debtor, does not liberate the other obligants. As these judgments, however, in a great measure proceed on the presumption that the obligant knew when and where his obligation was payable, and wilfully omitted to provide for it, the ground of decision is inapplicable to a question where the surety, though in form a principal, got no information whatever on these points from the creditor who filled up the bill.

"Besides, with reference to all of the English cases on the point last noticed, the Lord Ordinary must be permitted to express great doubt whether they do not proceed on technical

grounds peculiar to the English law, and in a great measure inapplicable to our practice. For example, it seems to be laid down in England, that a creditor holding a variety of parties bound to him as principal debtors on the face of the instrument, is entitled to treat them all as principals, and to act without reference to the peculiar interests and pleas competent to the obligants who are cautioners. But that clearly is not the law of Scotland. When a party bound *ex figura* as a principal is truly a cautioner, within the knowledge of the creditor, the creditor can do nothing to injure or put to hazard the right of the cautioner. He loses his recourse if he gives time to the principal debtor, as exemplified in the cases of *Stirling against Forrester* (1 Shaw, Appeal Cases, p. 37), and *Hume against Youngson*, in 1830 (8 Shaw, p. 295), and cases there cited; and generally, the long-established rule of the Scots law is laid down by Erskine, when he states: 'The cautionary obligation ceaseth if the creditor shall do any act which hath a tendency even to weaken the cautioner's right of relief.'—Erskine, B. III. t. 3, § 66.

"There appears, however, to be other very essential distinctions between the rights of Scots and English sureties, which materially affect the present question. Thus, it is laid down in the law of England, that the obligation of a party to relieve a surety, who had accepted a bill for his behoof, does not arise till he has actually paid the bill (see Thomson on Bills, p. 367); while in Scotland, unquestionably, an action of relief is competent to the surety at any period after he has become bound, whether he has retired the bill or not. In like manner, it seems quite settled in the law of England, that joint obligants in bills and bonds have no summary relief against the principal debtor, even when they have paid up the debt, but must proceed by a separate suit. But the law of Scotland has stood differently from a very early period; and a surety, though bound as a joint obligant, when compelled to pay a bond or bill, may demand an assignation or indorsation from the creditor to enable him, by summary diligence, to enforce instant payment under the original obligation from the principal debtor.—See 1 Bell, p. 348; Thomson's Treatise on Bills, pp. 580, 581, and cases there referred to. In particular, the case of *Erskine against Manderston* (Fac. Coll., 14th January 1780; Dict. p. 1386,) deserves attention, as, in that instance, one of two joint acceptors of a bill was found entitled to an assignation, for the very purpose of enabling him to do summary diligence against his co-obligant. The pursuer, however, obviously put it out of the power of Mr Butter to avail himself of these remedies competent to a cautioner by our law, when they could be effectual for his relief.

"This peculiarity in our practice, whereby sureties, or assignees for their behoof, have power, by summary diligence, to operate their relief against the principal debtor, renders it more peculiarly incumbent on any creditor in Scotland, who has converted a skeleton bill to his own use, to apprise every known surety, at least, without any unnecessary delay, of the position in which he has been made to stand by the filling up of the bill, so as the cautioner may be enabled to take all necessary measures in due time for his own relief. On these views the Lord Ordinary has held that the defender is entitled to be assolated from this action."

At advising,

Lord Gillies.—I fear the interlocutor of the Lord Ordinary must be altered. When a party subscribes a blank bill, he is, or ought to be aware that he is considered as an acceptor, and subjects himself to all the liabilities of an acceptor. The only question here is, was Butter an acceptor? Aye or no? If an acceptor, he may still show that the acceptance was obtained by fraud, and escape from the obligation which it would otherwise impose upon him; for I do not see that fraud might not be pleaded in a case of this kind, as in any other case. But if the acceptance was given without fraud, then Butter, as the acceptor, is truly the debtor in the bill, and has incurred all the liabilities, and subjected himself to all the exceptions which attach to him as the debtor. How then stands the case? Baird is indebted to Lyon, and not finding it convenient to pay, offers security. For this purpose he applies to Butter. I don't know what he said, and it is of no consequence; for what he said cannot affect

Lyon. The result is, that he returns with a blank bill signed by Butter, and without explanation delivers it to Mr Bayley, who happens to be both his own agent and Lyon's too. Say he had given it to Lyon himself,—what then? Lyon would have been entitled to make the best use of it he could, and for that purpose to make Butter the acceptor. If this was his right, the agent did nothing more than his duty in securing it for him. There is nothing on the face of the bill to give any indication of fraud, and it is not a slight indication that would do; for in a case of this kind the proof must be pregnant. The fraud must be clearly brought home to the creditor. Holding, then, that Butter was fairly made acceptor, he is not entitled to plead delay in the demand of payment. This is fixed; and fixed, I think, in accordance with expediency, as it must tend to put gentlemen on their guard, and let them know that if they do sign blank bills, the consequence is that they will be treated as acceptors.

Lord Mackenzie.—I am of the same opinion. This case falls under the rule of law, that a party who signs a blank stamp, makes himself answerable for the largest sum which can be drawn for on that stamp. I understand that to be the law, without the qualification that notice should be given of the bill being filled up to the person who thus subscribes it. Perhaps an Act of Parliament, requiring that such notice should be given, would be a good one. But there is no such Act. I am not aware that in any one of the cases in which such effect has been given to blank stamps, any immediate notice was given of the stamps being filled up. Here Mr Butter put the stamp out of his hands with his name adhibited to it, and by so doing he rendered himself liable to be made acceptor for any sum within the stamp. It is said that he stipulated that his liability should only subsist for a limited period. If he had put that on the back of the stamp, there would have been something in it. But no such thing was done. So if it had been offered to be proved by Lyon's oath, that he knew of Butter having stipulated for a limitation of his obligation, that would have made the matter different. But there is no such offer, and no proof to that effect. And I do not think any thing has been elicited from the examination of the party's agent which can affect his claim. I think that examination was irregular; and we certainly never intended, when we refused to allow the examination of the party himself, that his agent should be examined. There is no evidence of fraud in the case; and there being none, what is there? If Butter had a right to any thing, it was to instant notice of the bill having been filled up. But that, as I have already said, I think he was not entitled to.

Lord Fullerton.—The general rule is perfectly established. It is held, and I think justly, that a party signing a blank bill gives a power or mandate to the receiver to avail himself of it in any form which the signature admits, and to fill it up to the amount carried by the stamp. This is fixed beyond question by decisions which are not at all affected by the case of Drum. For in that case it was specifically alleged that the bill was delivered for a particular purpose, and that it was perverted from that purpose under circumstances which made it very questionable if the holder was not aware of the perversion, and liable for the consequences of it. Now if, in the present case, Baird had taken the bill to Lyon, and got him, while cognisant of the circumstances, to fill up the bill without procuring Baird's signature at all, there might have been some ground for holding that the case of Drum applied. But nothing of the kind can be alleged here. The bill was signed as an accommodation, and it was applied as an accommodation. No doubt it is said that the accommodation was not intended to exceed £200 or £300 for two or three months; but we cannot listen to this. The amount intended must be measured by the sum which the stamp covered. But it is said that Butter did not receive notice, and that he was entitled to receive it. This plea was expressly disregarded in the case of Taylor, and I think justly; for I am not able to see with Lord Mackenzie, that any advantage would be gained by an Act of Parliament making notice imperative in such circumstances as the present. For when one individual puts that exuberant confidence in another which is implied in giving him his signature to a blank bill, the party who becomes creditor in the bill, is entitled to think that the individual who was accommodated will himself give due notice to his friend. At all events, that friend is bound, in the exercise of

ordinary prudence, to inquire. The fair presumption is, that one or other of these things will be done, and that the creditor, therefore, is not called upon to interfere. Stronger cases than the present have occurred, where it was held that the acceptor was not entitled to notice.

Lord President.—From the moment I read the note of the Lord Ordinary, I was satisfied that great consideration would be necessary before the judgment could be adhered to, and I was glad when I knew that the cause was to be so ably argued on both sides. Now, after the fullest consideration, I am satisfied with your Lordships that the interlocutor must be altered. First, I entirely agree as to the general rule, fixed by various decisions, that after a party has signed a blank bill, and delivered it, he is responsible for the full amount of the sum that the stamp will cover. There may be cases of fraud, where the acceptor might have a good exception against the holder of the bill; but where fraud is alleged, it must be distinctly proved. It cannot be presumed. On the contrary, in cases like the present, the presumption is, that the party who signed the blank bill gave full authority to the person to whom he gave it, to use it in any way he pleased. Is there any thing, in the circumstances of the present case, to defeat this presumption? If I had been present when the authority was given to examine Mr Bayley, I would have had much doubt as to its propriety. The examination, however, has been taken, and we cannot now shut our eyes to it;—but to what does it amount? It appears that Baird made a communication to Lyon's agent, stating his inability to pay a former bill, but offering to give security, by obtaining Butter's acceptance to a new one. The agent professes his willingness, as far as he is concerned, to delay till that acceptance is produced. Then, on a future day, Baird comes forward with this blank bill on a stamp sufficient to cover the amount of his debt. Had it been for a smaller sum, Mr Bayley might have said, "I cannot go into the transaction; I must have payment, or sufficient security for the whole." He sees, however, that the stamp is sufficient, and he had no occasion to inquire farther. What had he to do with what passed between Mr Butter and Mr Baird? It is very possible that Mr Butter's account of what passed is correct, but that cannot overbalance the fact, that by signing the blank stamp he put himself entirely in the other's power. Whatever cause there may be for Mr Butter's complaint, it cannot affect either Mr Lyon or his agent. I cannot see any thing wrong in Mr Bayley's conduct. As Lord Gillies has said, he did no more than he was bound to do for the interest of his constituent. As to the necessity of notice, there was nothing that called for it from Mr Lyon. It was entirely Mr Butter's affair; and though he doubtless might have been entitled to it from Mr Baird, his not receiving it, cannot in any way exempt him from liability for the debt. Indeed, the Lord Ordinary seems to admit that the general rule of law is against him, but he thinks there are specialties which take this case out of the general rule. I feel obliged to be of a different opinion.

The Court altered the interlocutor, and decerned in terms of the libel.

Pursuer's Authorities.—*Drum v. Campbell*, 18th Feb. 1813; *Hume's Decisions*. *Smith v. Taylor*, 1824; *F. C. Fisher v. Kidd*; *Hume's Decisions*, p. 65.

Defenders' Authority.—*Wood v. Darling*, 1808; *Hume's Decisions*.

Lord Ordinary, Cuninghame.—*Act. Rutherford, Marshall; Macritchie, Bayley and Henderson, W.S., Agents.*—*Alt. Solicitor-General (M'Neill), Whigham; James Fergusson, W.S., Agent.*—*B. Clerk.*—[H.B.]

7th December 1841.

SECOND DIVISION.—(J. W.)

No. 41.—THE REV. DAVID DEWAR and OTHERS,
Suspenders, v. ALEXANDER PETERKIN, *Defender*.

Process—Remit *ob contingentiam*—*Circumstances in which a motion to remit a cause ob contingentiam from one Lord Ordinary to another, was refused.*

Process—Decree in Absence—Suspension—*A suspension of a decree in absence having been enrolled before a Lord Ordinary who had not pronounced the original decree, he pronounced an interlocutor remitting the case to the proper Lord Ordinary. A reclaiming note complaining of the interlocutor was refused.*
—Opinion, *That the more regular course was to have allowed the case to be withdrawn, and enrolled of new before the proper Lord Ordinary.*

The majority of the Presbytery of Strathbogie having been suspended by the General Assembly on the 1st June 1840, and the present suspenders having been appointed a special commission to co-operate with the minority of the Presbytery "in providing for the preaching of the gospel, and the administration of the ordinances of religion, and the exercise of discipline" in the parishes of the suspended ministers during their suspension,—they presented to the Court of Session a note of suspension and interdict against the said sentence and commission. The note was called in the Outer-House rolls, but no appearance was entered for the present suspenders. On the 20th July 1841, Lord Cuninghame decerned in the following terms:

"Sitting in judgment, the said Lords suspended and interdicted, and hereby suspend and interdict, as craved; declared and hereby declare the interdict perpetual; and decerned and hereby decern: Farther, on the 20th day of July 1841 years, decerned and ordained, and hereby decern and ordain, the respondents to make payment to Alexander Peterkin, Solicitor Supreme Courts, agent disburser, of the sum of £120. 6. 4., being the taxed amount of expenses of process, and £1. 11. 2. as the dues of extracting this decree," &c.

The respondent extracted the decree of suspension and interdict, and ordered a charge to be given to the present suspenders for payment of the expenses decerned for. The suspenders presented a note of suspension and interdict, which was passed on consignment of the amount charged for in the hands of the clerk to the bills, in terms of the Statute. The suspension was enrolled in Lord Cockburn's Outer-House roll for Wednesday the 17th; but an objection having been taken, that the case should have been enrolled before the Judge who pronounced the original decree, in terms of the 1st and 2d Vict. c. 86, § 5, Lord Cockburn, on the 18th November, remitted the suspension to Lord Cuninghame. Against this interlocutor the suspenders reclaimed.

On the 6th November, there was enrolled in the Outer-House roll, to be called on the 10th, before Lord Cockburn, a summons of reduction of the suspension and interdict, in which the decree for expenses was pronounced, and it was moved that this process also should be remitted to Lord Cuninghame *ob contingentiam*. The ground stated was, that there had appeared in the same weekly rolls, to be called before Lord Cuninghame on the 9th November, a summons of reduction of the General Assembly's sentence of *deposition* against the majority of the Presbytery of Strathbogie, pronounced 27th May 1841. The Lord Ordinary took

this motion to report, in order that it might be disposed of at the same time with the reclaiming note.

Argued for the Presbytery of Strathbogie—

That it was clear, upon the Statute, that Peterkin's case must be remitted to Lord Cuninghame; and that between the reduction of the suspension of the sentence suspending the ministers of Strathbogie, and the reduction at their instance of the sentence of deposition pronounced against them by the General Assembly, there was not only contingency, but identity. By the Act of Sederunt, 28th December 1838, it is specially declared, "that when such contingent causes shall be brought, for the first time, before two or more Lords Ordinary in the same weekly rolls of new causes, the cause enrolled before the senior Lord Ordinary shall (provided the enrolment is regular) be deemed the first or leading process, and the other Lords Ordinary shall remit the contingent causes to the said senior Judge." But the suspension sought to be reduced, cannot be said to be a cause brought into Court for the first time: it formerly depended before Lord Cuninghame. Before whom, also, there depends two other cases involving the same points, viz., *Edwards v. the Minority of the Presbytery of Strathbogie*, and the *Earl of Kinnoull v. the Presbytery of Auchterarder*.

Answered for the Commission of Assembly—

The only contingency which subsists must be between the reduction of the suspension, and the suspension of Mr Peterkin's charge. But the Court must dispose of the motion to have the reduction of the suspension remitted to Lord Cuninghame, in the same manner as the Lord Ordinary must have done at the time when the motion was first made. The suspension of the charge was not then in Court, nor for a week after. It is not yet before Lord Cuninghame. That the suspension sought to be reduced was originally before Lord Cuninghame, is no ground for remitting it to him. A suspension of a decree in absence must by Statute be enrolled before the Judge who pronounced the decree; and we offered to withdraw the suspension of Peterkin's charge from Lord Cockburn's roll, and enrol it before Lord Cuninghame. But this rule does not apply to reductions of extracted decrees. Parties have the privilege of choosing the Lord Ordinary before whom they will bring their cause; and the Act of Sederunt, section 38, is express, that where two contingent causes appear for the first time in the same weekly rolls, the cause enrolled before the senior Lord Ordinary shall be the leading cause. It is said that the reduction of the suspension is not a new cause, but the decret sought to be reduced has been extracted and out of Court: it is clearly, therefore, a new cause. As to the analogous cases of *Edwards* and the *Earl of Kinnoull*, the parties are not the same; and it might as well be contended that a case of entail should be remitted to one Division of the Court and to one Lord Ordinary, because there happens to depend, at the same time, other cases of entail before the same Division and the same Lord Ordinary. It is submitted, therefore, that while the reclaiming note may be refused, we are entitled to judgment on the case reported.

At advising,

Lord Moncreiff.—We can discover from the papers and statements in this case, that it may involve questions of very great importance. But the matter at present before the Court is of no importance, except to this extent, that we take care that the excitements to which these cases may give rise, do not lead us to sanction any irregularity in the form of process. In itself, it is of no consequence before what Ordinary or what Division of the Court the case may depend; for if the questions involved are of great importance, I think the probability is, that they will be submitted to the consideration of all the Judges. But we must judge of the matter now before us. The case which has been reported by Lord Cockburn, is an action of reduction of a decree pronounced by Lord Cuninghame, and which has been extracted and taken entirely out of Court. This action of reduction appeared in Lord Cockburn's printed roll on the 10th of November, and the question proposed to us is, whether this process ought to be remitted to Lord Cuninghame *ob contingentiam* of certain other processes depending before his Lordship; for I think it is clear that there is no such thing as remitting a process from one Lord Ordinary to another, or from

one Division to another, independent of some other process with which it is contingent, so as to render it expedient that both proceedings should proceed before the same Ordinary or Division *de futuro*. In the case of *Gibson v. Stewart*, 15th June 1827, it was decided that it was incompetent for one Division of the Court to remit to the other, unless there was an actual depending process before them, to which, *ob contingentiam*, it could be remitted; and least of all would it be competent so to remit, when the former proceedings were in absence of the party. Now, to what process do the defenders ask this reduction to be remitted? When it was called in Lord Cockburn's printed roll on 10th November, to what process could it then have been remitted? The mere fact of the decree in absence having been pronounced by Lord Cuninghame, is no reason for such a remit. If an action is brought for payment of £100, and decree in absence is pronounced and extracted, it was surely never thought of, that when a reduction of that decree is raised, it must depend before the Lord Ordinary who pronounced the decree in absence. That was never proposed. It may be true that a different rule holds as to suspensions, but as to a reduction of a decree in absence, there is no reason for remitting it to the Lord Ordinary who pronounced the decree under reduction. What else then is there? It is stated that there is a reduction of a sentence of deposition pronounced by the General Assembly, which action has been called in Lord Cuninghame's roll. If there was a legal contingency between that action and the reduction of the decree in absence—and perhaps there may: still it is clear, that by the Act of Sederunt, passed in 1838, both of these actions ought to depend before Lord Cockburn, as senior Lord Ordinary; both being, in the express terms of that Act, in the same weekly rolls of new causes. If there was any legal contingency between these two actions, the action called before Lord Cuninghame should rather have been remitted to that before Lord Cockburn. The defenders referred to the other processes, but they are not between the same parties, and have indeed no legal affinity to this. Indeed Mr Robertson, in reply, confined himself, on this point, to the action at the instance of Mr Edwards, which, in my opinion, has no legal contingency with the present, especially as explained by Mr Bell in reply. So matters stood on the 10th of November, when the motion was made to remit the reduction to Lord Cuninghame *ob contingentiam*. No doubt, next week a suspension of a charge by Mr Peterkin, for the expenses of one of the processes of suspension and interdict, came before Lord Cockburn. This is the subject of the reclaiming note, and Lord Cockburn has remitted it to Lord Cuninghame, on the ground, that being a suspension of a decree in absence, it must, in terms of the Act of Parliament, be laid before the Ordinary who pronounced the decree. But the object of the rule was to expedite the proceedings. That case must be disposed of on the reclaiming note; but what effect this shall have on the reduction, when both shall be regularly in dependence, I shall give no opinion. Between the two, however, it is certain that there is a contingency. Holding that the suspension goes before Lord Cuninghame, whether in the form proposed by the Lord Ordinary, or in any other form, the reduction must be regarded as the leading process, having been in Court a week before the suspension appeared in any roll. The result, in my opinion, is, that we are not at present in a situation to instruct Lord Cockburn to remit, as proposed, to Lord Cuninghame. It may come to that; but I do not think it is competent just now: and we should so find. As to the reclaiming note, that appears to me a simple matter. I think it is unlucky that Lord Cockburn did not assent to the proposal to allow the suspension to be scored out as irregularly enrolled before him. But Lord Cockburn remits to Lord Cuninghame. The regular course was to allow it to be withdrawn from his roll. Still it will make no material difference if we were now to adhere to the interlocutor. On the whole, while I think that the most regular course would be to remit to Lord Cockburn, with instructions to allow this action to be withdrawn from his roll, and let it be enrolled before Lord Cuninghame, I am willing, if your Lordships do not think that this is the best course, to adhere to the interlocutor.

Lord Macdowall.—After much consideration, I have come to coincide with Lord Moncreiff generally. I think we are bound

to consider the state of matters when the two processes were enrolled. At that time there was no process before Lord Cuninghame that required the reduction to be remitted to him. Lord Cockburn was the senior Lord Ordinary, and the provision in the Act of Sederunt, 1838, is clear and precise, that the action before him was to be considered as the leading process. As to the suspension, I think it was not incompetent for Lord Cockburn to remit it to Lord Cuninghame, though it might have been more regular to have allowed it to be withdrawn. I give no opinion whatever as to what shall be the effect when this action is enrolled before Lord Cuninghame. I understand that the object of the law, as to the enrolling of suspensions of decrees in absence before the Ordinary who pronounced the original decrees, was this, that as the original pursuer had his right of option of the Lord Ordinary; so by decree being allowed to pass in absence, the other party might not deprive him of his election. I give no opinion as to what may be the judgment of the other Division, if the case should be brought before them, after it is enrolled before Lord Cuninghame. All that we now do is, to remedy the mistake for which the defenders in the action of reduction are certainly not answerable, but for which the pursuers in that action are. I think we should refuse the reclaiming note, and let the case go before Lord Cuninghame. As to the report of Lord Cockburn, I think we are not in *hoc statu* warranted to pronounce any order, except, perhaps, to refuse the motion from the bar *hoc statu*.

Lord Medwyn.—I do not think it is necessary, in a point of this kind, to give any detailed opinion, after those delivered by your Lordships, with which I concur.

Lord Justice-Clerk declined.

The Court *refused* the reclaiming note, and also the motion from the bar *hoc statu*.

Lord Ordinary, Cockburn.—*Act.* Bell, Moncreiff; William Young, W.S., *Agent.*—*Alt.* Robertson, Whigham, Pyper; A. Peterkin, S.S.C., *Agent.*—*T. Clerk.*—[J.W.]

TEIND COURT.

8th December 1841.

No. 42.

The following augmentation was awarded:

Tweedsmuir—Presbytery of Peebles—Old Stipend, 24th January 1821, 14 chalders, and £8. 6. 8. for communion elements.—Stipend modified of this date, 16 chalders, and £8. 6s. 8d. for communion elements,—being an augmentation of 2 chalders.

8th December 1841.

FIRST DIVISION.—(H. B.)

NO. 43.—JAMES GRAHAM, *Raiser*, v. Captain THOMAS MACINTOSH and MRS JANE GORDON or MACINTOSH, *Claimants*.

Provision to Children—Parent and Child—Liferent and Fee.—*A father, in contemplation of the marriage of his natural daughter, bound himself, for love and favour, to make payment to her of a sum of money, and that to her in liferent during all the days of her lifetime, secluding the jus mariti of her intended husband, and to the children of the marriage in fee, whom failing, to the husband.—Held that the wife was liar.*

In 1825, Alexander Duke of Gordon, "in contemplation of an intended marriage" between Jane Gordon, his natural daughter, and Lachlan Macintosh, executed a bond of provision, in which, "for the love, favour and affection" which he had to the said Jane Gordon, he bound himself, his heirs and successors, to make payment to her,

"at the first term of Whitsunday or Martinmas after the said intended marriage, of the sum of £5000 Sterling, and that to the said Jane Gordon, in liferent, during all the days of her

lifetime, secluding the *jus mariti* of the said Lachlan Macintosh, her intended husband, and to the children to be procreated of the said intended marriage, in fee, and that in such proportions as the said Jane Gordon and Lachlan Macintosh shall appoint by any writing under their hands, and failing thereof, to the said children, equally among them, share and share alike, or failing issue of the said intended marriage, then to the said Lachlan Macintosh in fee."

The Duke of Gordon farther bound himself and his foresaids,

"to make payment to the said Jane Gordon, during all the days of her lifetime, secluding the *jus mariti* of the said Lachlan Macintosh, of a free liferent annuity of £200:" "Declaring that the said annuity, and also the interest of the foresaid sum of £5000 Sterling, shall be payable upon the receipt of the said Jane Gordon alone, during her lifetime; and declaring also, that in case I, the said Duke, or my foresaids, shall incline to pay up the foresaid sum of £5000, we shall be entitled to do so at any term of Whitsunday or Martinmas, on giving six months' notice to that effect; and in that event, the foresaid sum of £5000 shall be again lent out and reinvested on good and sufficient security, at the sight and to the satisfaction of the Most Noble George Marquis of Huntly, Adam Gordon, Esq. of Newton, and Captain John Anderson of Candacraig, or the survivors or survivor of them,—the security to be taken in the same terms as are above expressed: And in order to secure the reinvestment of the foresaid sum of £5000 as aforesaid, it is hereby declared to be necessary that the discharge to me or my foresaids shall be granted with the consent of the said George Marquis of Huntly, Adam Gordon and Captain John Anderson, or the survivors or survivor of them, as trustees, for the purpose of carrying the said reinvestment into effect: And I hereby revoke and recall all bonds of provision granted by me at any time of my life, to and in favour of the said Jane Gordon, my daughter."

In 1829, after the Duke of Gordon's death, the £5000 having been paid up by his trustees on the joint receipt and discharge of Mr and Mrs Macintosh and Captain Anderson (who alone of the three individuals mentioned in the bond of provision accepted of the appointment), was paid over to Mr Macintosh, who granted bond for it in terms of the Duke of Gordon's bond of provision. Mr Macintosh then lent it out to Alexander Fraser, Esq., now Lord Lovat,—£120 on personal security, and £4880 on a redeemable annuity for £411, secured by an heritable bond over the barony of Lovat, and made payable to Captain Anderson and William Hackney Kerr, as trustees for Mr and Mrs Macintosh and their children. In order to secure the ultimate repayment of the £5000, two insurances were effected in the name of these trustees,—one for £5000 on the life of Lord Lovat, and another for £2500 on the life of Mrs Macintosh; and for keeping up these insurances, it was provided by a deed of agreement and declaration of trust, that the annuity of £411, as uplifted by the trustees, should be applied, in the first instance, in payment of the premiums. The residue of the annuity, in so far as it did not exceed the legal interest of £5000, was to be paid to Mrs Macintosh, secluding her husband's *jus mariti*. In the event of the annuity being redeemed, or the sum insured on the annuitant's life becoming payable in the lifetime of Mrs Macintosh, her husband, his heirs and successors, were taken bound, on receiving an assignment to the insurance on her life, to reinvest the full sum of £5000 in terms of the Duke of Gordon's bond of provision; and on the other hand, in the event of the annuity subsisting till her death, the sum insured on her life was to be employed, *pro tanto*, in payment

of the bond which her husband had granted for the £5000. The residue of that bond, so far as not provided for by the sums recovered from the insurance on Mrs Macintosh's life, was to be provided for "by a sale or transfer of the said annuity, or such part thereof as may be requisite for that purpose, and that within such time after the death of Mrs Macintosh as the parties concerned may agree upon, and the remainder of said annuity, or of the prices or proceeds thereof, if the whole is sold, shall belong or be assigned over to the said Lachlan Macintosh, his heirs or assignees, and his foresaid bond for the said sum of £5000 Sterling shall be delivered up to him discharged."

Two children were born of the marriage between Mr and Mrs Macintosh, but one only, a son, survived his father, who died intestate in 1832. Thereafter, Mr William Paul was appointed *factor loco tutoris* to the son, who continued to reside with his mother till circumstances occurred which the Court deemed sufficient to warrant his removal. An order to that effect was given, but Mrs Macintosh secretly withdrew with him to Boulogne, where he died in 1839, while measures were in progress to enforce the authority of the Court. In the meantime, the trustees, Captain Anderson and Mr Hackney Kerr, having died, an application was made to the Court for the appointment of a judicial factor. Mr James Graham was accordingly appointed *ad interim*, and brought the present process of multiplepounding for the purpose of having it determined to whom the fee of the £5000, and the relative securities, belonged. In this process he called as competing claimants, Mrs Macintosh and Captain Thomas Macintosh, the only surviving brother and sole next of kin of her late husband, Mr Lachlan Macintosh. Appearance was also made by James Macintosh, who was the son of Mr Lachlan Macintosh's immediate elder brother, and claimed as heir of conquest, on the supposition that the sum had been rendered heritable. During the dependence James Macintosh died; and as he was succeeded by Captain Thomas Macintosh, the competition was ultimately limited to the two parties originally called. A preliminary objection was taken by Captain Macintosh, on the ground that Mr Graham, who only held the appointment of judicial factor *ad interim*, had not a sufficient title to raise the process,—more especially as the permanent appointment had been conferred not on him but on Mr Kenneth Mackenzie. The Lord Ordinary repelled the objection, and held the summons as a condescendence by Mr Mackenzie of the fund *in medio*.

Mrs Macintosh claimed—1. The fee of the £5000 contained in the Duke of Gordon's bond of provision, or at least one-half thereof as *jus relicta*, or as due to her by the rules of succession applicable to the domicile of her son at the time of his death.

2. In the event of its being found that she had a liferent interest merely in the fund, she claimed that the annuity be paid over to her by the judicial factor, under deduction of such a proportion only of the premiums of insurance as may correspond to her interest in the fund as liferentrix.

3. In the same event, she claimed her *jus relicta* from the policy for £2500.

Captain Macintosh claimed the principal sum of £5000 as the *fiar* of the provisions contained in the

Duke of Gordon's bond, and the subsequent deeds executed in relation thereto.

The Lord Ordinary ordered mutual cases on the whole cause.

Pleaded by Mrs Macintosh—

1. The sum was plainly designed as a provision for her. It was bestowed on her account. She was the daughter of the granter, and she was also, *per expressum*, the grantee. The affection of the granter towards her, embodied into an intention to make a suitable provision for her, was the inductive cause of granting the bond. The granter accordingly bound himself and his heirs "to make payment to the said Jane Gordon." This is a perfect, and, so far as she is concerned, an absolute and unqualified obligation to pay the sum to her. It may be quite true, that *failing the claimant*, the granter did intend the sum to go to the issue of the marriage, and that, failing both the claimant and issue, he meant to give a contingent interest to the husband; but it never can be maintained that he intended to promote either the right of the heir of a deceased child, or the right of the heir of the husband, over the right of his own daughter. 2. Independently of the intention, the words used vest the fee in her according to the established rule in law, that a conveyance to a parent in *liferent*, and to children *nascituri* in fee, without a nomination of trustees, or the use of the term *allenary*, or other terms to signify that the parent is himself constituted trustee for the children, vests the fee in the parent. It may be said that the bond does contain an appointment of trustees; but then it ought to be observed, that these trustees were not constituted creditors. The granter does not convey the sum to them in the event of its being paid up. On the contrary, he framed the bond so as to make and keep his daughter the creditor, and the only creditor. He vested no fiduciary right in any one, either for the behoof of the children, or, failing them, for behoof of Mr Macintosh. The sole object of the appointment of trustees was to secure the reinvestment of the fund, in the event of its being paid up, so that it might not be dissipated, but reserved entire for the use of his daughter. A strong confirmation of this view is the fact, that the *jus mariti* is expressly excluded. As Mrs Macintosh is prepared to rest her case substantially on the plea that the fee vested in her, it seems unnecessary to enlarge on the alternative heads of her claim.

Pleaded by Captain Macintosh—

The effect of the destination in the bond was to vest the fee of the £5000 in the son as the sole issue of the marriage. Even in feudal rights, to which the technical rule as to a fee never being *in pendente* properly applies, whenever the words of conveyance to a parent, and to children *nascituri* of a *liferent* and fee respectively, are such as clearly import a limitation of the parent's right, the fee, though *ex necessitate* in the parent, is only fiduciary. When the conveyance is of a sum of money, where of course no feudal technicality interferes, the intention, expressed or presumed, of the granter alone regulates the conveyance. Accordingly, it will be found, that wherever there is an indication of intention to secure the fee to the children, whether by words restraining the right of the parent, or providing for implement to the children, the destination is held to give a beneficial destination to the latter. In the case of a trust unaccompanied with taxative expressions, it has been held that the effect of it is to give the fee to the children. In the present case, not merely does the whole tenor of the bond show that it was intended to give a bare right of *liferent* to Mrs Macintosh, and to protect the fee for the issue of the marriage, but there is also a trust created sufficient to keep separate and distinct the several estates of *liferent* and fee. Were it possible to put a different construction on the conveyance, the more probable construction would be, that the fee vested not in the wife, but in the husband as the *persona dignior*.

The Lord Ordinary pronounced the following interlocutor:

"4th November 1841.—The Lord Ordinary having heard counsel in this multiplepounding, and thereafter advised the revised cases, writs produced, and whole process—Finds that the

late Alexander Duke of Gordon, in 1825, granted a personal bond for £5000 Sterling in favour of Jane Gordon, his acknowledged daughter, afterwards wife of Lachlan Macintosh, which bond proceeded solely on the narrative of 'the love, favour, and affection which his Grace had and bore to the said Jane Gordon,' and on no other inductive cause; and that on that narrative the Duke bound and obliged himself, and his heirs, 'to make payment to the said Jane Gordon at the first term of Whitsunday or Martinmas after the said intended marriage, of the sum of £5000 Sterling, and that to the said Jane Gordon, in *liferent*, during all the days of her lifetime, secluding the *jus mariti* of the said Lachlan Macintosh, her intended husband, and to the children to be procreated of the said intended marriage, in fee, and that in such proportions as the said Jane Gordon and Lachlan Macintosh shall appoint, by any writing under their hands, and failing thereof, to the said children equally among them, share and share alike, or failing issue of the said intended marriage, then to the said Lachlan Macintosh in fee.' That it was farther provided in a subsequent clause of the said bond, that in case the said Duke, or his forebears, should 'incline to pay up the foresaid sum of £5000, he shall be entitled to do so at any term of Whitsunday or Martinmas, on giving six months' notice to that effect, and in that event, the foresaid sum of £5000 shall be again lent out and reinvested on good and sufficient security, at the sight, and to the satisfaction of the Most Noble George Marquis of Huntly, Adam Gordon, Esq. of Newton, and Captain John Anderson of Candacraig, or the survivors or survivor of them, the security to be taken in the same terms as are above expressed; and in order to secure the reinvestment of the foresaid sum of £5000 as aforesaid, it is hereby declared to be necessary that the discharge to me or my forebears shall be granted with the consent of the said George Marquis of Huntly, Adam Gordon, and Captain John Anderson, or the survivors or survivor of them, as trustees for the purpose of carrying the said reinvestment into effect.' Finds that the said Lachlan Macintosh was, soon after the date of the said bond, married to the said Jane Gordon, but that it does not appear from any documents produced, or otherwise, that he made any settlement on his spouse on that occasion: Finds that, notwithstanding the seclusion of his *jus mariti* contained in the said bond, the said Lachlan Macintosh was allowed, by the only trustee who acted under the said bond, to intromit with and uplift the said sum of £5000 in the year 1830, on a consent obtained from Mrs. Macintosh during her coverture; that the said sum was invested by Macintosh in the purchase of a redeemable annuity from Thomas Fraser, Esq., then of Lovat, now Lord Lovat; and the repayment of the capital was secured on certain policies of insurance effected by Macintosh on the life of Lovat and his wife, the premiums of which were annually provided for out of the annuities payable by Lord Lovat in consideration of the said £5000: Finds that the marriage between the said Mrs Jane Gordon and Lachlan Macintosh was dissolved by the death of Macintosh in 1832, and that Alexander Adam Gordon Macintosh was the only surviving child of the marriage, but that he died in pupillarity in 1839: Finds that the legal rights of Mrs Jane Gordon in the sum, as secured to her by the said bond at the date of the marriage, cannot be affected by the transactions of the said Lachlan Macintosh subsequent thereto, which were hazardous and prejudicial to her, and unauthorised by the bond, and that the husband's heir cannot found on any deed or deeds of consent obtained by him from his wife *stante matrimonio*: Finds that Mrs Jane Gordon is now entitled to repudiate and recal the same, and that she has, by a competent deed produced, recalled her consent: Finds that according to the terms and conception of the said original deed, and under the admitted state of the fact, that both the child of the marriage and the said Lachlan Macintosh have predeceased his wife, the prospective but contingent interest of these parties, under the substitution in the bond, has now ceased, and that the sole interest in the fund secured by the said bond, and the right of uplifting, disposing, and burdening the same at pleasure, is vested in the claimant Mrs Jane Gordon; and in respect it is not denied that the fund *in medio* consists of money to be realised under the foresaid policies, which must be held as a *surrogatum* for the amount of the original bond, uplifted by

Lachlan Macintosh as aforesaid, finds, on the whole matter, that the same is now claimable by the said Mrs Jane Gordon, and prefers her accordingly to the fund *in medio*: Finds no expenses hitherto incurred due to either party, and decerns.

"Note.—The claim of Mrs Macintosh to the property and control of her own fortune, under the whole circumstances articulately detailed in the interlocutor, appear to the Lord Ordinary to be so strongly founded in justice, that he should have regretted if any rules of strict law had prevented him from giving effect to it. But it is apprehended that the authorities which fix the legal construction of the principal documents on which the question turns, decisively support the plea of Mrs Macintosh.

"In the outset, it is supposed to be quite clear that the rights of this lady must be ascertained and governed by the terms of the bond under which the original portion was bestowed on her by her father. The fund stood on that bond at the date of the marriage. The *jus mariti* of the husband was strictly excluded, and therefore no transaction or arrangement which he prevailed on his wife to give her consent to, *stans matrimonio*, can affect her legal rights as previously constituted.

"The next and chief question in debate is, what was the extent of the right vested in Mrs Macintosh under the Duke's bond of 1825? The *heir-at-law* of Lachlan Macintosh contends that Jane Gordon was effectually, and in apt and formal terms, excluded from the fee of the sum provided under this bond—that this was held by her as a trustee for the child of the marriage, whom failing, for Lachlan Macintosh;—while Mrs Macintosh maintains that the fee was vested in *her* for her own behoof, subject to such limitation in her use or control of the fund as the peculiar terms of the bond (subject to renewal in the events specified) may import in law. The Lord Ordinary is of opinion that Mrs Macintosh's plea is well founded on every consideration of weight in the law, whether founded on the presumed intention of the granter of the bond, or on the authorities and precedents which fix the legal meaning and import of an obligation and destination expressed in the terms used in the bond which is now the subject of construction.

"In the first place, it is hardly possible to suppose that any rational parent granting a provision to a daughter in the terms of this bond, could seriously intend that in case of the predecease of her husband a few years after the marriage, and of the death of the children of the marriage in *pupillarity*, the fee of the provision should be claimable by the collateral and distant heirs of the first husband, thus depriving a woman still in youth, and likely to form another connexion in life, of the capital of the whole provision. If that extraordinary arrangement had been contemplated by the father, there were various ways of carrying his intentions into effect; but most assuredly the bond in that case never would have been expressed in the terms in which it was here framed. But,

"In the next place, it is apprehended that the clauses in the bond, according to their legitimate and established construction in our practice, were sufficiently calculated to preserve every interest which the parties must be presumed to have had in view at its date; and as these interests no longer exist, Mrs Macintosh is now left in the free and uncontrolled right of the provision secured to her by her father. The material clauses of this bond deserve to be separately considered.

"1. In the leading and obligatory clause of the bond, the Duke became bound to 'make payment to the said Jane Gordon, at the first term of Whitsunday or Martinmas after the said intended marriage, of the sum of £5000 Sterling, and that to the said Jane Gordon in *liferent*, during all the days of her lifetime, excluding the *jus mariti* of the said Lachlan Macintosh her intended husband, and to the children to be procreated of the said intended marriage in fee, and that in such proportions as the said Jane Gordon and Lachlan Macintosh shall appoint by any writing,' &c., 'or failing issue of the said intended marriage, to the said Lachlan Macintosh in fee.'

"Now, if that clause stood *per se*, it is supposed that no lawyer could seriously entertain a doubt that the payee of the bond, though *ex figura verborum* a *liferentrix*, was truly and legally the *fiar*. There have, it is supposed, been thousands of instances, since the case of Newlands in 1794, in which similar

destinations to parents in *liferent*, and to children *nascituri* in fee, have occurred in practice, and no party has for many years attempted to question their legal effect. They have been invariably held to vest a fee in the nominal *liferenter*. The case of Cuthbertson in 1781 (*Dict.* p. 4279), quoted in Mrs Macintosh's case, is an early precedent in point; but the case of Lindsay, in 1807, (*App. to Morison, voce Fiar*, No. 1) appears to be a still stronger exemplification of the leaning of the law to hold a fee as vested in the nominal *liferentrix* under a destination to a party in *liferent*, and her children *nascituri* in fee. There, William Lamberton having given money to his married daughter in trust, to purchase a tenement, the conveyance, as arranged, was taken 'to William Lamberton (the father) during all the days of his life, and after his decease, to his daughter Janet Lamberton, also in *liferent* during all the days of her life, and to the children already procreated or to be procreated of the marriage between her and David Lindsay, equally among them, in fee.' There was a power reserved to William the father, without consent of the daughter, to alter or innovate the destination, or even to *sell* or *burden* the premises. He never did so; but on his death, Janet the daughter sold the tenement, when a declarator was brought to try her right; and the Court, with only one dissentient voice, found that the fee was in Janet.

"In short, upon these and other authorities of daily citation, it is thought that the import of such a destination as that which is set forth in the obligatory clause of the present bond, is now irreversibly fixed, and that no question as to its import could now be safely mooted.

"2. But the whole difficulty of the present case is said to arise from another provision in the bond, which now deserves particular attention. The clause referred to, is that whereby the noble granter of the bond stipulated that he should be at liberty to pay up the capital sum, and that so often as the sum was paid up, and as the existing security was changed, 'it should be again lent out and reinvested on good and sufficient security, at the sight and to the satisfaction of the Most Noble George Marquis of Huntly' (and certain other gentlemen named), 'the security to be taken in the same terms as are above expressed.'

"Here it will be observed, that no provision was made for any new restraint being introduced into the title. The security was to be granted on every renewal, precisely in the same terms as the original bond. But the plea of the *heir-at-law* of the husband is, that this stipulation had the effect of converting Mrs Macintosh's right into that of a mere *liferentrix*, and that it reduced such fee as was technically vested in her into a fiduciary fee for the children *nascituri*, in the first instance, and failing them, for Macintosh the husband, and his heirs-at-law.

"It seems, however, to be contrary to every sound and legitimate inference, to hold that this was the real meaning of the parties in the clause under consideration. The bond appears to have been prepared by the agent before this Court of a nobleman of extensive property, at a time when it had long been understood by the profession that a destination in similar terms carried the fee to the nominal *liferentrix*, and it was matter of equal notoriety at that period, that parties who intended to limit a provision about to be given to a young relative, to a *liferent* only, were bound either to direct the conveyance to be given for '*liferent* use *alienarily*,' as laid down in the case of Newlands, or otherwise to convey the subject or fund directly to *trustees*, as in the case of Seton (*Dict.* p. 4219), who would have held the fund securely for behoof of all to whom any ultimate right was intended to be given. But when the bond was not so expressed, it follows on every principle of law and right construction, that it was framed for another purpose, which, if discoverable, must receive effect from this Court.

"In this inquiry, it is well known that prohibitions to *uplift* money secured by bonds in special terms, and obligations to reinvest the fund if paid up, have not been of very frequent occurrence in modern practice; but in the earlier periods of our law these were not uncommon. In the Dictionary there is a whole section on the effect of 'prohibitions to alter,' and 'to uplift *without consent*,' and of clauses 'of return,' &c. (*Dict.* 4304), and the import of all the decisions seems to come to this, that such clauses were intended to prevent *gratuitous* alienations; but that they could not affect the previous and legal right vested

in the original creditor or payee, at least so far as to prevent the property or fund so vested in him from being attached for his onerous debts and deeds, or even alienated by the creditor for just and useful purposes. In illustration of this doctrine, reference may be made to the case of Drummond (Dict. p. 4307), which is reported at great length, both by Stair and Gilmour, and to the cases of Strachan in 1683 (p. 4310), and Strachan in 1714 (p. 4312)—all reported under the same title of the Dictionary.

"It is conceived that these authorities sufficiently indicate the legal import and extent of the obligation to keep up and renew the security in the present case. That stipulation could not have been inserted for the purpose of *divesting* the disponent or creditor of the right vested in her by the obligatory clause of the bond. On the contrary, it provides anxiously for the repetition and renewal of the security in the precise terms of the original right. The rights of the parties in the fund, therefore, must be judged of in the same manner as if the Duke of Gordon had retained the fund upon the original bond, without paying up the capital till the present period; in that event the question would have occurred purely, and without any speciality, if the fee or right of property in this fund now remained with Mrs Jane Gordon, the favoured party, or if it had passed to the heirs of her deceased husband, who were strangers in blood to her and her father. Could onerous creditors contracting with Jane Gordon, not have attached this fund as now free and disencumbered of every burden and interest previously existing in third parties? Or would Mrs Jane Macintosh be viewed as a mere fiduciary for her husband's collateral heirs?

"The Lord Ordinary is of opinion that the widow's plea on these points would have been insuperable. She was, by the conception of the original bond, constituted in proper technical terms the *fiar* of the fund; and though there was a substitution fenced with a certain prohibitory clause, which effectually prevented her from altering the destination, it is at least questionable if her creditors would have been legally restrained, even if the marriage had *subsisted*, from attaching the fund for any properly onerous contraction of hers; and still less can she be prevented from alienating the subject, when the parties have *predeceased* her, whose contingent interest, now at an end, was manifestly the sole cause of any limitation imposed on her by her father, in the uplifting and disposal of her portion.

"The case is treated by the heir-at-law as if the clauses of the bond in the present instance were equivalent to a formal and irrevocable conveyance of the fund in trust, to the parties authorised to superintend the reinvestments. But if the legal construction of the bond before suggested be correct, there is an important distinction between the cases. The bond imposed a certain restraint upon the wife, but it did not in law entirely exclude her administration and power over the fund for onerous causes, as a conveyance to stranger trustees would have done. This apparently was not intended. It might have been greatly against the interest of Mrs Macintosh's children themselves, whose ultimate advantage was obviously contemplated in this bond, so to restrain the *fiar*; as it might be necessary for her to raise or borrow money on the bond, to educate or establish them in the world, or for other purposes beneficial to herself and her family. Hence the appointment of third parties to advise the *fiar* in uplifting and reinvesting the capital, was proper, as her husband's *jus mariti* was excluded, and it was probably thought expedient to put some restraint on her against unnecessary and gratuitous alienations. But such a provision cannot change the legal character of the right conferred on the payee under the principal clause of the bond, or raise the mere *spes* of substitutes under a contingent destination into an immediate right of fee.

"Finally, even if the sum in the bond here, instead of being made payable directly to Jane Gordon, had been at first conveyed by the Duke of Gordon, in proper and formal terms, to trustees, for behoof of the same parties who are called under the substitution in the bond, it is probable that the claim of Mrs Macintosh, in the events which have now emerged, would have been equally well founded. Even if the Duke of Gordon had placed £5000 in the hands of trustees, for behoof of his daughter in life during all the days of her life, and of the children of the marriage, whom failing, of Lachlan Macintosh, her hus-

band, in fee (without any mention of heirs), it is clear that such a provision would not have been exigible from the trustees till Mrs Macintosh's death; and if so, no *jus crediti* would have vested in any of the substitutes till the period of payment, as laid down by the First Division of the Court in the late cause of Wright and Ogilvie, which was elaborately argued and well considered. (See Rep., 9th July 1840). But if, as has happened here, all the substitutes die without issue prior to the term of payment, it follows that the provision, in so far as any contingent interest was given to substitutes, would lapse, and so leave the fund (if there had been a trust) to be claimable in absolute property by the party for whose primary behoof it was created.

"Indeed, even when a trust has been constituted over a wife's property in an antenuptial contract of marriage, or (semble) in any other deed in contemplation of marriage, it may be recalled or put an end to by the radical owner of the subject, on the dissolution of the marriage, when the interests have come to an end in respect of which the trust was created. This was almost the unanimous opinion of the Court in the case of Mrs Torry Anderson of Tushielaw in 1837 (See Reports, 2d June 1837), in which it was held that while a trust made by a bride of her property, in an antenuptial contract of marriage, could not be recalled pending the marriage, it might unquestionably be revoked after the dissolution of the marriage, when no party had any longer an interest to maintain the trust. That principle might have applied to the circumstances of the present case as they now stand, even if a formal trust had been created; but the parties did not think it necessary to constitute any such stringent security when the marriage of the claimant took place.

"In every view, therefore, which the Lord Ordinary can take of this case, he is of opinion that there are ample grounds, in point of law, for sustaining the claim of Mrs Macintosh."

Captain Macintosh reclaimed. At advising,

Lord President.—It is certain that the word *alienarily* does not occur here. This is a fact of great importance; but I apprehend that in the most of those cases in which that word has been considered necessary, in order to restrict the parent's right to a bare life rent, the kind of property in question was land. There may be some room for doubting if the rule applies as strongly to the case of a money provision. A question occurred lately in the Second Division as to the construction of a will, and we all concurred in thinking, that if from the words of the deed it appeared that nothing more was intended than to give a life rent, effect must be given to the intention, even in the absence of taxative words. I am aware that we cannot trench on the case of Newlands; but I have some doubts whether the present case can be considered identical with it. The matter certainly does not appear so clear to me as it does to the Lord Ordinary.

Lord Gillies.—I am quite decided that the interlocutor is right. Effect ought certainly to be given to the will of the grantor; but I have no doubt that in this case, that will was just as the Lord Ordinary has interpreted it. I cannot conceive that the grantor wished his daughter to be deprived of the fee. I dare say he did not contemplate the event which has happened, of the issue of the marriage becoming extinct during the mother's life. Had he done so, it is probable that he might have provided more distinctly for the consequences. But the Lord Ordinary's note is so full and satisfactory, that I have little to add. I may only observe, that though the provision was granted in contemplation of the marriage, it was also for love and favour to the daughter. That was the grantor's motive; and it is altogether inconsistent with it, to suppose that he wished to deprive her of the fee, and leave it to go to utter strangers. This I cannot believe. Then the payment is not only to be made to Jane Gordon, but it is to be made secluding the *jus mariti*; and I am satisfied that the whole clause regarding the reinvestment was framed for the purpose of giving effect to this seclusion. Taking these two things into view—first, the exclusion of the *jus mariti*, and then the declaration of love and favour, as the sole or chief object of the provision—I can have no doubt that the fee is in Mrs Macintosh. I must also say, that I see no ground for the distinction between heritable and moveable in questions of this nature. The case of Newlands

stands untouched, and has been followed in various instances analogous to the present.

Lord Mackenzie.—I am of the same opinion. This is the case of a money provision granted by a father to his daughter on the occasion of her marriage. It is directed to be paid to the daughter in liferent, and her children *nascituri* in fee; and the question is, whether it belongs to the daughter or to the heirs of her children predeceasing,—that is, whether the fee is vested in her or not? If it did vest in her, it is in her yet. If it did not, she has no right. The heirs of her children must take the fee. Now I think that the fee was in her. It was established as a general point by the case of *Newlands*, that where a grant is made in this way to a parent in liferent, and the children *nascituri* in fee, the fee is in the parent, unless the word *alienari* be used, or some other word of full and entire equivalence. That decision has been adhered to over and over again, in subsequent cases; and these decisions have regulated the practice of conveyancing. The rule was introduced from a legal necessity, contrary to what may have been presumed to be the intention of the granter. But after it was established, and deeds came to be drawn by skilful professional conveyancers, the intention of the granter must be supposed to have been according to the technical construction of the terms employed. That very remark was made in the case of *Duff*, in 1810; and in that case, though there were some special grounds for doubting whether the terms were not intended to be used in a different sense, they received their common effect. Are there then sufficient specialties in the present case to overrule, in the first place, the difficulty that the fee must have been *in pendentis*, unless it vested in Mrs Macintosh; and in the second place, the presumption that the words were used in their technical sense? I rather think, if we are to guess, from a view of the whole deed, at the meaning of the granter, that it was that his daughter should have the fee. It is true that the grant was in contemplation of the marriage of the granter's daughter, but it also bears a narrative of love and favour to her, and it was in lieu of all former provisions in her favour, which are revoked accordingly. Favour to the husband is not described as one of the causes of granting, nor any thing granted on the part of the husband to the wife. Then there is another grant of an annuity of £200 to his daughter, over and above the provision of £5000, and in both there is a careful exclusion of the husband's *jus mariti*. No weight is to be attached to the circumstance, that failing her having children, the provision was to go to her husband; for this was no great mark of favour, seeing that, as she was a natural child, she could have no other heirs except her children, to take the fee vested in her. But then it is said that there was here a trust constituted—not directly, indeed, but contingently. If that were true, there would be something in it; still it would be a curious thing, that a trust which was to have the effect of overturning the ordinary effect of the destination, should only be a contingent one. But it is not true. A trust would have taken away the objection that the fee was *in pendentis*. But all that was provided was, that the money should be reinvested at the sight of certain friends, in case it should suit the granter to pay it up. They were not to hold the money as trustees, but only to see it reinvested. That does not remove in the least degree the difficulty of the fee being *in pendentis*; nor is it a solid ground for presuming the granter's intention to have been in favour of the husband. The only argument that struck me was, that if she be the *fiar*, she must have power to uplift the money herself. But this difficulty applies in some degree, whoever is *fiar*; and even though the daughter was *fiar*, I think the provision as to the money being reinvested might be intended as a check upon her, to prevent the payment of it for the granter's convenience, throwing it loose into her hands. It would be too much to infer from this that there was to be no fee in the wife, or that there was intention in favour of the husband at her expense.

Lord Fullerton.—I am of the same opinion. The only question is, whether the fee was in the wife or in the children? On looking at the terms of the deed, I am clear that it was in the wife. We are not entitled to suppose that the intention of the granter was different from the import of the technical words employed. These are evidently to be interpreted as conveying a fee to the wife, and I see nothing in the condition as to the

reinvestment, to cast any doubt on this interpretation. What the effect of the check might have been, had the wife endeavoured to use her rights as *fiar*, without regarding it, is a different question; but here all we have to determine is, where the fee vested? I am clear that it vested in the wife.

Lord President.—After hearing your Lordships, I feel bound to say that my doubts are removed, and that I am also disposed to adhere to the interlocutor.

The Court adhered.

Authorities for Mrs Macintosh.—Torry's Creditors, 25th Nov. 1755; Mor. 4262. Dewar, 5th May 1825; 1 Wilson and Shaw. Douglas, 7th July 1761; M. 4269. Lindsay, 9th Dec. 1807; M. voce *fiar*, App. No. 1. Case of Cuthbertson, 1st March 1781; M. 4279. Case of Provan, 14th Jan. 1840. Johnston 9th June 1840.

Authorities for Captain Macintosh.—Gerran v. Alexander, 16th June 1781; M. 4402. Mein v. Taylor, 5th June 1827. Newlands v. Newlands' Creditors, 19th July 1794, affirmed 26th April 1798. Hunter v. Hunter's Trustees, 9th July 1794; Bell's Cases. Ewan v. Watt, 10th July 1828. Fisher v. Dixon, 24th Nov. 1831, affirmed 1st July 1833. Archibald Seton v. Creditors of Sir Hugh Seton, 6th March 1793; M. 4219. Turnbull v. Tawse, House of Lords 15th April 1825. Leitch v. Leitch's Trustees, 2d June 1826, affirmed 17th Feb. 1829. Scott v. Napier, 14th Feb. 1826; 2 W. and Sh. Stair, B. II. t. 6, § 10, Brodie's Note. Cuninghame v. Hawthorn, 29th Dec. 1810. Earl of Wemyss v. Earl of Haddington, 28th Feb. 1815, House of Lords 20th May 1818. Bell's Illustrations, Vol. II. pp. 511, 514.

Lord Ordinary, Cuninghame.—For Mrs Macintosh, Rutherford, G. Bell; James Macallan, W.S., Agent.—For Captain Macintosh, Solicitor-General (M'Neill), Pyper; David Wight, W.S., Agent.—B. Clerk.—[H.B.]

8th December 1841.

FIRST DIVISION.—(H. B.)

NO. 44.—GEORGE DILLON HEARNE KIRKALDY, *Suspender and Advocate*, v. MRS CATHERINE MARSHALL and OTHERS, *Chargers and Respondents*.

Trust—Catholic Creditor—Ranking—A trust-settlement for family purposes, by a party who proved to have died insolvent, having been taken up by the trustees, and administered by them on a general understanding with the creditors, and for their behoof, a creditor holding a personal and heritable security for the same debt, claimed on the personal security for the whole amount. A multipointing was afterwards raised by certain creditors in name of the trustees, and the same creditor again lodged his claim to rank for the full amount of the debt, without deducting a payment which he had in the meantime received from the heritable security—Held that the ranking was good.

Abraham Middleton, plumber in Dundee, died in August 1832, leaving a general disposition and settlement of his whole property, heritable and moveable, to trustees, with instructions, after paying his debts and funeral expenses, to divide the residue among his children. The trustees, after entering on the management, saw reason to doubt the solvency of the trust-estate, and published an advertisement calling a meeting of Mr Middleton's creditors "to consider of the state of the trust-affairs, and advise as to the best course to be pursued for the interest of all concerned." They at the same time desired all who had claims on the estate to lodge them, with affidavits of verity, and those indebted to it to make payment. Claims and affidavits were accordingly lodged; and at a meeting of the creditors, on the 29th September 1832, it was resolved that the trustees should proceed to realise the estate, and distribute the funds among the creditors.

One of the debts due by Mr Middleton was a sum of £2000 which he had borrowed in 1825 from Mrs and Miss Kirkaldy, and for which he had granted his personal obligation, and also a bond and disposition in security over certain heritable subjects in Dundee. On the 19th September, previous to the above meeting of creditors, Mr G. D. H. Kirkaldy, who had acquired right to the debt, intimated the assignation of rents to the tenants, and shortly after, having made requisition of payment both upon the trustees and Mr Middleton's heir-at-law, entered to possession.

On the 6th July 1833, Mrs Catherine Marshall, one of Mr Middleton's daughters and residuary legatees, with certain of his creditors, brought a process of multiplepounding in name of the trustees before the Magistrates of Dundee. At this time Mr Kirkaldy had not lodged his claim with the trustees; but on the 3d August following, he lodged it with an affidavit, in which, founding on the bond and disposition in security, he deponed,

"that no part of the said principal sum of £2000 Sterling, nor of the said interest thereof from the said term of Whitsunday (1832), to the said 9th day of August in the year 1832, amounting to £23. 11s., has been paid, or in any way compensated to the deponent," "and he claimed to be ranked on the personal estate for the said two sums, amounting together to the sum of £2023. 11s., without prejudice always to the security held by the deponent over the property in the Nethergate Street of Dundee;" but with the understanding always, "that the deponent is not to draw or retain more than full payment of the said debt, with subsequent interest, and the expenses incurred to him in recovering the debt from the personal estate and the said heritable property."

On the 5th August, at another meeting of the creditors called by the trustees in consequence of the raising of the process of multiplepounding, it was resolved by a considerable majority, that "a process of multiplepounding is premature and unnecessary, and calculated rather to hamper and retard than to facilitate and expedite the winding up of the estate;" that the administration of the trustees had been satisfactory; and that a petition should be presented in their name against an interlocutor which the Magistrates had pronounced sustaining the process, and ordering a condescendence of the fund *in medio*. A petition was accordingly presented, but was refused on the 20th November 1833. About a month previous (16th October), Mr Kirkaldy, with concurrence of the trustees, brought the heritable subjects to sale. The price obtained was £2140, and the disposition to the purchaser, granted also with concurrence of the trustees, bore to be

"without prejudice always to the ranking lately claimed by me" (the present claimant), "for the said principal sum, and interest due thereon, at the time of the said Abraham Middleton's death, upon his personal estate, under the management of his said trustees, the said ranking and claim being hereby expressly reserved, to the effect of enabling me to obtain payment and reimbursement of whatever sum the said principal sum, with the interest remaining due to me, and the expenses which I have incurred in relation thereto, and which are justly chargeable under the said bond, shall exceed the price now received by me from the said Andrew How" (the purchaser) "as above mentioned, but no farther."

Another meeting of the creditors was held on the 30th November 1833, and adjourned to 4th January 1834, against which time the trustees were directed to make up a state of the funds, to scrutinize the claims

given in, and prepare a scheme of division. At this adjourned meeting Mr Kirkaldy's agent gave in a letter, in which he stated, that

"presuming that the dividend on Mr Kirkaldy's ranking will amount to more than £131. 12. 9., I have on his part to state, that he restricts his dividend to that sum, or to whatever less sum shall appear to be due to him on an inspection of the accounts to be rendered," &c.

This amount, afterwards restricted on account of an *error calculi* to £129. 12. 2., was entered by the meeting as an objected claim, and was accordingly reserved in April 1834, when the trustees made payment of 5s. per pound to the other creditors whose claims were not disputed, on their granting a discharge. Meantime the process of multiplepounding continued in dependence; and an interlocutor having been pronounced fixing the term within which claims were to be lodged, Mr Kirkaldy, on the 18th January 1835, gave in a claim and affidavit in terms similar to that which he had formerly given in to the trustees. The claim was objected to by certain of the creditors, on the ground that Mr Kirkaldy was not entitled to be ranked on the fund *in medio* for the full original debt owing under the bond and disposition in security, but only for the balance remaining unpaid when the claim was lodged. After a variety of pleadings, the Magistrates having ordered a report to be made on the claim, found "in terms thereof, that the just amount of the debt for which the claimant G. D. H. Kirkaldy is entitled to be ranked along with the other ordinary creditors of the deceased, according to the judgments of this court, of date 6th July and 3d August 1836, is £103. 11. 8;" and *quoad ultra* sustained the objections, and rejected the claim. Afterwards, in October 1838, the Magistrates pronounced the following interlocutor:

"Having considered the account of the expenses found due by the claimant, Mr G. D. H. Kirkaldy, to the objectors to his claim, with the report thereon, and whole process, approves of the report, and, in terms thereof, taxes the said expenses at £24. 17. 8½., and decerns."

Mr Kirkaldy having received a charge for the amount, with the expense of extract, brought a suspension, in which he prayed the Court "*simpliciter* to suspend the foresaid pretended decret, letters of horning and charge, and whole grounds and warrants thereof." The chargers objected to the suspension as incompetent, on the ground that the merits were not before the Court, and Mr Kirkaldy presented a note of advocacy, which was passed by the Lord Ordinary on the bills "*ob contingentiam*, without prejudice to any objection on the ground that all the parties have not been named in the advocacy as respondents." The record was afterwards closed on revised reasons of suspension and advocacy, and answers.

The suspender and advocator *pleaded*—1. As the respondents were the only parties who appeared and opposed the claim of the complainer in the Court below, and are the sole chargers in the suspension, it was not necessary to direct the advocacy against any other parties. 2. The multiplepounding was, under the circumstances, both inexpedient and incompetent, and ought to have been dismissed by the Magistrates, reserving to any alleged creditor or legatee to institute an action of count and reckoning against the trustees: Crichton v. Stewart, 4th March 1836; Stobbie's Trustees v. McCall, 12th December 1838; and the com-

plainers as a creditor, and as in right of the trustees, who on behalf of the complainer and other creditors opposed the competency of the action, is entitled to plead that objection; and *separatim*, he is entitled to state this, and every competent objection to the legality of the decree under which he is charged to pay expenses. 3. The respondent, Mrs Marshall, has no title to appear or to oppose the complainer, or to charge for expenses. 4. No mere creditor is entitled to object to the debt of another creditor (more especially where no objection is made by the debtor), unless such creditor has competing diligence; and therefore the respondents have no title to object to the claim of the complainer; and at all events, the respondents, on the supposition that Mr Middleton died solvent, have no such title; and it is only on the footing that he died bankrupt that they have any such pretension. 5. The complainer, as a creditor on the insolvent estate of Mr Middleton for the full amount of his debt, in terms of the personal obligation, was entitled to draw a dividend thereon, and his right to do so was not affected by the circumstance that he held a pledge or security for the more effectually obtaining full payment; and the circumstance that he subsequently realised the value of that pledge or security cannot affect his claim, to the effect of preventing him from recovering 20s. in the pound.

The respondents *pleaded*—1. The advocator has not called the proper parties, in respect that, while it is sought in this advocacy to overturn the multiplepointing *funditus*, it is not directed against the creditors, who unanimously resolved that the estate should be administered under it, nor against the trustees who made, or the creditors who received payment from the funds on the faith of that resolution. 2. The advocator is barred from objecting to the competency of the multiplepointing,—(1.) In respect that he not only made appearance in the multiplepointing to plead his case upon the merits, and made up a record without either objecting to the jurisdiction or advocating the judgment on the competency which had already been pronounced, but likewise in his pleadings expressly admitted the jurisdiction of the Court: (2.) In respect he cannot both claim a dividend under the minutes of 30th November 1833 and 4th January 1834, and at the same time repudiate the arrangements and common measures resolved upon at that meeting: (3.) In respect he has not called the parties with whom the question of jurisdiction was tried in the Court below. 3. A multiplepointing is competently brought in the Court which has jurisdiction over the fund, or the holders of the fund, these being in law defenders, and all claimants pursuers. 4. The complainer was not entitled to be ranked on the moveable estate, except after deducting the sum which he had received from the sale of the heritable property.

The Lord Ordinary pronounced the following interlocutor:

" 22d June 1841.—The Lord Ordinary having heard the counsel for the parties on the closed record, and whole process, and made *avizandum*, repels the reasons of advocacy founded on the alleged want of title or interest in the respondents to insist in their objections to the complainer's claim of ranking, or on the incompetency of the process of multiplepointing, as for defect of jurisdiction in the Magistrates. But, in respect to the substantial merits of that claim of ranking itself, Finds, *Primo*, That the trust-deed executed by Middleton, though

originally intended and taken up as a mere family settlement, came, very soon after his death, and prior to any of the proceedings founded on in this action, to be recognised and administered exclusively as a trust for creditors on an insolvent estate, and was acceded to as such apparently by all the creditors, and in particular by the whole parties to this process, who not only left the entire property in the hands of the trustees, and lodged claims upon it as in their custody, but actually received from them an equal dividend of 5s. in the pound of their admitted debts, and had set apart for them a similar dividend on such of their claims as were disputed;—and that the legal effects of this adoption and recognition of the trust cannot be at all affected by the circumstance that the multiplepointing against certain judgments in which this advocacy has been presented, was raised in the name of the said trustees by certain of the creditors: Finds, *Secundo*, That on the 3d of August 1833, a claim and affidavit was lodged with the said trustees by the present complainer for the whole amount of his debt of £2000, with interest thereon then due; and that subsequently, viz., on the 16th October 1833, the said complainer, with concurrence of the trustees, sold by public roup the heritable property disposed to him in security of the said debt, under the powers of sale contained in his bond, and on 30th November thereafter executed a disposition (also with concurrence of the trustees) in favour of the purchaser, in which it was set forth that the said sale, and the complainer's consequent receipt of the price, should be without prejudice to the 'ranking lately claimed by him for the whole principal sum and interest upon the personal estate of the debtor, under the management of his said trustees,—which claim and ranking is expressly reserved, to the effect of his obtaining full payment of the said sum and interest.' Finds, *Tertio*, That the legal effect of the adoption of this trust by the whole creditors, and of their practical accession thereto, was to vest the whole personal estate of the debtor in the trustees, for behoof of, and for equal distribution (according to their existing preferences) among the whole acceding creditors, and to constitute the property so vested as a fund attached and secured for their rateable payment, in the same way and to the same effect as if the same had been attached by separate diligence, used simultaneously at the instance of each of the said creditors: And finds, *Quarto*, That, in these circumstances, the ranking originally claimed by any of the creditors on the said insolvent estate cannot, if correctly made at the time, be restricted or diminished by any subsequent recoveries obtained by them from separate securities held by them, either from third parties or over particular properties belonging to the debtor, but must subsist and be allowed to their full original extent, to the effect of enabling them to draw any sum not exceeding 20s. in the pound of their whole debt and interest: And therefore advocates the cause; and alters the interlocutors of the Magistrates complained of, and finds the complainer entitled still to be ranked for the whole amount of his original claim, to the effect of recovering full payment of the balance of his whole debt; and finds him accordingly entitled now to receive the sum set apart for this contingent claim, when the dividend of 5s. in the pound was paid (in January 1834) to the creditors whose claims were not disputed; and decerns in the ranking and preference accordingly: Finds the complainer entitled to expenses, subject to modification, both in this Court and before the Magistrates: Allows an account to be given in, and remits to the auditor for his taxation and report.

" *Note*.—The Lord Ordinary having expressed pretty fully, in the body of the interlocutor, the views upon which it proceeds, does not think it necessary to add any farther exposition of these views, or any remarks on the authorities, to which very copious references were made in the course of the argument. The hinging point of the case is, whether, by the recognition and adoption of the trust, there was actually an attachment of the trust-funds for behoof of the creditors, equivalent to what might have been effected by separate *pari passu* diligence at the instance of each, and a security then constituted in their favour over these funds, such as would have been created by the use of such diligence? For it was not at last disputed that, when there is once such an attachment and security, the ranking originally obtained on these attached funds cannot be restricted (except by being discharged on full payment) by any subsequent

recoveries from other and separate securities. Now, on the whole matter, the Lord Ordinary cannot doubt that the trust-funds were so attached and secured in this case, just as effectually as if the trustees had obtained a joint mandate or commission from the whole acceding creditors to use diligence for their behoof, and had accordingly led adjudications of the heritage, and proceeded by poindings and arrestment to secure the whole moveables for their satisfaction. The adoption of the trust, and especially the actual receipt of an equal and rateable dividend from the hands of the trustees, implied, he thinks, all this, and truly imported an assignment of their several rights to the trustees (in trust), and a renunciation of all such separate diligence as could alone bring the actual possession of the said trustees, and their right to distribute the property, into question.

"As to expenses, the Lord Ordinary contemplates a very large modification of those incurred in the Inferior-court, where the proceedings of the claimer were in many ways objectionable; and even in this Court there are grounds, he thinks, for a very considerable restriction."

The respondents reclaimed, except in so far as the interlocutor repelled the reasons of advocacy.

At advising,

Lord President.—After giving all the attention in my power to this case, and to the arguments urged against the interlocutor, I am not able to see any thing in the special circumstances of the case that ought to induce us to alter it. The general rule of law is not disputed. The Bankrupt Statutes have introduced a new principle of ranking, which of course regulates all the cases properly falling under these Statutes; but the Legislature has not thought proper to extend that principle to rankings at common law, according to which it is well known to be a clear and indisputable rule, that a creditor holding separate securities for the same debt, is entitled to rank upon all of them without deduction, to the effect of drawing full payment. Here Mr Kirkaldy holds two securities; and the only question therefore is, whether there is any thing, in the special circumstances of the case, to debar him from ranking fully for both? The Lord Ordinary has taken these circumstances into view, and has, I think, disposed of them correctly. First, it appears, that though Mr Middleton's deed was merely a family settlement, and did not contemplate the appointment of trustees for the behoof of his creditors, there afterwards came to be an understanding among the creditors that the trustees under the settlement should continue the management for their behoof. This is proved by the special resolution of a meeting called by the trustees to consider the state of the trust-affairs, and adopt measures for the behoof of all concerned. Mr Kirkaldy accordingly gives in a claim to the trustees for the whole amount of the debt, and the trustees receive it without exception. No doubt afterwards, when a composition of five shillings in the pound was paid by the trustees, the sum effieing to Mr Kirkaldy's claim was reserved, because an objection had been taken to it, on the ground that, by the sale of the heritable property, payment of the greater part of it had been realised, and that the claim ought to be restricted to the balance. But then it is most material to observe, that in the disposition to the purchase of the property, there was inserted, with the concurrence of the trustees, an express reservation, bearing, that it was granted without prejudice to Mr Kirkaldy's claim to rank for the full amount of the debt. The process of multiplepoinding, and the lateness of the period at which Mr Kirkaldy lodged his claim in it, cannot in any way affect the validity of this reservation.

Lord Gillies.—I concur, and think it unnecessary, after what has been said, to make any observations.

Lord Mackenzie.—I also think the interlocutor is right, though I am not prepared, perhaps, to adopt all the reasons on which it is founded. The general rule of law, as to the effect of a double ranking, it is impossible to disturb, though I don't pretend to comprehend the principle which led to the adoption of it.

Lord Fullerton.—I think the Lord Ordinary's interlocutor is right in its conclusion, though I have some doubt of the principle on which, in part at least, he rests it. The interlocutor,

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after laying down various propositions in which I concur, finds, "that the legal effect of the adoption of this trust by the whole creditors, and of their practical accession thereto, was to vest the whole personal estate of the debtor in the trustees, for behoof of, and for equal distribution (according to their existing preferences) among the whole acceding creditors, and to constitute the property so vested as a fund attached and secured for their rateable payment, in the same way and to the same effect as if the same had been attached by separate diligence used simultaneously at the instance of each of the said creditors." And in the note, he certainly holds this to be the point on which the judgment in favour of the claimant turns: "The hinging point of the case is, whether, by the recognition and adoption of the trust, there was actually an attachment of the trust-funds for behoof of the creditors, equivalent to what might have been effected by separate *pari passu* diligence at the instance of each, and a security then constituted in their favour over these funds, such as would have been created by the use of such diligence?" Now, certainly, if the trust-deed could be viewed in this light, there would be an end to all questions. On that view it is admitted, even by the opposite party, that the judgment must be in favour of Kirkaldy. Accordingly, the argument against the interlocutor was directed to show, that a trust-deed of this kind produced no such effect, and formed no such security as that assumed by the Lord Ordinary. I think it would be difficult to show that it did. I have great doubts, indeed, whether a trust like this, merely for the objects of a family settlement, could be converted, even by the circumstance of creditors claiming under it, into a security excluding all separate diligence, and "equivalent to separate *pari passu* diligence of each." But then I do not think that essential to the success of the claimant Kirkaldy, or that the existence of a security over the general fund having such an effect, is the indispensable condition of his ranking on that fund for the full amount of his debt, after taking benefit of the separate security. I think the competency of that double claim rests on the indisputable fact, that there was here a competition and ranking of creditors on an estate which was insolvent, or treated as insolvent. Indeed, if it had not been so, there could have been no room for the present question. It certainly seems at first sight singular that a creditor should, after getting payment of part of his debt, be allowed, for any purpose, to found upon it as subsisting to its full amount. When a debtor makes, and a creditor receives a partial payment, the debt is diminished by that amount. And if the creditor holds a security, the security is proportionally diminished,—that is, it is only a security for the balance. When it is said, in some of the cases referred to, that the security remains certain, though the debt is diminished, it can mean nothing more than that the totality of the *ipsum corpus* of the subject forming the security remains available to the creditor, though it is a security for a smaller sum. A party holding a pledge for a debt, and taking a partial payment, retains the full right of the pledge; but it remains a pledge only for the balance. Accordingly, if, in this case, Middleton had paid part of this debt in his lifetime, or if Kirkaldy had, during his lifetime, or even before the ranking and competition, sold the lands and got the price, his subsequent claim of ranking must have been limited to the balance. But where a competition of creditors, and a ranking of those creditors, occurs, a different principle is let in. There are no means of payment to which, *ex hypothesi*, the funds are inadequate. For the claim of payment which existed against the debtor, there is substituted, as against the competing creditor, a claim to share the fund of division. And the proportional share of each creditor on the fund is estimated according to the amount of his debt as it stood when the ranking commenced. Accordingly, in the ordinary case of sequestration, the dividends, as paid, are not subtracted from the amount of each debt; but on each successive fund of division emerging, each creditor is rated on it according to the amount of his original debt. This leads to no difficulty when the estate is all massed together, and where all the creditors share on the same principle. But the difficulty arises, where, by separate securities or preferences, there is a separation of one part of the estate from the mass, and certain creditors, holding those preferences or securities, are entitled to share the fund

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covered by those securities, to the exclusion of the great body of the creditors. Then the question arises, whether the creditors who have taken the separate fund, shall be bound to deduct the value of the security, or a payment from the amount of the debt for which they would otherwise have ranked on the general fund, or shall be entitled to rank on both funds,—the fund of security, and the general mass of the estate,—according to their original debts. Different systems of law have adopted different principles on this point. In sequestrations, the former, which is more consistent with the equalization of the rights of creditors, has been introduced by Statute. But the rule of the common law has been framed on different principles. According to it the creditors who have shared or appropriated one part of the property of the bankrupt, are still, in ranking on the residue, entitled to share according to the *ratio* of their whole original debts; always under the condition that, by so ranking, they shall not draw more than full payment. And whatever may be thought of this in equity, it involves no absolute inconsistency. There being in such cases, as has been already observed, no question of *payment* to which the whole estate is confessedly inadequate, but of *division*, the principle just referred to does no more than allow each preferable creditor to rank and share on each of the separate funds of division according to the *ratio* of his original debt, just as each creditor ranks in a sequestration for his whole debt on each successively arising fund of division. Nothing brings out this principle more clearly than such cases as those of the Earl of Loudoun against the Creditors of Gilston, and the ranking of Auchinbreck's Creditors, in which a *pari passu* adjudger, who had drawn a payment from funds not covered by the adjudication, was still found entitled, in competition with the co-adjudgers, to rank on the adjudged property for the full amount of the debt. Now, it does not appear to me to be indispensable, in order to let in the operation of this principle, that there should be two or more absolutely effectual securities. That is indeed one case of the application of the principle. But there is room for it on the broader ground, wherever there is insolvency and a ranking of creditors, and where one part of the debtor's property or effects is separated, by diligence or securities in favour of one or more creditors, from the general mass of the effects. In every case of the kind there are two funds of appropriation or division,—the one divisible among the creditors secured separately, and the other divisible among the general body. The ranking on each is different; that on the first being confined to the creditor, or creditors secured,—that on the latter extended to the whole body of creditors, including those secured. But in both the *ratio* of the ranking, as in every ranking, is the same,—viz., the amount of the original debt of each creditor. On these grounds, I think the claimant, Kirkaldy, was entitled to rank on the general fund with the other creditors for the full amount of his original debt, whether the trust could be held to be equivalent to complete diligence in security or not. It is admitted, at all events, to have practically operated as a division of, and ranking on, an insolvent estate. Indeed, if it were not insolvent, there could be no room for the present question. And though Kirkaldy took the full benefit of the one fund of division—the estate covered by his security—because on it he had no competition; he was still entitled to rank on the mass of the estate along with the general body of the creditors; and being so entitled, I think he must rank according to the *ratio* which at common law is involved in any ranking, viz., the amount of his original debt. This admits of being brought to another test, which seems conclusive. It is not pretended that here the other creditors could have compelled the claimant, Kirkaldy, either to sell the estate, or to value and deduct the security from his debt before ranking, if the estate had remained unsold. On the contrary, it seemed to be admitted, that he might have ranked first for the full amount of his debt, drawn the dividend, and still have, after that, taken the full benefit of the security by selling and drawing the price. Now, this appears to me utterly inexplicable on any sound or consistent principle. If the price of the estate sold before the ranking was to be considered as a partial payment, obliging the claimant to deduct, his holding the estate then remaining unsold must have been considered, on the very same principle, as an appropriation of part of the insolvent's property, which he was bound to value and deduct. It seems utterly impossible, on

any rational principle, to treat differently the *price* and the subject from which it was produced; and I cannot see how a different rule should be let in, merely by the circumstance, *ex concessis* in the option of the preferable creditor, of selling before or after the ranking. I think, therefore, that the Lord Ordinary's interlocutor ought to be adhered to, though I am not disposed to rest it on the narrow ground of the trust-deed operating as an absolute security, or being equivalent to diligence for behoof of all the creditors, but on the broad principle, that there was here a ranking on an insolvent estate, which the claimant was entitled to share according to the *ratio* of his original debt, though he had previously taken the benefit of a separate security.

The Court pronounced the following interlocutor:

"Adhere to the interlocutor reclaimed against, except in so far as it finds the complainer entitled now to receive the sums set apart for answering his claim, and refuse the desire of the reclaiming note: Find the complainer entitled to expenses since the date of the Lord Ordinary's interlocutor, and remit the account to the auditor to tax, and report to the Lord Ordinary; *quoad ultra*, remit to the Lord Ordinary to hear parties farther as to the amount of the sum which the complainer is now entitled to draw, and to do therein as he shall see just."

Lord Ordinary, Jeffrey.—*For Suspendor and Advocator*, Rutherford, Russell; *Shepherd and Grant, W.S., Agents.*—*For Respondents*, Dean of Faculty (Wood), Shaw; Greig and Morton, W.S., *Agents.*—B. Clerk.—[H.B.]

8th December 1841.

SECOND DIVISION.—(J. W.)

No. 45.—JOHN SWAN, *Suspendor*, v. ALEXANDER BLAIR, *for behoof of Bank of Scotland, Changer.*

Stamp Act, 55 Geo. III. c. 184, Part 1st, p. 66.—Bank—Banker's Draft—*Found*, 1. *That drafts upon a banker in the form of a mere order, without any mention either of the bearer or of a particular payee, are to be considered as drafts payable to the bearer, in the sense, and within the benefit of the Act 55 Geo. III. c. 184: 2. That drafts in that form do not lose their privilege from their bearing, after and apart from the signature of the drawer, a memorandum in his handwriting, such as "per A B." But that an order having such addition in the body of it, and before the signature, is payable only to the party mentioned, and is not entitled to the statutory privilege as payable to the bearer: 3. That drafts payable to A B, E F, "or to the bearer," are to be considered as drafts payable to the bearer.*

Vide ante, Vol. VII. p. 200, 5th February 1835, and Vol. VIII. p. 4, 6th July 1835.

The suspendor, on the 16th June 1819, became cautioner for Mr William Martin in a cash-credit bond to the Bank of Scotland for £600. Mr Martin became bankrupt in 1831; and the present process is a suspension of a charge given to his cautioner by the treasurer of the bank, to make payment to him of the sums of £552. 2. 8. of principal, and £137. 15. 11. of interest, due under the bond. The mode by which Mr Martin operated upon the account was by means of printed drafts of a particular form, furnished to him by the bank, and bearing the place "Dumfries," as that at which they were apparently issued. Various reasons of suspension were stated, but were all reserved with the exception of one relating to the form of the drafts, upon which the balance charged for arises, and which, it was alleged, were in violation of the Stamp Acts. These Statutes impose a particular duty on all bills, promissory-notes, orders, drafts, or other documents, under the following exception:

"All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers,

or any person or persons acting as a banker, who shall reside or transact the business of a banker within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders, and provided the same shall bear date on or before the day on which the same shall be issued, and provided the same do not direct the payment to be made by bills or promissory-notes."

The drafts challenged were in the following forms:

- "£100. *Dumfries, 30th June 1819.*
 "Debit my account with the Bank of Scotland, with the sum of one hundred pounds Sterling, p. James Martin, writer, Dumfries."
 "To John Barker, Esq., agent, } "WM. MARTIN.
 Dumfries. } "Indorsed JAS. MARTIN."
 "£173 Stg. *Dumfries, 17th Jan. 1820.*
 "Debit my account in the Bank of Scotland, with one hundred and seventy-three pounds Sterling."
 "To J. Barker, Esq., agent for the } "WM. MARTIN.
 Bank of Scotland, Dumfries. } "p. JAS. JAMIESON."
 "One hundred and seventy-three.
 "Indorsed JAS. JAMIESON."

The Lord Ordinary pronounced the following interlocutor:

"20th March 1841.—The Lord Ordinary having heard the counsel for the parties on the closed record, and whole process, for the purpose of considering whether any of the reasons of suspension admit of being finally disposed of on the documents and admissions in process, and what judgment should be pronounced upon any such reasons,—Finds, 1mo, That drafts drawn in the form of a mere order, to debit the drawer's account with a particular sum, and without any mention either 'of the bearer,' or of a particular payee, are to be considered as *drafts payable to the bearer*, in the sense, and within the benefit of the Act of 55 Geo. III. c. 184: Finds, 2do, That drafts in that form ought not to lose the privileges conferred by that Act, merely from their bearing on the lower part of the paper, below, and quite apart from the signature or address, a memorandum, note or jotting, in the handwriting of the drawer, consisting of such words as 'per James Martin,' or 'James Thomson,' or any other individual: But that such an order having an addition or direction of this kind inserted in the body of it before the signature, and as a sequel or continuous part of the order itself, must be regarded as drawn payable only to the party mentioned in such addition, and not entitled, therefore, to the statutory privilege as payable to the bearer: Finds, 3tio, That drafts made payable to James Martin, James Thomson (or any other individual), 'or to the bearer,' ought to be considered as drafts payable to the bearer, in the sense of the Statute referred to, and as such entitled to the same privileges as if made payable to the bearer only, and without the mention of any individual; but that drafts made payable to James Martin (or any other individual), therein described, merely as *the bearer*, must be held to be drafts payable only to the individual so specified, and consequently not within the benefit of the Act; and before further answer as to the reasons of suspension founded on the form and tenor of the different drafts to which objections have been stated, appoints the cause to be enrolled, that parties may explain to what particular drafts the preceding findings should be applied, and the practical result of this application on the validity of the charge: *Quoad ultra*, finds that none of the other reasons of suspension can be properly disposed of on the documents and admissions in process, nor until the disputed facts in regard to them are settled by farther proof."

Both parties reclaimed,—the suspender against the first part, and the charger against the second part of the second finding.

At advising, the suspender *argued*, that the cheques exempted from the Stamp Act were not negotiable. They were meant to be evidence of payments between the drawer and the bank, but not in any question between the drawer and payee, or the bank and payee;

but the making them payable to a payee *nomination*, was making them evidence of the payment, and that whether the payee was named after the signature of the drawer or in the body of the order, and before the signature of the drawer.

Lord Justice-Clerk.—As to the first form, in which the direction to make payment to James Martin is inserted in the body of the draft, and before the signature of the drawer, the bank could not honour the draft without thereby proving payment to James Martin, which would be eliding the receipt-stamp. In the second form, the bank may honour the draft without thereby proving payment to Jamieson; and should the document be afterwards presented as evidence of payment by reason of his indorsation, it would not be admitted.

The Court pronounced the following interlocutor:

"Recal, as unnecessary in this cause, part of the third finding in the interlocutor complained of, relative to the draft made payable to James Martin, therein described, merely as a bearer: *Quoad ultra*, adhere to the interlocutor, and refuse the desire of both notes, and remit to the Lord Ordinary to proceed accordingly."

Lord Ordinary, Jeffrey.—*Act.* Dean of Faculty (Wood), G. G. Bell; William Martin, S.S.C., *Agent.*—*Alt.* Solicitor-General (McNeill), Rutherford, Walker; Davidsons and Syme, W.S., *Agents.*—*F. Clerk.*—[J.W.]

8th December 1841.

SECOND DIVISION.—(J. W.)

No. 46.—JAMES LUMSDEN, *Complainer*, v. MRS STUART or LORIMER and HUSBAND, *Respondents*.

Process—Interlocutor—Error—Suspension and Interdict.

Vide ante, Vol. XIII. p. 534.

On the 8th July last, the Court in this case remitted to the Lord Ordinary to pass the bill of suspension, but *per incuriam* omitted to continue the interdict in the meantime. On the application of the complainer the following interlocutor was pronounced:

"The Lords having considered a note for the suspender, stating that in the interlocutor of the 8th of July last, there had been an omission *per incuriam* to declare that in the meantime the interdict should be continued,—do in supplement now declare to that effect accordingly, and direct the Lord Ordinary to proceed accordingly."

Act. Marshall.—[J.W.]

9th December 1841.

FIRST DIVISION.—(H. B.)

No. 47.—GEORGE MARQUIS OF TWEEDDALE, *Pursuer*, v. ALEXANDER BEATSON and OTHERS, *Defenders*.

Superior and Vassal—Reddendo—Circumstances in which the word *hordeum*, in the reddendo of a charter of the sixteenth century, held to mean not bear or bigg, but barley.

In 1580, the Commendator of the Abbey of Dunfermline, with consent of the convent, granted a charter conveying to David Durie of Durie, and his heirs-male, the office of heritable bailie of the regality of Dunfermline, together with various feu-duties and dry multure payable to the abbey from certain lands within the regality. These feu-duties and multure are stated to consist of certain quantities "*hordei*." The charter further provided, that the bailie, and his successors in office, should have free entertainment in the monastery, for themselves and twelve followers, horse and foot, in meat and drink, and suitable lodging and accommoda-

tion, whilst they should happen to be detained at the three yearly head courts, and other courts of the regality, for the administration of justice in their said office, at the sole expense of the commendator and his successors. At the Reformation, the abbey of Dunfermline was annexed to the Crown, and erected into a temporal lordship by James VI., who, in 1593, conveyed it to his queen, Anne of Denmark. In 1611, while the office of bailie was possessed by Alexander Seton Earl of Dunfermline, an agreement was entered into, by which Queen Anne, as Lady of Dunfermline, commuted the above provision for the entertainment of the bailie and his followers into a grant, *inter alia*, of the whole kain, capons and poultry, payable from the regality. The office and emoluments of bailie, after being enjoyed by several Earls of Dunfermline, were appraised in 1665 by John Earl and afterwards Marquis of Tweeddale, in whose family they have since continued. From 1641, the bailie had enjoyed, along with the emoluments properly belonging to his office, a Crown lease of the whole feu and teind-duties of the regality of Dunfermline. In this way, the whole feu-duties, &c., payable from the regality, were levied by the bailie, and massed together, without distinguishing between those which properly belonged to him as bailie, and those which belonged to him as lessee. The Crown lease expired in 1780, when a submission was entered into between the bailie and the vassals, and the amount of the duties ascertained. Some of the vassals who had not been properly made parties to the submission, denied the accuracy of the award, and in 1801 an action was brought against one of them, in order to have the general question tried. The late Marquis of Tweeddale died in 1804; and the question with the vassals never having been decided, the present Marquis brought this action, in which he concluded that the defenders should be decreed to pay the *cumulo* duties, farms and others, from Whitsunday 1804, and thereafter with interest since the same were rendered litigious in 1801, but under deduction of certain payments to account: Or, alternatively, that the duties and others should be subdivided among the defenders in proportion to their respective possessions, the portions so ascertained declared due by the defenders respectively, and they decreed to make payment of the same, with interest, and under deduction as aforesaid.

The Lord Ordinary, after hearing parties, made a remit before answer to Mr Allan Menzies, W.S., who gave in a report, exhibiting, in terms of the remit, 1. The *cumulo* duties, farms, and others payable to the Crown, and those vested in the pursuer. 2. The proportions of the said *cumulo* duties, farms, and others effeiring to the lands of the several defenders, specifying separately the amount of the said proportions payable to the Crown, and the amount payable to the pursuer. 3. A state of the several defenders' accounts for their respective proportions of the above, showing, (1.) The amount paid by them, or their predecessors, to the Crown and to the pursuer; (2.) The amount still due to the Crown and to the pursuer. In an appendix, explaining the principles on which the amounts due by the defenders had been calculated, the reporter observed:

"A question has been raised in the course of this investigation, as to the kind of grain in which the victual farms are pay-

able, viz., Whether in barley or in bear?—the pursuer holding that the term 'hordeum,' used in the titles, is capable of either interpretation, and therefore explicable by practice; and that the conversion having always been at the highest regality fiars, the term must be held to import the best grain of the kind; while one of the defenders maintains, on the other hand, that at the date of the old charters, in which the term 'hordeum' occurs, no barley was grown in Scotland, and therefore the grain intended must have been bear or bigg.

"The reporter submits the following observations on the point:—

"The word 'barley' is used in agricultural treatises as a generic term, applicable not only to the species of grain commonly known by that name, but also to the inferior kinds called bear and bigg. The grains are distinguished in the *Encyclopædia Britannica* (new edition) as '*Hordeum Distichon*, two-rowed barley, which is the kind most extensively cultivated; and *Hordeum Tetrastichon*, four-rowed barley, often called bear or bigg, the culture of which is for the most part confined to inferior soils, or to situations where the climate is unfavourable to the former species.' As the term thus embraces the whole genus, the case appears to be one in which the principle of exposition, by reference to the usage or practice of the parties, must be resorted to, in order to determine the species intended.

"The accounts of Sir Henry Wardlaw, before referred to, show that the victual due by the abbey's vassals, comprehended two kinds of bear, viz., 'ferme beir' and 'teind beir'; and the rental-books produced, which go back to the year 1727, show that these duties were, from that date until 1780, converted at prices fixed for the lordship of Dunfermline, exhibiting, without variation, the farm bear as of a higher value than the teind bear.

"No fiars prices of barley appear to have been struck in the county of Fife until the year 1790. In previous years the price of bear is given, and in that year the best sort is called barley bear; and there are also prices given for two inferior kinds, called blanded or bramble bear, and rough bear.

"The reporter has only had an opportunity of comparing the regality prices with the county fiars for crops 1780 and 1781, and these are respectively as follows, viz.:

	Regality.		County Fiars.
	Farm Bear.	Teind Bear.	
1780, . . .	£ s. d. 0 13 4	£ s. d. 0 11 0	£ s. d. 0 9 9
1781, . . .	0 13 0	0 11 0	0 9 6

"It thus appears that the farm bear, at the price of which these victual duties were converted, was rated in the regality rental at a rate exceeding by more than twenty-six per cent., the only kind of bear contained in the county fiars prices.

"The presumption thus raised in favour of the pursuer's argument is confirmed by the later practice of the parties, which appears to leave no room for doubt. The rental, dated 13th October 1800, prepared by William Keith, accountant, in the submission to him, states the feu-farm bear (which includes the victual farms here in question,) as convertible at £8. 13s. 6d. Scots, or 14s. 5½d. Sterling per boll. The feu-duties included in this rental having lain over unsettled, for crops 1781 and 1798, and the intervening crops, the above rule of conversion was the average price for these unsettled crops; and it is found that Mr Keith's rate is exactly the average of the county fiars prices for the years referred to, the price of bear being taken, until that of barley began to be struck, and the price of barley thereafter. Mr Wemyss, one of the defenders, and the author of Mr Greenhill's trustees, and another of the defenders litigating this case, made a payment, on 17th August 1812, of the amount ascertained by a state prepared by Mr Martin, his

own agent, in which the price stated by Mr Keith is adopted throughout; and although the application of that price to later crops than those of which it was the average rate, is erroneous, the fact shows the understanding that the victual farm was payable in barley. In like manner, Mrs Aytoun, the other defender who has appeared, has produced receipts for feu-duties from 1798 to 1815, paid by her predecessor; and it is shown, by states of these feu-duties, which are also in process, that the portion of them, consisting of victual, was converted at the fiars prices of barley.

"In these circumstances, the reporter has proceeded upon the principle sanctioned by the practice of the parties, adopting the fiars prices of bear, until those of barley began to be struck, and the latter thereafter."

Objections to the report were lodged by Mr Wemyss of Cuttlehill, the trustees of the late Alexander Greenhill, and Mrs Aytoun of Inchdairnie,—the leading objection being, that the word "*hordeum*," used in the reddendo of the charters, had been interpreted to mean "barley," whereas, from the date of the charters, it could only have meant "bear or bigg."

The Lord Ordinary pronounced the following interlocutor:

"17th July 1841.—The Lord Ordinary having heard the counsel for the parties on the objections to the report by Mr Menzies,—*Primo*, As to the objections by Mrs Aytoun of Inchdairnie, sustains the first objection, viz., that the receipts founded on by her must be held to operate as a discharge of all claim against the lands to which these receipts apply, prior to the year 1816: Sustains her *second* objection, viz., that she can only be called to account, at the fiar conversion, for four bolls of bear, and not of barley: Repels her third objection, that the capons ought not to be charged at three shillings each: *Secundo*, As to the objections of Robert Wemyss, Esquire of Cuttlehill, sustains his first objection, that he is only liable for the fiar conversion of bolls of bear, and not of barley: Finds that his second objection, viz., that under the summons the demand against him cannot go beyond the year 1804, is superseded by the statement made at the bar by the pursuer, that he makes no claim prior to this period: Finds that his third objection, viz., that the demand against him cannot be carried beyond 10th November 1794, is superseded by the same statement: *Tertio*, As to the objection by the executors of the late Greenhill, finds that they can only be charged with the fiar conversion of bear, and not of barley: *Quoad ultra*, approves of the report: Finds no expenses due to either party in discussing these objections, and decerns.

"*Note*.—The only point (as it appears to the Lord Ordinary) which is attended with any difficulty, is, as to the meaning that is now to be attached to the word *hordeum* in the titles. The parties have declined adducing evidence to explain it. In this situation, and looking to general history alone, the Lord Ordinary thinks that barley, as a separate grain, was not known anciently in Scotland, and therefore he holds *hordeum* to be bear, which was the grain of the country at the date of these titles."

When the cause was first advised, it was delayed, at the suggestion of the Lord President, in order that parties might have an opportunity of bringing under the notice of the Court a passage in Sir Robert Sibbald's "*Scotia Illustrata*,"—an authority to which they had not adverted, and to which his Lordship's attention had been called by Lord Meadowbank. In that part of the work where he treats of plants "in *Scotia sponte nascentes*," he says, Lib. I. Par. ii. c. 8, p. 30:

"*Hordeum distichum* J. B. *Distichum quod spica binos ordines habet* Plinio B. P. common barley. *Officinalis est*."

"*Hordeum polystichon*. J. B. *Polystichum Hibernum*. B. P. Bear—Barley."

The cause was again advised:

Lord President.—After hearing counsel in this case, the Court took time to consider that part of the interlocutor of the Lord Ordinary complained of,—namely, that part sustaining the objection of the defenders, that payment ought to be made as for the fiars conversion of bear, and not barley. Upon again considering the case, I am satisfied that the reporter, Mr Menzies, is correct, and that the interlocutor must be altered. The stipulation contained in the charter is, that the vassals shall pay to the bailie of the regality a certain number of bolls of a grain designated by the word *Hordeum*. The ordinary, and indeed the only translation of the word, as given by Ainsworth in his Dictionary, is barley, and it does not seem to be disputed that it may mean different sorts of that grain. But though it may mean barley as now grown and known, it is maintained that no barley was grown in Scotland in the sixteenth century; and in support of this an appeal is made to the fact, that it was only in 1790 that the fiars of barley were struck for the first time in Fife. The circumstance of fiars not being struck, is no evidence of the non-existence of barley in Scotland, or in any particular district of it. In some counties, till very recently, no fiars but those of wheat have been struck, but it will not be pretended that in these counties barley was not grown. But in addition to the statement of Sir John Sinclair in his Treatise on Agriculture, that "the two-sided species denominated barley, has long been grown in Scotland," reference has also been made to Sir Robert Sibbald's Work, entitled "*Scotia Illustrata*," to which my attention was called by Lord Meadowbank. The work is dated 1684; and in chapter 8, p. 30, where he is treating of plants and herbs growing spontaneously in Scotland, he mentions, "*Hordeum Distichum—Distichum quod spica binos ordines habet*," which he translates *common barley*. Such is this author's statement of what was produced in Scotland in early times; and its being designated under the word *hordeum*, clearly shows that the word is applicable to both of the varieties which grow in Scotland. Why then presume that the inferior species must be held to be meant by the reddendo in question? The evidence produced from the old rentals, and from the mode in which payment was wont to be made, is all the other way, as it is indisputably clear, that while there was a marked difference in the values of farm and teind bear, the duties in question were uniformly exacted and paid in farm bear,—i. e., in the kind bearing the highest price. Conformably to this was the understanding of parties; for in the settlement which was made in 1820, the amount of grain payable was estimated in barley. I am therefore satisfied that the vassals are liable to be charged for the highest species of grain denominated by the word *hordeum*; and that as both bear and barley are designated by this term, the latter is the species which, under the reddendo in the charters, the vassals are bound to pay. The species exigible being the best possible that could be grown by superior cultivation, why should not the species which is now grown be exigible?

Lord Gillies.—I entirely agree with your Lordship. The word *hordeum* evidently applies both to bear and barley, which, indeed, are not different sorts of grain, but merely different varieties of the same species. In the same way, there are many varieties of the other kinds of grain, as wheat, which is red or white, with awns or without them; but it would be absurd to hold, that if at the date of a charter the worst of these species happened to be the only kind grown, all future payments of the reddendo should be estimated as payable only in that species. I have no doubt whatever that barley was cultivated at a very early period in Fife—as early, at least, as in any part of Scotland. One striking proof of the superior cultivation in Fife I have heard stated. It is said that there is a property in the east of that county, the rental of which was as high at the beginning of the eighteenth century as at the beginning of the nineteenth.

Lord Mackenzie.—I am of the same opinion. The *reddendo* is a grain called *hordeum* of a certain quantity, and also, as is evident from the documents produced, of a good quality. In these circumstances, I have no doubt that the payment must be made in barley. I think it quite certain that barley was grown in Scotland at the date of the charters. Indeed I think this more certain than that bear was grown at that period; for I

am convinced that barley is the older of the two. Barley was certainly grown on the continent from the earliest times; and it is quite incredible, that when Scotsmen were importing wheat, they should have omitted also to import barley, which, it is well known, was much more profitable than bear, and was equally capable of being grown, at least on good land. Unless there had been an Act of Parliament expressly prohibiting the introduction and growth of barley, I do not see how it could have been kept out at a time when it was a common crop both on the continent and in England. It seems probable that the word bear, though now appropriated to mean *bigg*, originally had an interpretation as extensive as *hordeum*, and meant both *bigg* and *barley*. If so, the vassals can make nothing of the use of the word bear in the old rentals. I agree with Lord Gillies, that *bigg* and *barley* are not different species of grain, but merely varieties of the same species. That being the case, it seems absurd to maintain, that because an inferior species was grown in an imperfect state of agriculture, it must be held to be the species in which payment is to be made ever after. On the same principle, it might be maintained, that in Old Scotland there was no manuring—no draining, &c., and that, therefore, as the grain grown without them must have been of inferior quality, all grain now payable under old charters may also be of inferior quality.

Lord Fullerton.—I am very much of the same opinion. I don't found much on the classical meaning of the word *hordeum*; for though it is evident that it includes both species of grain, it is also evident, both from the old rentals of Sir Henry Wardlaw, and also from the dispositions, that when *hordeum* was translated into Scotch, the word used was *bear*, at least so far down as 1780, when the submission was made to Mr Keith. The important question then, is, not what is the meaning of the word *hordeum*, but what is the meaning of the word *bear*? Was it restricted to what is now called *bigg*, or was it applicable to both *bigg* and *barley*? My opinion is, that it did include both; and I think this is confirmed by one of the entries in the old rentals, in which the name used by Sir Henry Wardlaw is *barley bear*. This much is certain—the kind understood to be payable was grain of the best quality; for in all the rentals where a higher and lower price are mentioned, the estimate is always made the higher price; and in 1780, when the two prices were 13s. 4d. and 9s. 9d., the conversion was made at 13s. 4d. Afterwards, when fiars of barley began to be struck, the payment was made according to these fiars. Attending, therefore, to the evidence that barley was grown in Scotland at the date of the charters,—that the grain, when designated as bear, was always taken at the highest price,—and that, after the fiars of barley began to be struck, the estimate was made in barley,—I am satisfied that the reporter has taken the correct view, and that the interlocutor, in so far as it sustains the objection to that view, must be altered.

The Court pronounced the following interlocutor:

“Recal the Lord Ordinary's interlocutor in so far as reclaimed against: Repel the whole objections to Mr Menzies' report, except only the first objection stated by Mrs Aytoun, which stands sustained, and also the second and third objections for Mr Wemyss, which are superseded by the interlocutor of the Lord Ordinary, whose judgment on these points has not been submitted to review: Find that the victual duty payable by the defenders under their charters is barley, and not bear: Find the pursuer entitled to the expenses of the discussion applicable to this last finding, as against the defenders, Greenhill's trustees and Mr Wemyss; allow an account thereof to be given in, and remit the same to the auditor to tax and report; and, *quoad ultra*, reserve all other questions of expense till the final issue of the cause; and remit to the Lord Ordinary to proceed farther therein as to his Lordship may seem just.”

Lord Ordinary, Cockburn.—Act. Rutherford, Anderson; Gibson-Craigs, Dalziel and Brodie, W.S., Agents.—For Greenhill's Trustees, Thomson; Shepherd and Grant, W.S., Agents.—For Mr Wemyss, Marshall; H. J. Burn, W.S., Agent.—For Mrs Aytoun, Moir; James Greig, jun., W.S., Agent.—N. Clerk.—[H.B.]

9th December 1841.

SECOND DIVISION.—(J. W.)

No. 48.—A v. B.

Expenses—Auditor's Report—Fee.

The auditor's fee being allowed in his report, and no note of objections having been lodged within the period prescribed, it was held incompetent to object to the fee being allowed, on the motion of the other party to have the report approved of.

Act. H. Robertson.—Alt. Anderson.—[J.W.]

9th December 1841.

SECOND DIVISION.—(J.W.)

No. 49.—LIEUT.-GEN. DUNCAN DARROCH, Pursuer,
v. ANDREW RANKEN, Defender.

Property—Marches—Superior and Vassal—Warrandice—A party feued a piece of ground, described as extending “nine feet in breadth on each of the east and west sides, and bounded by the public road on the south, by the shore ground of Diverts on the north,” and amounting in measure, along with other portions of the subject feued, to “two acres four falls and four yards, computing each fall to contain thirty-six superficial yards.” The superior brought a declarator that he had the only good and undoubted right to the whole of the ground on the north side of the public road, at a distance of more than nine feet from the north edge thereof. The vassal alleged that the road trustees, in virtue of previous possession, and also of their statutory powers, had the right to extend the road from its present breadth of thirty feet to forty feet, and that the decree of the superior should be so qualified as to preserve the right of the vassal to ground nine feet beyond the full breadth of the road, or so far as nineteen feet from the existing line.—Held that the subject feued was specifically limited, and that the contemplated proceedings of the trustees were irrelevant to qualify the decree as craved.

The pursuer's predecessor, Angus Darroch of Gourock, disposed in feu to the defender three pieces of ground lying on the south side of the public road from Greenock to the Cloch, and also a small piece of ground on the north or opposite side of the road, which is thus described in the feu-contract:

“All and whole that piece of ground lying between the said public road and the sea-shore, and directly opposite to, and on the north of the ground first above described, of the following mensurations,—viz., 406 feet fronting to and on the north side of the said road; the like number of feet along the shore on the north, and nine feet in breadth on each of the east and west sides, and bounded as follows,—viz., by the said public road on the south; by the shore ground of Diverts on the north; by the lands of Midtown on the east, and by the lands of Diverts on the west.”

The feu-contract also bears, that the said four pieces of ground thereby disposed, amount in measure to “two acres four falls and four yards, computing each fall to contain thirty-six square superficial yards;” and the reddendo is declared to be “the sum of £32. 8. 3. Sterling, being at the rate of two shillings Sterling per fall of feu-duty yearly.” The breadth of the ground on the north side of the road, between the road and the high-water mark of ordinary tides, varies considerably. But where it is narrowest it seems to exceed nine feet.

The present action was brought to have it found and declared “that the pursuer has the only good and undoubted right to the whole of the said ground on the north side of the public road, at a distance of more than nine feet from the north side or edge thereof, and that the defender has no right to any part of the said

ground at a distance of more than nine feet from the present north side or edge of the road."

It was stated in defence, that "ever since the date of the contract, the whole ground between the north side of the road and the sea has been used and occupied by the defender for the purpose for which it is almost alone applicable, viz., communication with, and access to, the sea and sea-shore. The defender, at considerable expense, built a quay or landing place at the point, and he, his family and boatmen, have been in the constant practice of using the whole ground in passing to and from the sea. It has been also used for carting gravel for walks, and sea-ware for the garden, hauling up boats, tracking, and using bathing-houses," &c. Further, it was alleged, that "at the date of the feu-contract, the actually existing public road, along which the stripe is declared to be, was, as it continues to be, only thirty feet in breadth. But according to the Acts of Parliament for forming and maintaining the road, as well as under the General Turnpike Act, the trustees were and are entitled to make it of the breadth of forty feet. The trustees have intimated their intention of acting upon this right, and claim to make the road of the full breadth of forty feet, without even so much as compensation, on the allegation that it formerly went over this vacant piece of ground now in question, which is the fact. If this operation takes place according to the plan proposed, the nine feet of stripe running along the north side of the road, to which the pursuer alleges the defender is confined, will be taken into the public road, and wholly evicted from the defender."

Pleaded by the pursuer—1. The defender, by the feu-contract founded on, having right only to the limited extent of ground on the north side of the public road thereby conveyed to him, as bounded and described in that deed, and this without any servitude of any description upon or over the ground beyond it, is not entitled to encroach upon, or occupy any ground to the northward of the ground so feued to him, and lying between it and the shore, and decree of declarator to that effect, and to the effect that all the ground lying to the northward of the defender's feu, and between it and the shore, belongs to the pursuer, in virtue of the titles he has condescended on, ought to be pronounced. 2. What has been stated by the defender in reference to the breadth to which he alleges that the public road may be extended, on the alleged contemplated proceedings of the trustees, can afford no ground, even if true, for not pronouncing decree as craved, or for qualifying that decree in any way.

Pleaded by the defender—1. The claim made in the present action is unfounded, inasmuch as the feu-contract libelled on conveys to the defender the whole ground on the north side of the road down to the sea or proper sea-shore. 2. Even supposing the defender's right to be not so extensive, he is at least entitled to carry his ground nine feet beyond the full breadth of the public road, or so far as nineteen feet from the existing line of road, and the defender would be entitled to insist that any decree obtained by the pursuer should be qualified accordingly. 3. At all events, before the pursuer can insist in his present claim, he must have the public road authoritatively confined to its existing situation, and secure the defender's posses-

sion of the nine feet in breadth beyond the existing line, against the claim of eviction made by the road trustees. 4. Supposing the pursuer were to establish a right of property in the ground claimed by him, the defender would be still entitled to exercise a right of servitude over the same, to the effect of preserving it open and unenclosed for the purpose of walking thereon, and of access to and communication with the sea; and any decree to be obtained by the pursuer should be qualified accordingly.

The Lord Ordinary pronounced the following interlocutor, with note annexed:

"20th May 1841.—The Lord Ordinary having heard parties' procurators on the closed record, and made avizandum, repels the defences, and finds, declares, ordains and decerns, in terms of the libel: Finds the defender liable in expenses; appoints an account thereof to be given in, and when lodged, remits the same to the auditor to tax and report.

"*Note*.—This seems a clear case.

"1. The property that has descended to the pursuer comprehends, along its boundary seaward, what the defender himself describes (stat. 2) as 'a small strip of what is called sea-green, of varying breadth, but generally not more than a very few yards.' It is not disputed,—however the parties may differ as to the precise extent,—that the average breadth of this sea-green, at all events, exceeds nine feet. Indeed, in his second plea, the defender contends for a right 'to carry his ground nine feet beyond the full breadth of the public road, or as far as nineteen feet from the existing line of road;' thereby necessarily assuming that there is a sufficient breadth of ground, to the extent of ten feet at least, over and above the nine feet which are here in dispute.

"2. Of this property the defender feued, from a predecessor of the pursuer, a patch, specifically limited both as to boundary and measurement,—it being described as extending 'nine feet in breadth on each of the east and west sides, and bounded as follows, viz.,—by the said public road on the south; by the shore ground of Diverts on the north,' &c., 'and amounting in measure,' along with certain other portions of the subject feued, to an exact and anxiously definite statement of 'two acres four falls and four yards, computing each fall to contain thirty-six superficial yards.'

"3. It is thought to be quite desperate on the defender's part, to contend that such a grant was intended to give him the entire 'shore ground of Diverts,' in place of only a small portion of it, bounded by the rest; or, in other words, to give him the whole space of ground, between the road and the sea,—no matter how much its actual breadth might happen to exceed the stipulated and limited measurement of nine feet. And equally so is it for him to pretend that, if the property did not pass, he has at least a right of servitude over it. The feu-right must be construed on the strength of its own expressed words, and not upon any gloss to which the defender may now find it convenient to resort, with reference to the supposed, but not expressed, meaning of the parties. Even, however, as a question of intent, it seems impossible to deny that the superior could mean nothing else than to reserve to himself all that he did not in terminis convey. In truth, the defender's letters (in process), after his present encroachment was first challenged, are conclusive as to his own understanding, viz., that he had no right whatever, either in property or servitude, beyond the express breadth of nine feet for which he had contracted, and for more than which he confessedly had not paid. See especially his letters of 15th January and 19th April 1839: in the latter of which he says,—'As soon as you can produce to me a certificate under the hand of the agent for the trustees, or the surveyor of the road, specifying the precise breadth of said road, we can easily ascertain the precise position of my stripe.' 'I claim nothing more, and I want nothing more than what is conveyed to me by the feu-contract,'—meaning plainly neither more nor less than the specific stripe of nine feet south from, and along the line of the road which he mentions.

"4. It is, in truth, to some alleged proposal of the road trus-

tees to widen this road, and thereby to incorporate and cut off the original space of nine feet conveyed to the defender, rather than to any doubt as to the import or effect of the conveyance itself, that the whole of the present dispute may be traced. The defender's own statement (stat. 10.) is this,—'At the date of the feu-contract, the actually existing public road, along which the stripe is declared to lie, was, as it continues to be, only thirty feet in breadth. But according to the Acts of Parliament, &c., the trustees were and are entitled to make it of the breadth of forty feet.' Now, what the defender is in reality contending for in the present case is, a right to have nine feet beyond this road, as it may exist, *after being widened*, as a *surrogatum* for the nine feet which were actually conveyed by the feu-right, beyond the road as it existed at its own date. But this will not do. For if he got all that was conveyed, it matters nothing that the road trustees, in the exercise of their statutory powers, either propose to take, or have actually taken from him what, until taken, was sufficient to satisfy the description of the subject in the feu-contract. If, indeed, the defender could establish that the superior was not *in titulo* at the date of the contract, and that the nine feet which were thereby conveyed, in reality then belonged to the trustees, who had accordingly since evicted them, that might have raised a different case. But even there the defender's remedy would have been an action on his warrandice in respect of the eviction; whereas, it appears from the record, that there has as yet been no *eviction* in the legal sense, the defender distinctly setting forth (stat. 8), that 'ever since the date of the contract, the whole ground between the north side of the road and the sea has been used and occupied by him.' As it is, however, the road trustees appear to have no other right, as regards their widening of the road here in dispute, than they would have as to any other existing road of only thirty feet in breadth. They may widen it,—that is to say, paying compensation to the proprietor. But such proprietor can have no recourse on that account against his author. It is not from defect in the *title* that the property is taken from him, but from the inherent condition attaching to all property, however undoubted the legal title, and from the exercise of powers, vested on public grounds, in the road trustees, to take such property, let it for the time belong to whom it may. In short, as regards any interference on the part of the road trustees, if a breadth of nine feet had been taken from the defender along the south, instead of along the north side of the road in question, he might just as well have contended, that he was in that case entitled to compensate himself at the expense of the pursuer's estate seaward, as in the actual circumstances under which the present question has arisen."

The defender reclaimed, and *argued*—That the intention of parties was, that the defender should get nine feet from the road northwards, so as to protect him against buildings being erected opposite the south side. But this object will be defeated if the trustees resume possession of the whole forty feet, which they have intimated their intention to do. The declarator is founded upon an unfair and untrue construction of the contract.

Replied—The question is, is the defender entitled to any other nine feet than those which he got at the date of the contract? It is agreed that the road was then only thirty feet wide; and the contract has regard to the road as it then existed. Supposing the trustees to resolve upon exercising their statutory powers, they may throw the additional breadth of road upon the south side, as well as upon the north. Both by the private Act applicable to this road, passed in 1803, and also by the General Turnpike Act, 2 and 3 Will. IV. c. 43, § 61, compensation must be paid. But apart from the road Acts altogether, the parties contracted for a stripe of nine feet along the road, bounded by the shore ground of Diverts on the north. The defender got possession, and there was nothing to have hindered

the superior from feuing forthwith behind the nine feet. Ranken maintains that his was a shifting feu; but he was bound to know that the trustees had the power to widen the road.

Lord Justice-Clerk.—It is of great importance to understand the allegations put upon the record, for the feu-charter appears to be one susceptible of explanation by proof of the extent of possession. Where there is a discrepancy in the mensuration, it is competent to explain the extent of the right by proof of possession. The stripe here given, is not one of the breadth of nine feet uniformly along the road, but nine feet at each of the ends; and the ground between the road and the sea-shore is said to vary considerably in breadth. The pursuer says, on the one hand, that his tenants were in use to pasture it; while, on the other hand, the defender makes a distinct averment of possession,—that he had built a quay,—and that he, his family and boatmen, had been in the constant practice of using the whole ground in passing to and from the sea, carting gravel, hauling up boats, tracking, and using bathing-houses. This is exactly a case in which it is relevant to allow a proof of possession in order to explain any discrepancy in the mensuration. But although this be the case upon the record, the defender has not adhered to it; he now asks only nine feet from the road, supposing the road to be altered as proposed by the trustees. This is a very different point. The road was thirty feet wide when he contracted, and he got nine feet to the north of it; but he now says, that in respect of the right of the trustees, arising from previous possession, I must be held to have contracted upon the supposition of the probability of their taking forty feet, and that I am entitled to nine feet beyond whatever they take. Now what is the fact? The road it is admitted was only thirty feet, and this was apparent. If Darroch feued the nine feet immediately to the north of the road, and it should turn out that this was not his to feu, then the remedy is, not other nine feet, but an action of damages on the warrandice. If, on the other hand, the trustees take the ground feued, in virtue of their statutory powers, this won't give rise to any claim against the pursuer for other nine feet; it can only found a claim against the trustees for the statutory compensation. But where is there a relevant averment to support the defender's construction of the contract. The right of the trustees to resume, or their power to take possession of forty feet, does not solve the question as to what was the ground feued under this contract, or the extent of it. The defender appears to have abandoned the only averments on which an issue might have been framed, and there is now no relevant defence against this declarator.

Lord Moncreiff.—If the measurement specified in the contract was meant to fix the feu-duty by acres and falls, how is it possible that it does not also fix the extent of ground. If the defender occupies more, does he pay for more. There is no power to raise the feu-duty: the nature of the contract is a measured boundary. I do not think there is any relevant averment on record to warrant a proof of possession, in order to interpret a contract so very clear and explicit as this. There is no relevancy in the statement, that the trustees have power to widen the road. If they do so under their statutory powers, the defender will receive the statutory compensation. If they evict his feu, under their right of previous possession, he will have his action against the superior on the clause of warrandice.

Lord Meadowbank.—Looking at the contract, it appeared to me that the shore land of Diverts was to be the northern boundary of the defender. But what he now claims, requires that he should have a shifting boundary. In my opinion he has no case.

Lord Medwyn.—I have great hesitation in holding that this contract requires to be interpreted by a proof of possession, or that there is any relevant averment on the record to entitle the defender to such a proof. The ground feued lies between the road and the sea-shore,—not the whole ground, but a stripe of nine feet along the road. It is described as nine feet at each end, but I think the breadth was uniform along the whole extent; and the northern boundary, it will be observed, is not the sea-shore, but the shore ground of Diverts. The measurement is very precise, and I don't think any thing further is required to enable us to construe the extent of the right. The

averments made by the defender, at least, are not sufficient to make us construe it differently from the measurement. Neither is there any substantive averment that the trustees had right to forty feet of road, from previous possession.

The Court *adhered*, with expenses.

Lord Ordinary, Ivory.—*Act.* Dean of Faculty (Wood), Patton; Andrew Clason, W.S., *Agent.*—*Al.* Solicitor-General (M'Neill), Penney; James Stuart, W.S., *Agent.*—T. Clerk.—[J.W.]

9th December 1841.

SECOND DIVISION.—(J. W.)

No. 50.—DONALD LINDSAY, (*Marquis of Huntly's Trustee*), Pursuer, v. JOHN WEBSTER, Defender.

Bankrupt—Sequestration—Reduction on Act 1621—Landlord and Tenant—Lease—Rent—*A landlord, five years previous to his bankruptcy, addressed a letter to his factor, authorising him to give his tenants a deduction of twenty per cent. from their rents for the bygone year, and to acquaint them that the deduction would be continued during the currency of their leases.—Found that the abatement of rent was in the fair and bona fide administration of the estate at the time, and could not be objected to by the trustee of the landlord under his sequestration.*

In 1826, the defender became tenant, under the Marquis of Huntly, then Earl of Aboyne, of the lands of Meadows, for the period of nineteen years from Martinmas 1826. The rent to be paid was £240 per annum. In 1834, the Marquis addressed a letter to his factor, Mr Hillocks, in the following terms :

" *Finhaven, 7th November 1834.*

" Mr HILLOCKS,—I hereby empower you to discharge the tenants on the estate of Finhaven, by giving them a deduction of rent of 20 per cent., and discharging them accordingly for crop 1833. And, with the exception of Bogardo, I hereby authorise you to acquaint the tenants that I am to continue that deduction during the currency of their several leases."

(Signed) " ABOYNE."

Amongst others, the defender had the letter communicated to him; and year by year the stipulated deduction was given him down to Lord Huntly's bankruptcy in 1839. Thereafter, a process of sequestration was raised against the defender by the present pursuer, as Lord Huntly's trustee, in which the full rents stipulated in the lease were concluded for. The defender pleaded his right to the abatement given in the letter; and the Sheriff of Forfarshire, before whom the process depended, gave effect to the plea. The judgment of the Sheriff was advocated by the trustee; and with the view of aiding the advocacy, the present process of reduction was brought. The summons concludes to have it found and declared that the letter or authority is null and void,—is not holograph of the Marquis,—is not duly signed or tested,—and is otherwise defective in the solemnities required by law. The second is :

" That at and prior to the date of granting the said letter or authority, the said George Marquis of Huntly, then Earl of Aboyne, was in insolvent and bankrupt circumstances, and the same was granted without any true, just, or necessary cause, without a just consideration therefor, and after contracting lawful debts to various creditors, for whose behoof the pursuer is trustee as aforesaid. And the same was so granted to the hurt and prejudice of the said just and lawful creditors, and of the pursuer, as trustee for their behoof, for which reasons, as well as others, the pursuer is entitled to have the said document, above recited, reduced and set aside; and, accordingly, the said letter or authority is null and reducible at common law, and in terms of the Act of Parliament 1621, cap. 18, the Act of Parliament 1696, cap. 5, the Act of 54 Geo. III.

cap. 187, and the said Act in the third year of our reign above mentioned, or one or other of them,—to all of which Acts reference is hereby specially made, and which are hereby held as repeated *brevitatis causa*."

In defence it was maintained, that although the letter be not holograph, nor signed with the statutory solemnities, it is subscribed by the Marquis, and the signature is admitted. Moreover, *rei interventus* took place on the faith of it, and it is therefore as completely effectual as the most formal document. The alleged insolvency of Lord Huntly, at the date of the letter, is not admitted; at all events, there is no ground for applying the Statute 1621, which refers to "alienations, dispositions, assignations, and translations whatever, made by the debtor of any of his lands, teinds, reversions, actions, debts or goods whatever, to any conjunct or confident person, without true, just, and necessary causes, and without a just price really paid." The letter in question was manifestly not granted to a conjunct or confident person. As little is there any room for applying the Statute 1696, which applies to securities for prior debts, which is not the case here; and where the debtor has become notour bankrupt, which is not alleged. Again, to warrant a reduction on the head of common law, it would be necessary to establish something fraudulently done on the part of the bankrupt, and the person with whom he contracted, for the purpose of prejudicing the general body of creditors. It is not alleged, however, that the defender was aware of Lord Huntly's being a bankrupt, nor is it even said that Lord Huntly himself was aware of his alleged insolvency.

The reduction and advocacy having been conjoined, the Lord Ordinary pronounced the following interlocutor :

" *24th June 1841.*—The Lord Ordinary having heard counsel in these conjoined processes—In respect, 1st, That the Marquis of Huntly, at the time that the rents of the defenders were restricted, was in possession, and in full administration of the estate of Finhaven: 2d, That no positive averment is made, and still less any specific statement set forth on record, either in this Court or in the Inferior-court, to show that the Noble Marquis, by the restriction of rent authorised by his letter to his factor, dated 7th December 1834, reduced the rents to a lower rate than was proper and justifiable, in a fair and bona fide administration of the estate at the time, or that he acted from any motive or view unduly to favour the tenants at the expense of his creditors, real and personal, having an interest in his estate and affairs: Finds that the pursuer is not entitled to object to the rent as restricted by the said letter of the Marquis of Huntly in 1834, libelled on: Therefore, in the advocacy, adheres to the interlocutor of the Sheriff; remits the cause to the Sheriff *simpliciter*; and in the reduction, repels the reasons of reduction; sustains the defences, and assolizies the defender from the action of reduction: Finds the defender entitled to expenses, both in the advocacy and reduction, as the same may be taxed by the auditor, and decerns."

The pursuer reclaimed, and *argued*—That singular successors, and creditors-adjudgers, are bound by the lease, or any thing indorsed upon it, but not by a letter such as that founded on; Macleod, 1 Sh. App. 213. An onerous contract, though improbable, may be made good by *rei interventus*; but can the tenants say here, I have given an onerous consideration for it, and have acted upon it?

Answered—The defender is here in a question, not with heritable but personal creditors. The letter would have been binding against Lord Huntly, and can the

personal creditors take the benefit of the lease without the restriction? There was nothing to prevent Lord Huntly from giving up the lease, and granting a new one at the reduced rent. Substantially he did the same thing, and nothing more.

Lord Moncreiff.—I don't always admit the distinctions taken between a purchaser and an adjudging creditor. But here the abatement had actually taken effect, and been acted upon for years before sequestration.

Lord Justice-Clerk.—Sequestration is a measure severe enough in itself, without being made rescissory of the best acts of a man's life,—his acts of justice and generosity.

Lord Meadowbank and *Lord Medwyn* concurred.

The Court adhered, with expenses.

Lord Ordinary, Cuninghame.—*Act*. Dean of Faculty (Wood), Sandford; Gibson-Craigs, Dalziel, and Brodie, W.S., Agents.—*Alt*. Rutherford, Penney; Walter Duthie, W.S., Agent.—*F. Clerk*.—[J.W.]

9th December 1841.

SECOND DIVISION.—(J.W.)

No. 51.—JAMES STEWART of Burgh, Pursuer, v. THOMAS POLLEXFEN, surviving Trustee of the late James Stewart of Burgh, Defender.

Trust—Trustees—Powers—Liability—Bona Fides.—A party executed a trust-deed, in which he directed his trustees to invest the whole residue of his funds "in the purchase of lands in Orkney, or any other place they should judge expedient," and to convey them to his heir of entail. The trustees purchased the superior-duties affecting the entailed estate, and which were payable in kind; but it having been found that this was an application of the funds which they had no power to make by virtue of the trust-deed, and that they must account to the heir of entail for the capital sum of money applied in the purchase.—Held that they must also account for interest on the capital sum, according to the rate which had been payable on heritable bonds, and that, instead thereof, the heir of entail was not bound to accept of the produce of the subject purchased.

Continuation of case, No. 235, Vol. XIII. p. 543.

On the 14th July last, the Court found that the purchase of feu-duties by the trustees of the late James Stewart of Burgh, was in violation of the direction in the trust-deed to invest the residue of the trust-funds in the purchase of lands, and, therefore, that the trustees must account for the capital sum so applied. But in reference to the question, whether they were to be liable for interest on the said capital sum since the date of the purchase, and if so, at what rate, parties were appointed to be farther heard.

Dean of Faculty (Wood), for the defender, argued.—That the second finding of the Lord Ordinary proceeds upon the assumption of *mala fides* on the part of the trustees, but this view was not entertained by the Court: on the contrary, it was assumed that the trustees had acted in *bona fide*. The payment of these duties in kind formed a burden of a very grievous nature upon the entailed estate, and the offer of their redemption required to be accepted within a very limited time. Mr Laing and Mr Clark were both of opinion that the purchase of them formed a good temporary investment of the trust-funds under the deed. The heir ever since has had not only the pecuniary benefit arising from the purchase, but something beyond money—relief from cumbersome and vexatious burdens. At and subsequent to the date of the purchase, the subjects yielded a fair return: they were purchased for £3025, and yielded annually £118. The protecting clause in the deed is unusually broad, and, joined to the *bona fides* of the trustees, ought to protect them against any claim other than for the actual fruits of the subject. If a party possesses *bona fide*, on a

colourable title, the property of another, the true owner may recover the property, but not the fruits; and so, also, a party paying *bona fide* to a person who is the colourable creditor, is protected against any claim for second payment at the instance of the true creditor: *Ersk. III. 4, 3*. In the case of the Duke of Roxburgh (2 Sh. App. p. 18), part of the entailed estate was inadvertently comprehended under the trust, but *bona fides* protected the trustee against a claim for restitution of the fruits at the instance of the heir of entail. The pursuer was major in 1832, and was previously under curators of his own appointment: he was bound, therefore, to have given notice that he meant to challenge the investment earlier than 1838, when the present action was raised. Finally, if the trustees are to be liable in interest as an accessory of the principal sum, what is to be the rate? Are they to be liable in five per cent.? If the money had been invested in land in Orkney, the heir would have been in a worse situation than if he were compelled to accept the profits of the feu-duties. At the utmost, the trustees cannot be liable for more than would have been drawn on an heritable bond, viz., three and a-half per cent.; but, in the special circumstances of the case, they ought not to be found liable for more than bank interest.

Solicitor-General (McNeill).—

By a previous judgment of the Court it has been found, that the purchase made by the trustees was an unwarrantable and illegal application of the trust-funds, and that the trustees are bound to replace the capital sum. Now, I desiderate the authority for holding that they are not also bound to replace the interest of the capital so applied. The principle of *bona fides*, as to *fructus percepti*, is not applicable here: *Ersk. II. 1, 25*. That principle proceeds upon the supposition of the parties spending what they believe to be their own; but here, confessedly, the application is of another person's funds, and that unwarrantably. The trustees do not pretend a right to the fruits, as in the case of a *bona fide* possessor. *Bona fides* exempts altogether from accounting; but no such exemption is pretended here. Between the two cases there is therefore no parallel. I don't say they are bound to account for the highest rate of interest; but the pursuer is entitled to the fair proceeds of the capital sum, according to the state of the market.

At advising,

Lord Medwyn.—This is a very hard case against gratuitous trustees. We have affirmed the interlocutor of the Lord Ordinary, finding that they had no power under the trust-deed to apply the trust-funds to the purchase of feu-duties, but we did not affirm the interlocutor in so far as it finds that they did so without any reasonable ground; for, believing that they had power, I think they acted under the belief that they had the power; but the heir rejects the purchase, and I see no principle of law for holding that they are not bound to account for the interest as well as the capital sum. I do not think that the case falls under the principle of *bona fide* consumption. If a party acquires a property onerously, and consumes the fruits, he is not liable to be called upon for restitution; but here there is an unwarrantable investment of another person's funds, and I don't see that the principle of *bona fides* applies. The trustees admit that they are liable to account for the profits; and the only dispute is as to their liability for interest instead; but the profits never came into their hands so as to admit of being consumed. Believing that they had the power to make the investment, I think they must be liable only for the rate which would have been drawn upon an heritable bond. As to the claim for accumulation, I cannot lay out of view the improvement which has arisen to the estate from the redemption of these duties, and therefore I would reject that claim.

Lord Moncreiff.—It is very probable that what is proposed by Lord Medwyn may come near the equity of the case. But I am of a different opinion as to the liability of the trustees, and think that they are bound only for the produce. I grant that the purchase was not a legal investment of the trust-funds, or within their powers. This has been already held in law; but it was held also that they made the purchase in perfect *bona fides*, and under the belief that it was for the benefit of the family. They were neither negligent, nor had any sinister purpose, but were solely under a misapprehension as to their

legal powers. They now make good the money so invested, and, meanwhile, the heir has enjoyed the estate freed from these burdens, and unmolested by third parties—by Lord Dundas or others. The rule of law is firmly settled, that if a party has a reasonable title, and, believing himself proprietor, has consumed the fruits, he cannot be called upon to repeat by the true owner. In the case of Bonny, 1760 (Dict. 1728), there were arrears of rent due, and yet the extruded proprietor recovered these in preference to the true owner. In the case of Swinton, legacies were paid away, which, but for the *bona fide* possession of the legatees, ought to have been restored. In *Dick v. Cook*, the party obtained a declarator, and entered into possession. The decree was found to be null, and a claim was made for the rents according to the rental; but it was found that he was liable to account only for what he received. There are also the familiar cases of persons paying to wrong creditors, and many others. The general principle is, that a party possessing on an ostensible title, is not bound to restore the fruits; and surely the strongest of all possible cases is that of a party possessing and using property which is not his own. The present case is much simpler, and the equity is plain and clear. The pursuer seems to mistake the point, when he supposes that the subject of the trustees' possession was the feu-duties. The subject is the price which they are called upon to repay out of their own pockets, and the fruits of which they have consumed in their own families in perfect *bona fides*. If no fruits at all had been found due, this would have assimilated the case to the others; but here the defenders themselves reap nothing but labour and anxiety. They take no produce: their hands are entirely clean. Is not this much stronger than the case of Bonny—of Swinton, and others? They made a mistake in law, and they replace the fund misapplied:—is not this a severe enough penalty without being subjected also in interest? It is *a fortiori* of all the cases. There may be a difficulty as to the teind-duties; but having given to the heir all that they themselves got, it would only be a difficulty. After all, it will be difficult to do justice between the parties. The heir has derived a benefit which cannot be estimated. If it is to be by interest, it must be according to the rate which has been payable on bonds. I see no ground for accumulation. That would neither give effect to the *bona fides* of the trustees, nor to the protecting clause in the trust-deed.

Lord Meadowbank.—I never meant to attribute any thing like an immoral or dishonest purpose to these trustees; but after what we have already found, that the purchase of these duties was illegal and unwarrantable, we cannot give them the benefit of perfect *bona fides*. We have now nothing to do with the purchase: that is *jus tertii*. The only remaining point is, that the trustees having had money belonging to the estate in their pockets for a number of years, are they to be liable in interest? I agree with the opinion of Lord Medwyn.

Lord Justice-Clerk requested to be allowed to decline, in consequence of having been counsel in the cause.

Lord Moncreiff observed, that it was ruled in the case of President Blair, that the being counsel in the cause was no disqualification; but if his Lordship wished to decline, there could be no objection to his doing so.

The Court found that the trustees were liable in interest on the capital sum, according to the rate which had been payable upon heritable bonds.

Lord Ordinary, Jeffrey.—*Act. Solicitor-General (M'Neill), H. Robertson; James M'Cook, W.S., Agent.—Alt. Dean of Faculty (Wood), G. Bell; William Stewart, W.S., Agent.—F. Clerk.—[J.W.]*

10th December 1841.

SECOND DIVISION.—(J. W.)

No. 52.—JAMES CORBETT PORTERFIELD of *Porterfield, Pursuer, v. NATHANIEL GORDON PORTERFIELD and OTHERS, Defenders.*

Entail—Construction.—The maker of an entail called to the succession a number of substitutes, reserving to himself the power to alter the succession, except as to the first five substitutions; as to which the said order of succession is declared unalterable by himself, or his son the institute, or by the heirs of tailzie above mentioned.—Held that “the heirs above mentioned” denoted not merely the first five substitutions, but the heirs generally; and that the prohibition against altering the succession was binding upon the sixth and succeeding substitutes.

Entail—Resolutive Clause.—At the conclusion of a general resolutive clause there followed a directory clause as to the way in which the heirs succeeding upon a contravention may make up titles to the estate,—the direction to the next heir being to establish his right without respect to “any innovation, alteration or change, by the person contravening, or any acts of commission or omission, or any acts or deeds whatsoever, which may import any contravention of the above-written clause irritant”.—Held that this directory clause formed no part of the resolutive clause, and that the omitting to enumerate therein sales or debts, did not exempt those acts from the prohibitions of the entail.

Entail—Precept of Sasine—Statute 1685.—In the precept of sasine there was no express mention of the resolutive clause—the mandate being merely to give sasine “with and under the burdens, provisions, and irritant clauses above mentioned”.—Held that these words comprehend both the irritant and resolutive clauses.

The deceased Alexander Porterfield of that ilk, executed an entail, contained in a contract of marriage between William Porterfield, Esq., his son, and Miss Julian Steill, dated the 19th and 21st October 1721, and recorded in the Register of Tailzies the 12th December thereafter. The clause of destination called to the succession

“the heirs-male procreate or to be procreate of the said marriage betwixt the said William Porterfield and Julian Steel; whilks failing, the heirs-male of the body of the said William Porterfield of any other marriage; whilks failing, the heirs-male of the body of the said Alexander Porterfield; whilks failing, the eldest heir-female of the body of the said William Porterfield, and the descendants of the body of the said eldest heir-female, without division; whilks failing, the next heir-female successive of the body of the said William Porterfield, and the descendants of the body of the said next heir-female successive, all without division; whilks failing, any other heirs of tailzie to be nominated and appointed by the said Alexander Porterfield, by writ under his hand, at any time in his lifetime, in his *liege pousie*; whilks failing, the eldest heir-female of the body of the said Alexander Porterfield, and the descendants of the body of the said eldest heir-female, without division; whilks failing, the next heir-female successive of the body of the said Alexander Porterfield, and the descendants of the body of the said next heir-female, without division; whilks also failing, the said William Porterfield his nearest lawful heirs and assignees whatsoever.”

Full powers were reserved by Alexander Porterfield to alter the order of succession, except the heirs-male and female of his son William's body, and the heirs-male of his own body:

“And further, reserving full power and liberty to the said Alexander Porterfield, at any time in his lifetime, he being in *liege pousie*, to alter, innovate or change the order, course and succession of the haill heirs of tailzie above specified, except the heirs-male and female of his son's body, and the heirs-male descending of the said Alexander Porterfield his own body, and that by write under his hand, notwithstanding of this present right of fee, and infeftments to follow hereupon, in favours of the said William Porterfield, and the heirs of tailzie above spe-

cified; declaring always, likeas it is hereby expressly provided and declared, that the said William Porterfield, and his heirs and successors, shall be obliged to take the rights, securities, and infeftments of the saids baill lands and others above mentioned, with the burden of the irritancies and provisions herein contained, to and in favours of such heirs of tailzie as the said Alexander Porterfield shall so nominate and appoint, failing the heirs, male and female, of the said William Porterfield his body, and the heirs-male of the body of the said Alexander Porterfield, as said is, as to which heirs, male and female, of the body of the said William Porterfield, and the heirs-male of the body of the said Alexander Porterfield, the aforesaid succession is hereby declared unalterable by the said Alexander Porterfield, or by the said William Porterfield, and the heirs of tailzie above mentioned, conform to the clauses irritant after mentioned."

The irritant and resolute clauses are in the usual terms; and in the event of any contravention, the entail proceeds with the following directory as to the making up titles to the estate by the heir succeeding:

"And it shall be leisum to the next heir of tailzie to establish the right of the saids lands and others foresaids, with the pertinents, in his or her person, and that either by declarator or serving heir to the person who died last vest and seised in the lands and others foresaids, immediately before the contravener, or by adjudication, or any other manner of way, consisting with the laws and practiqs of this kingdom for the time, without respect to the person contravening, or the descendants of his or her body, and without respect to any innovation, alteration or change foresaid, to be made by the person so contravening; and without the burden of any acts of commission or omission, or any other act or deed whatsoever, which, according to the law, may be interpret to import any contravention of the above-written clause irritant."

The precept of sasine is, to give infeftment "to the said William Porterfield, and the heirs of tailzie above mentioned, in the order above set down, and with and under the burdens, provisions, and irritant clauses above mentioned."

In 1742, Alexander Porterfield executed a deed of nomination, referring to the entail of 1721, and nominating certain other heirs, among whom was Jean Porterfield, the eldest daughter of the entailer, from whom the present pursuer is descended. Alexander Porterfield died on the 14th of May 1743. Besides his eldest son William, in whose favour the deed of entail was executed, he had a second son named John. William died without issue in 1752. His brother John had predeceased him, but left a son, Boyd Porterfield, who succeeded his uncle William.

Boyd Porterfield was succeeded by his son Alexander, who died in 1815, without issue; on which event the lines of succession in the two deeds of 1721 and 1742 separated, and a competition for the entailed estates arose betwixt Sir Michael Shaw Stewart, who was the son of the eldest daughter of Boyd Porterfield and Mr Corbett, the father of the pursuer, who was the descendant of Jean Porterfield, the eldest daughter of Alexander Porterfield, the entailer, and spouse of James Corbett of Tollcross. Mr Corbett claimed to be served heir under the nomination contained in the deed of 1742. Sir Michael Shaw Stewart claimed to be served under the destination in the original deed of 1721. Both claimants died during the litigation which ensued,—Mr Corbett, the pursuer's father, having, however, lived upwards of three years after the succession opened to him. But the eldest sons of each claimant took up the respective pleas of their fathers; and after a long litigation, the pursuer of the present action

was preferred to the succession on 13th November 1829.

The pursuer, conceiving that the entail is defective, raised the present action, concluding to have it found and declared that he has full and undoubted right and power to make up and complete in his person valid titles to the lands and others in fee-simple. The conclusions of the summons were supported on four grounds—1st, That the prohibition against altering the succession applied exclusively to the first five branches of the destination contained in the original deed: 2d, That the terms "heirs of tailzie above specified," "heirs of tailzie above mentioned," being so restricted in the clause prohibiting alterations of the succession, the meaning of the subsequent words, "hail heirs of tailzie above mentioned," "any others, the members of tailzie above mentioned," are thereby fixed, and thus the prohibitions throughout the whole entail are limited to the five first substitutions: 3d, That the resolute clause, while it enumerates certain acts of contravention,—"innovation, alteration, or change foresaid,"—does not comprehend selling,—the "acts of commission or omission, or any other act or deed," being applicable only to feudal delinquencies: 4th, That the precept of sasine does not refer to, or comprehend the resolute clause, "with and under the burdens, provisions, and irritant clauses above mentioned."

The Lord Ordinary pronounced the following interlocutor:

"18th March 1841.—The Lord Ordinary having heard the counsel for the parties on the closed record and whole process, and made avizandum, sustains the defences; assoilzies the defenders from the whole conclusions of the libel, and decerns; finds no expenses due.

"*Note.*—The pursuer objects to the validity of the entail on four several grounds. But the Lord Ordinary is of opinion that he has not succeeded in any of them.

"The first was, that the prohibition (and irritancies) against altering the order of succession applied only to the first five substitutions; and that, as these are all now exhausted, he was at liberty to alter all that remained. The second, which rests on a more extensive application of the same principle, is, that the whole fetters and limitations of the deed are directed against the said five first substitutions only; and that he who has succeeded under the sixth, is therefore free from the whole of these limitations. He was at one time understood to claim a special exemption for this sixth branch (that of heirs to be named, and afterwards actually named by the entailer). But he did not insist upon this at the argument, and rested this part of the case on the two propositions now stated. They came naturally to be considered together; and it would be difficult to say which rests on the most insufficient foundation.

"The basis of both is in a clause on p. 11 of the printed entail, beginning at the marginal letter B, and ending between E and F. The sole and plain object of this clause is to give Alexander Porterfield (the entailer) full power to alter the order of succession of the whole heirs previously specified, with the exception of the first five substitutions, which includes the issue, male and female, of his son's body, and his own issue male. This is the whole object and effect of the clause. But it is expressed with an unfortunate anxiety and redundancy of useless words, which certainly add nothing to its clearness, though the Lord Ordinary cannot think that they raise such obscurity as to give colour or countenance to the pursuer's extravagant attempt to construe out of them a permission to him, and indeed to all the prior and postponed heirs, to alter the latter branches of the destination at their pleasure.

"There are various clauses of surplussage, to some of which it may be objected, that they have no very distinct meaning; and of all of which it may certainly be said, that they can have

no actual effect; though least of all the effect contended for by the pursuer. The first and sufficing provision is, that Alexander Porterfield shall have power and liberty, at any time of his life, to innovate and alter the whole order of succession above specified, except only as to the first five substitutions; and this, it will scarcely be disputed, was of itself unequivocal and complete. But the conveyancer, in his anxiety, thinks fit to add,—‘as to which (these five first branches) the said order of succession is hereby declared to be *unalterable* by the said Alexander Porterfield.’ Though superfluous, there was no great harm, perhaps, or excess of caution in this. But this becomes rather questionable, when we go on and find it anxiously provided, in addition, that the said privileged substitutions shall also be unalterable,—1st, ‘By the said William Porterfield,’ (the son); or, 2dly, ‘By the heirs of tailzie above mentioned, conform to the clauses irritant after mentioned.’ Considering that the whole clause is a mere qualification or limitation of the general power of alteration previously given to Alexander Porterfield the entail, and to him only, it is abundantly evident that the whole of these last declarations are mere surplusage, and amount to no more than an emphatic, but idle announcement, that the five privileged substitutions shall be *absolutely* unalterable; that is, not alterable either by him or any one else who may be called to the succession; a very needless, but certainly a very innocent, because an entirely inoperative, declaration.

“But the pursuer will have it, that ‘the heirs of tailzie above mentioned,’ who are thus idly precluded from altering the first five substitutions (they never having had any power to alter at all), can only mean the heirs included in these very substitutions, since no such power could possibly be assumed by any that came *after*; in respect that the whole of these previous substitutions must have run out and been exhausted before they were called to the succession. The Lord Ordinary is perfectly satisfied that no such views were in the mind of the party who introduced these words, and that they meant no more than that these first substitutions should not be altered by any body, without stopping to consider whether all the persons included in this most general prohibition could possibly have attempted to do so or not. But it is worth observing, that the imputed absurdity, whatever it may be, would be very little mended by adopting the views of the pursuer, since the prohibition would still apply to all the members of the first five branches, while it is obvious that it must have been just as impossible for those under the fourth or the fifth to have attempted to alter the first, second, or third, as for those of the sixth or seventh branch to have altered that of the fifth, while those of the fifth itself could have nothing to alter at all. The concluding words, in short, meant merely that the privileged substitutions should not be altered at all; while *all* that came after the declaration that they should not be altered by Alexander Porterfield, was, for any practical purpose, palpably superfluous and ineffectual. The only conjecture by which the Lord Ordinary can at all account for the idle redundancy of these last expressions, is suggested by the reference there made to the ‘*clauses irritant*’ that were to follow; and is, that as no express prohibition against altering the order of succession had yet been introduced, it might have been thought right to intimate that Alexander Porterfield, who had obtained a special power of alteration, was to be precluded from exercising it, as to these first five branches, by this express reservation, while all the other parties were to be disabled from touching them (or any of the other substitutions), by virtue of the general prohibitions and irritancies which were to ensue; the effect or application of which, however, could never be narrowed or affected by this needless and anticipating reference.

“But even if all this were doubtful, upon what principle does the pursuer propose to construe, out of this anxious and unnecessary *prohibition* to alter certain substitutions, an actual power or permission to alter all the rest? But for these words, it is not disputed that *all* the substitutions would be unalterable, except by Alexander Porterfield alone. The words, however, are words of intensive prohibition, or refusal of power, and nothing else; and how, therefore, can they possibly import an actual permission, to all and every of the heirs, to do away with the whole latter part of the destination, and even with that sixth branch, for the privilege of introducing which, provision is so anxiously made in various parts of the deed? Because it is said

that neither Alexander Porterfield, nor his son William, nor any of the other heirs, shall alter the five first substitutions, the pursuer actually maintains that the power of altering all the other substitutions must be held to be conferred, not merely upon all the members of the five first, but upon them, and all who may be afterwards called to the succession; and that, in consequence of this most stringent prohibition, the leading part of the clause, which, as it actually stands, merely gives power to Alexander Porterfield alone, at any time of his life, to alter all the other substitutions, must be read as if it had expressly provided that the same powers should be given to one and all of the heirs and members of tailzie, from William Porterfield down to the last *nominatim* substitute, inclusive.

“It is a very sound maxim in law, that *exceptio firmat regulam in casibus non exceptis*,—but it is only applicable to cases in which the *regula* itself is laid down with clearness and precision; and where is the rule that gives all the members of this entail a general power to alter all the substitutions, except the five first? Such a power no doubt is given to Alexander Porterfield, and the exception may accordingly confirm the rule *as to him*. But there is no such power given either by words or implication to any of the heirs; and the prohibition as to them is not therefore an *exception* at all, but a mere partial anticipation of the general provision by which *all alteration* is afterwards interdicted as to them. It is remarkable, too, and if the matter were not otherwise clear, would be *per se* decisive, that Alexander Porterfield, being neither an heir (or institute) of entail, nor continuing in the fee of the lands (for his right is reduced to a mere *liferent*), was neither, on the one hand, within the fetters, nor on the other, entitled, but for them to effect the descent of the property. His *right* to alter the succession (*pro parte*), and the limitations on that right, are both, therefore, the mere creatures of express contract and stipulation, and consequently, bear no analogy to the rights and limitations of these rights, which might afterwards vest in, or attach to, those who might actually take up the tailzied fee. The concluding words of the clause so often referred to, accordingly show that this distinction was fully in the view of the entail: since, after giving the power, and restraining it by express words in the case of Alexander, he refers for the parallel restraints to be imposed on *the heirs*, to the subsequent prohibitions and irritancies, by which he could be in no way affected.

“The Lord Ordinary therefore holds it to be abundantly clear, that it is impossible to sustain the pursuer’s leading proposition, that it is only the five first substitutions in this deed that are protected from alteration; or that, when William Porterfield, ‘and all the heirs or members of tailzie above mentioned,’ are afterwards (as at p. 12, E F) expressly prohibited from ‘altering, innovating, or changing the foresaid tailzie and order of succession above prescribed,’ this is only meant of the succession under these five substitutions. The words of the particular clauses, as well as the frame, policy, and structure of the whole deed, are utterly exclusive, it is thought, of so strange and extravagant a conclusion.

“But if this be so, there can be still less difficulty as to his *second* objection, which rests, if possible, upon a yet narrower foundation. Assuming, as the Lord Ordinary thinks quite erroneously, that the words, ‘the heirs of tailzie above mentioned,’ in the close of the clause so often quoted, limiting Alexander’s power of alteration (p. 11, E F), means only the heirs under the five first substitutions, he observes, that this clause happens to stand *immediately before* those which impose the cardinal prohibitions and irritancies of the entail, and that in some of those (though this, too, is inaccurate in point of fact) the restrictions are laid on the heirs under the same general denomination of ‘the heirs of tailzie above mentioned,’ and upon this assumption he contends, by a monstrous extension (or perversion rather) of the rule laid down in the cases of Tillycultry, Ballilisk, and others, that in all these restricting clauses the words should have the same limited meaning, which he says they had in the preceding clause, and, consequently, that the whole fetters and limitations should be held applicable only to the members of these first substitutions.

“It is almost unnecessary to specify the many answers that suggest themselves to this extraordinary deduction. But, as it was very much pressed in argument, the Lord Ordinary shall

shortly refer to some of them. In the *first place*, he is satisfied, for the reasons already stated, that the words in the preceding clause, being in themselves most comprehensive and general words, were not those used with any special reference to the heirs of the first substitutions exclusively; and if they were not, the whole ground of inference, and the basis of the objection, falls.

"In the *second place*, there is no such connection between the clause in which they first occur, being a special clause as to the reserved powers of the *entailer*, and not relating at all to the rights or disabilities of the *heirs*, and those which happen immediately to follow, in which all the limitations of the deed are engrossed, as to justify the transference or adoption into those latter clauses of any limited or peculiar meaning, which the context of the first clause may have put upon them in that connection. In all the cases referred to, the clauses into which the limited meaning was adopted, not only had a direct and necessary reference to those from which that limitation was inferred, but were in truth regarded as the sequel and complement of the preceding clauses; and it was entirely upon the ground of this dependence, and substantial *integration* of the whole as one complex provision, that the judgments in question proceeded. In the present case, however, there is palpably no room for the application of such a principle; and by adopting the views of the pursuer, the whole object and policy of the most elaborate parts of the deed would be wantonly frustrated, instead of being merely rendered into conformity with the other parts, which was the end sought to be accomplished by the decisions in the other cases.

"But, in the *third place*, and this is all that need be further said on the matter, the words used in the preceding clause, though themselves broad and comprehensive enough for the obvious purpose in view, are *not in fact* the words, in the first or in the most material of the subsequent clauses, by which the fetters and irritancies are imposed,—the latter words being in every case still more general and comprehensive. The first in order of those subsequent clauses, and that which immediately follows the provisions about Alexander Porterfield, is that which enjoins the bearing of the name and arms; and this is laid expressly (p. 11, G) on '*the haill heirs of tailzie above mentioned, as well female as male, and the whole descendants of their bodies*,' which is a marked diversity of expression, and is the phrase actually used to distinguish the whole line of destination, from the first five branches, in the very clause giving Alexander Porterfield his powers of alteration: the words of that provision being, that he should have power 'to alter the order of succession of the *haill heirs of tailzie above specified, except the first five substitutions*.' This injunction as to the name and arms is also followed up by a special *resolutive* clause (the mere neglect or omission against which it is directed, not being thought apparently to admit of a proper irritancy), the tenor of which marks still more emphatically the clear and *express* intention of the maker, that the whole fetters should apply to the whole destination; for it ends by declaring that the heirs succeeding to those forfeited for this contravention, shall be under the like irritancies '*to which the haill heirs of tailzie above mentioned, and the descendants of their bodies, are to be subject and liable, through the haill succession in time coming*.'

"It is thought to be quite clear, therefore, that this first penal injunction is *not* laid on the first five branches alone, but on the whole heirs of destination; and as it stands immediately after the clause supposed to limit the meaning of 'heirs of tailzie above mentioned,' so it breaks the only connection that clause ever had with any other of the limiting clauses, viz., that of juxtaposition, or immediate sequence, and disjoins them in place as much as they almost were in substance and effect. But there is in effect a similar variance in the terms of *all* the other material clauses. That against altering the order of succession (p. 12, E F), is directed against '*the said William Porterfield, the heirs-male of his body, and any others the members of tailzie above mentioned*.' While that against selling or burdening with debt is addressed, in like manner, against '*the said William Porterfield, the heirs-male of his body, and all others the heirs and members of tailzie above mentioned*,'—clauses which are not only substantially varied from those in

the clauses relied on, but which, both by the particulars with which they begin, and the generality to which they are afterwards so anxiously extended, are plainly *irreconcilable* with the notion that they were intended to relate, or *could* relate only to the first five substitutions.

"These two heads dispose of what is most material, and almost all that is peculiar in the argument of the pursuer. The two remaining objections, though more plausible perhaps in themselves, seem to require fewer observations.

"The *third* is, that, in what the pursuer calls the concluding part of the *resolutive* clause, there is an attempt to *enumerate* the acts of contravention against which it shall be operative, but that this is so imperfect as to omit all mention of *sales* or *debts*, and that these may therefore be entered into with effect. It may well be doubted whether there is any thing, in the passage referred to, which amounts to an enumeration of particulars, or indicates that such a thing was in contemplation,—the only things mentioned being, '*any innovation, or change, or any acts of commission or omission, or any acts &c. deeds whatsoever, which may import any contravention of the above-written clause irritant*,' which is substantially but a *general* reference to the previous details, and differs in this respect most materially from the case of Skelmorlie and Coilsfield, now under consideration, upon a similar objection (*inter alia*), of the whole Court.

"But the satisfying answer is, that this alleged imperfect enumeration *does not occur in the resolutive clause at all*, nor in any clause that is essential to the entail, but in a mere superfluous directory as to the way in which the heirs succeeding upon a contravention may make up titles to the estate, *already* freed of the whole acts of the contravener, by virtue of the confessedly *perfect irritant* clause, and of his fee or interest in it by virtue of a *resolutive* clause, to the completeness of which it is plainly impossible to take any exception. That the directory clause itself is a mere superfluity, in which it is, of course, of no consequence whether there be any enumeration, complete or incomplete, of particulars, is apparent, indeed, from its very tenor, which really enjoins no definite or preferable mode of proceeding whatever, but merely declares that the title may be made up 'either by serving to the last person who did not contravene, or by declarator, or by adjudication, or by any other manner of way consistent with the laws and practice of this kingdom for the time.' In all the cases referred to, where a defective enumeration was found to be altogether ineffectual as to the particulars omitted, and not capable of being cured by subjoining words of a more general description, the defect occurred in the body and vital part, either of the irritant or resolutive clause itself. But both these clauses are singularly complete and perfect in the present case; and both proceeded upon the most general reference to all acts and deeds prohibited, and without any thing bearing the semblance of an enumeration of particulars.

"The *fourth* or last objection is, that though the Statute requires the irritant and resolutive clauses to be inserted in the procuratories and precepts of *sasine*, they are not so inserted in this case; and specially, that there is no mention of the *resolutive* clause in the precept upon which the title was made up,—the mandate being merely to give *sasine* 'with and under the burdens, provisions, and irritant clauses above mentioned.' Now, the Lord Ordinary has always understood it to be settled, since the case of Murray Kinnymound, reported by Lord Kilkerran (Mor. 15,380), that where the whole restraining clauses are recited at length (as in the case here) in the *procuratory*, it is enough that they be generally referred to in the *precept*,—the real precept of *sasine* and warrant of infeftment in that case being, as Lord Kilkerran observes, the whole deed, which must have been in the hands of the notary at the time. This of course is a conclusive answer as to the want of a detailed repetition of the clauses in the precept; and as to the other objection, that the general reference is only to '*the burdens and provisions, and irritant clauses*,' without mention of the *resolutive* clause, the Lord Ordinary thinks it a satisfactory answer, that in the technical language of the time, in the Statute of 1685 itself, and in various passages of this very entail, the word *irritancy* is applied indiscriminately to the voidance and annulment, either of the acts of contravention, or of the

personal right of the contravener, and in fact is an apt and proper word for describing these several annulments, which (in substance and reality) belong to the same category. It is well known, accordingly, that in the writings of eminent lawyers of that age, what we now call the resolute clause was frequently called the irritant, and *vice versa*,—the truth being, that either denomination would describe well enough the object and effect of each,—the right of the contravener being properly enough said to be *irritated*, and that of the party who would otherwise profit by the act of contravention being in effect *resolved*. In two several parts of the Statute, accordingly, the words irritant and irritancy are used as denoting the whole fetters and penalties of the tailzie; and in three or four passages of this entail, they are used unequivocally in the same sense. Thus, in the sequel of the clause already referred to in relation to the third objection, it is provided (p. 13, F), that the heirs succeeding upon any contravention shall, in their turn, 'be subject and liable to the same irritancies to which the hail heirs of tailzie are to be subject and liable, through the whole course of succession.' The expression, however, occurs again on two occasions, where the use of it, in this indisputably general sense, is the more remarkable, as it bears an immediate reference to a contravention against which, as consisting in a mere omission, there were no *termini habiles* for a proper clause *irritant* (as the law is now understood), and where, accordingly, the prohibition is fenced with nothing but a separate and special clause *resolutive*. One of these relates to the obligation to bear the name and arms, and has been already referred to for another purpose. After providing that the heir contravening shall amit, lose and tye all right to the estate, the deed goes on to say (p. 12, D), that the heir succeeding on this contravention, shall himself be obliged instantly to assume, bear and wear the said name and arms, *under the like irritancies*, as the hail heirs above mentioned, &c. The other is as to the obligation to purge all diligences affecting the lands, to the neglect of which also, as consisting merely in *non faciendo*, no proper irritant clause (*ut nunc loquimur*) seems to have been thought applicable. For to that also there is merely annexed a special *resolutive* clause; in the end of which, after declaring that the heir so neglecting shall omit and lose all right to the lands, it is merely provided that the heirs succeeding (p. 15, G) 'shall be subject and liable to the same irritancy, if they do not purge and redeem the said diligences within six months after their succession by the said contravention,' although the only irritancy provided was that effected by the clause *resolutive* immediately preceding. There are other passages to the same effect, but these are probably sufficient; and when it is considered that the precept makes a general reference to 'the whole burdens and provisions above mentioned,' which of itself would probably be enough, as well as to 'the clauses irritant' in the plural, there really seems no ground for doubting that this ground of objection is as untenable as any of the others."

The pursuer reclaimed. At advising,

Lord Moncreiff.—Although it may be perfectly fair in the pursuer to try this question, it scarcely admits of a doubt. I cannot think that the prohibition against altering the order of succession applies only to the first five substitutions, and not to the heirs to be afterwards named. The whole of that portion of the deed has reference to a particular matter,—the reserved power of the entailor to alter, except as to the heirs of the body of William Porterfield, and the heirs-male of his own body. To render assurance doubly sure, he declares that the order of succession as to these heirs shall not only be unalterable by himself, but also "by William Porterfield, or by the heirs of tailzie above mentioned." This was no doubt useless. But the prohibitions of the entail properly begin after this special clause, and the one relating to the bearing the name and arms of Porterfield. The prohibitions are in the most regular and correct form, and cover all the heirs of tailzie, and amongst others, the heirs to be nominated under the reserved power of the entailor. The second objection is a modification of the first. In regard to the third, the imperfect specification occurs, not in the proper *resolutive* clause, but in that which regulates the mode in which the next heir is to make up titles to an heir contravening. The same question occurred in the Eglington case, and has been

found not to be a good objection. The general words, "deeds of commission or omission," are not sufficient to make a *resolutive* clause; but here they follow the *resolutive* clause. The fourth objection is the only point which presents any appearance of difficulty; but I do not think that it is well founded. The rule of the Statute is, that the irritant and *resolutive* clauses must be inserted in the sasine; but here, as in Murray Kinnymound, 5th July 1784, the clauses are engrossed in the same deed; and in that case, the precept is the whole deed, if reference be made to them in the sasine. The term "irritant clauses" is applicable both to the irritant and *resolutive* clauses. It is so used in the Statute; and being here used in the plural, it must comprehend both. At the origin of these clauses, they were considered as one clause. On the whole matter, I think it is impossible to give effect to these objections.

The other Judges concurred, and the Court *adhered*, with expenses.

Lord Ordinary, Jeffrey.—*Act. Solicitor-General (McNeill), Moncreiff; John Gibson, jun., W.S., Agent.—Alk. Rutherford, Anderson; W. and J. Cook, W.S., and William Patrick, W.S., Agents.*—[J.W.]

11th December 1841.

FIRST DIVISION.—(H. B.)

No. 53.—ROBERT, JOSEPH and THOMASINA STEPHENSON, *Pursuers, v. ARCHIBALD DUNLOP and OTHERS (Roughhead's Trustees), Defendants.*

Mandate.—Process.—A mandatory held sufficient, because in station and circumstances equal to those of the party.

In 1814, an action was raised by Thomas and William Stephenson, both now deceased, against James Roughhead and others, the trustees under their father's settlement. The action fell asleep, and was awakened in 1822. It again fell asleep, and both the original pursuers being dead, the present action of wakening and transference was raised in name of Thomasina and Joseph Stephenson, children of the original pursuer, Thomas Stephenson, and of Robert Stephenson, executor-dative of his uncle, William Stephenson, the other original pursuer, and directed against the original defenders, or their representatives or trustees, and, among others, the trustees of James Roughhead. Thomasina Stephenson was resident in Scotland, but both Robert and Joseph Stephenson were resident in England at Alderly Parks, where Robert was employed as farm-steward of the Earl of Derby, and Joseph lived with Robert, without employment. Robert and Joseph Stephenson were accordingly required to sist a mandatory, and proposed Robert Brown, Robert Stephenson's father-in-law, a farm-servant in East-Lothian, with a large family, and no other means than the earnings of his labour. The defenders objected to the sufficiency of the mandatory, but the Lord Ordinary repelled the objection, and sustained Robert Brown "as mandatory for Robert Stephenson and Joseph Stephenson."

The defenders reclaimed. At advising,

Lord President.—The cases mentioned are direct precedents, and I think we must follow them, in holding that the mandatory need not be of any higher grade than the party. I cannot admit, however, that the mandatory proposed is of the same station as both the parties. As to one of them, I think he is; but as to the other, it does not follow, that because Robert Stephenson was only a farm-servant when he left East-Lothian, we are to consider his station as no better than that of a farm-servant still. It appears that he has been selected by the Earl

of Derby to be his steward, and now holds that office, which is certainly much superior to that of the proposed mandatory, who is a common servant, with a family, and earns annually from £20 to £25. This is surely a station much inferior to that of steward to the Earl of Derby.

The other Judges concurred, and the Court pronounced the following interlocutor:

"Find that Robert Brown is not a sufficient mandatory for Robert Stephenson, and to that extent recal the interlocutor of the Lord Ordinary; but find that the said Robert Brown is a sufficient mandatory for the said Joseph Stephenson, and to that extent adhere to the interlocutor; and remit to the Lord Ordinary to proceed accordingly; reserving all questions of expenses."

Pursuers' Authorities.—Scott v. Gillespie, 29th January 1823. Duncan v. Duncan, 4th March 1830.

Lord Ordinary, Cockburn.—Act. Horn; Peter Bairnsfather, W.S., Agent.—Alt. Monro; Graham and Anderson, W.S., Agents.—N. Clerk.—[H.B.]

11th December 1841.

FIRST DIVISION.—(H.R.)

NO. 54.—JOHN STEWART, Pursuer, v. WILLIAM CUNINGHAME, Defender.

Expenses—Superior and Vassal—Agent and Client.—*A vassal found liable to the agent of the superior for the expense of preparing a charter of confirmation and precept of clare constat, though, from the vassal's having afterwards resolved to enter in a different form, the deeds prepared were cancelled.*

Messrs Pearson and Robertson, W.S., agents for William Cuninghame of Craigends, to whom the *dominium utile* of the lands of Fultons belongs, wrote John Stewart, W.S., agent for Major David Ogilvie Stewart, the superior, to the following effect:

"We now beg to send you the titles of the Fultons in the person of the late Mr Cuninghame, conform to inventory, to which you will find a note of the nature of the entry to be granted annexed. You will see from this, that parts of the Fultons lands are now held under entail, in virtue of four ex-cambions made in 1815 and 1819, and the remainder of the lands are still held in fee-simple, under the original titles.

"The draft of a charter was prepared some time ago by Mr Barr, writer, Paisley, and sent to us, which we have revised and made applicable to the part of the lands still held in fee-simple. We now send you the draft revised, that it may be extended and signed.

"With regard to the parts of the lands now under entail (the description of which is just the same as the lands excepted from the fee-simple land's description), we will thank you to prepare and send us for revision the draft of a charter of confirmation and precept of *clare constat*, which will be to the series of heirs, and with the conditions and restrictions contained in the Craigends' entail, an extract of which is herewith sent.

"We will feel obliged if you would send us the draft of the charter with as little delay as possible."

Mr Stewart prepared drafts of the deeds, and sent them to Messrs Pearson and Robertson, who returned them "revised," and wrote at the same time, *inter alia*, "The rental of the Fultons is about £600 a-year. We shall be glad to know when the charters are ready for delivery." Mr Stewart afterwards wrote that the deeds were completed, and added—"Major Stewart is entitled to a composition for the entailed lands, in which Mr Cuninghame enters as a singular successor,—the amount of which I will be glad to adjust with you." "Inclosed I send you a note of the fees of both charters, amounting to £38. 10s." In answer, Messrs

Pearson and Robertson expressed their surprise at the claim

"of composition for the entailed part of Fultons, as for an entry of a singular successor. This claim we cannot recognise in any shape, holding it to be clear beyond doubt, that Mr Cuninghame is entitled to an entry in the whole of the Fultons as an heir."

The letter concluded:

"We trust, therefore, that on reconsidering the matter, you will see the propriety of giving up the claim to an entry as singular successor; but should you still adhere to it, we have no objection to refer the point to some respectable practitioner."

Owing to Mr Stewart's absence from home, the letter of Messrs Pearson and Robertson was handed to Mr Christopher Douglas, W.S., who wrote them to the following effect:

"It appears to me that Major Stewart's right to a composition, as on the entry of a singular successor, from Mr Cuninghame, in those parts of the lands which have been entailed, and which had been conveyed by the last vassal to a third party, although now vested in the heir, is well founded. It is solely in the character of a singular successor that he seeks and obtains an entry. Wirbout, however, at present discussing the point farther, I, on behalf of Major Stewart, agree to your suggestion, to refer the question, whether a composition, or what consideration, is payable by Mr Cuninghame on his present entry, to any professional gentleman, to be fixed on; and I beg to suggest any one of the following, all of whom must have had similar points under their consideration, viz., Messrs Andrew Storie, Richard Mackenzie, H. D. Hill, or John Dundas."

Messrs Pearson and Robertson selected Mr Mackenzie "as the referee." A letter of reference was accordingly prepared, in which Messrs Pearson and Robertson for Mr Cuninghame, and Mr Douglas for Major Stewart, submitted to Mr Mackenzie's decision, "whether a composition, as on the entry of a singular successor, or what consideration, is payable by Mr Cuninghame to Major Stewart on the present entry?" Mr Mackenzie pronounced the following award:

"I am of opinion, that as the charter of confirmation and precept of *clare constat* by Major Ogilvie Stewart, in favour of William Cuninghame, Esq. of Craigends, of the lands of Fultons and others, confirms various titles in favour of parties other than the heir *alioqui successurus*, Mr Cuninghame is liable, on obtaining delivery of the charter and precept, in payment to Major Stewart, the superior, of a year's rent of the lands, in name of composition for the entry." "Note.—The circumstance stated on the part of Mr Cuninghame, that the different parties whose titles were confirmed, although appearing, *ex facie*, to be singular successors, were merely trustees for the heir-at-law, does not, in my opinion, affect the validity of the claim on the part of the superior."

After the award was pronounced, Messrs Pearson and Robertson wrote Mr Douglas, stating, that in consequence of it,

"we decline entering in the form proposed, which we should never have thought of, had we conceived that the composition of a singular successor was to be required. We are, however, willing to take out a precept of *clare constat* in these parts of the Fultons, in favour of Mr Cuninghame, as nearest heir to William Cuninghame, his grandfather, the last entered vassal, and we shall then complete the title to the property ourselves, as we best can. Be so good as let us know whether Major Stewart is willing to grant an entry in that form.

"We are also ready to take delivery of the charter, of the fee-simple part of the lands, and to pay the expense of the charter, amounting, as per Mr Stewart's note, to £14. 10s."

Mr Douglas replied, that he considered them barred

from resiling by the reference, but he ultimately expressed his readiness

"to extend the late reference to Mr Mackenzie, and in addition to what was there referred to, refer to him, whether, in the circumstances of this case, and according to practice and equity, the whole year's rent of the lands to be entered to, or if not, what proportion thereof ought to be paid by Mr Cuninghame to Major Stewart, on receiving the charter already prepared.

"In proposing this additional reference, I do so on the distinct understanding, that if it is agreed to by you, the award of Mr Mackenzie is to be implemented by both parties."

A second letter of reference was prepared in the following terms:

"On behalf of our respective constituents, we now beg to extend the former reference to you, as to Mr Cuninghame's entry to the entailed lands of Fultons, and hereby refer to your determination, whether, taking into consideration the whole facts and circumstances of the case, and the practice in cases similar to the present, Mr Cuninghame is bound to pay the composition of an heir or singular successor, on obtaining delivery of the charter already prepared. We are," &c. (Signed)

"PEARSON and ROBERTSON, for Mr Cuninghame. JOHN STEWART, for Major Stewart."

Mr Mackenzie's award was as follows:

"I am of opinion that Mr Cuninghame is bound to pay the composition exigible upon the entry of a singular successor, on obtaining delivery of the charter of confirmation and precept of *clare constat* which has been exhibited to me." (Signed) "RICHD. MACKENZIE." "Note.—As directed by the letter of reference, I have taken into consideration the whole facts and circumstances of the case, and the practice in cases similar to the present, and have been favoured with the opinion of six of my brethren who have had more experience of cases of a similar nature than I have, and they were unanimous in concurring with me in opinion, that the superior was entitled, on delivery of the charter, to a composition as upon the entry of a singular successor. But, at the same time, they all concurred with me in thinking, that, in the circumstances of the case, the superior ought to give delivery of the charter upon payment of a restricted composition, and that it would be reasonable that the composition should be restricted to a half-year's free rent of the lands in the charter."

On receiving the award, Messrs Pearson and Robertson sent it to Mr Stewart with a letter, in which they stated:

"We cannot see the least reason whatever why our client should, as Mr Mackenzie proposes, pay one-half the composition of a singular successor. In order, however, to save farther trouble, we are willing to pay a composition of £25 to obtain the charter already prepared, which is more than the expense we should be put to in completing our title in the other way. If you are not inclined to agree to this offer, then we beg to know whether you are willing to grant a precept of *clare constat* in favour of Mr Cuninghame in the lands, as heir to his grandfather, the last entered vassal. Mr Cuninghame has finally determined to give no more than the above sum for an entry; so that we must hold all farther negotiation at an end for an entry in the form already prepared, if our present offer is refused."

Mr Stewart wrote declining the offer, and added:

"Before I can give you an answer to your query, whether Major Stewart is willing to give Mr Cuninghame a precept of *clare* as heir to the last entered vassal, it is necessary that the expenses of the charter already prepared, and of the reference, be first paid; and I beg to know whether you are ready to pay them, on receiving the charter cancelled."

Messrs Pearson and Robertson, after stating their determination not to give more than the £25 offered for an entry, concluded their letter as follows:

"With regard to what you say as to payment of the expenses of the charter already prepared, we beg to state, that as our offer has been refused, and we are obliged to be at the expense

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of obtaining an entry in another form, we shall certainly not agree to pay any part of the expense of this charter, which is of no use to our client, and is only proposed to be delivered to us cancelled."

Mr Stewart brought the present action, concluding for payment of £28. 11. 2. as the amount of his account for preparing the deeds, and of the expenses of the references to Mr Mackenzie.

The defender *pleaded*—1. The pursuer cannot be held to have been employed by the defender or his agents, but in preparing the entry was acting for his own client, the superior. 2. The pursuer is not entitled to maintain the present action against the defender, who was not his employer. 3. Even supposing the pursuer was directly employed by the defender to prepare the charter libelled on, he is not entitled to demand the expense of that deed from the defender, while he only offers to deliver it cancelled, and of no use. The defender has always been ready to pay the expense of the charter, on receiving delivery of it in a complete and valid state. 4. The defender never agreed, or gave the superior reason to suppose, that he was to consent to pay the composition of a singular successor. On the contrary, from the first he distinctly intimated to the superior's agent that he considered himself only bound to pay the composition of an heir, and that he was to be entered as such. This view of the matter was acquiesced in by the superior and his agent. 5. If the superior intended to demand the composition of a singular successor from the defender, it was his duty to have distinctly intimated this to the defender from the first; and he was in *mala fide* in going on with the entry, and allowing the defender to suppose he was to be entered as an heir, till the charter was ready for delivery. 6. The award of Mr Mackenzie does not by any means bind the defender to enter as a singular successor, and to pay a composition as such. All that is settled by Mr Mackenzie's award is, that the defender is not entitled to insist on an entry in the form that was originally proposed, unless he consents to pay a composition as a singular successor. The defender has acquiesced in this.

The Lord Ordinary, before answer, remitted to Mr James Moncreiff Melville, W.S., to report,

"Whether when a vassal, being required by a superior to take out an entry, applies to the person pointed out as the superior's agent for an entry with the superior, and transmits his titles for that purpose, the superior's agent is held to have a direct claim for his professional fees in preparing a charter or precept against the vassal; or whether, in practice, the employment of the superior's agent is held to be on behalf of the superior alone, and without any claim against the vassal?"

Mr Melville reported:

"That I understand the agent for the superior, in the case of the vassal being required to take out a charter, and sending his titles for one, has a direct claim against the vassal for his professional fees in preparing the charter; and I have no doubt that in practice the employment of the superior's agent is held not to be in behalf of the superior."

Thereafter the Lord Ordinary pronounced the following interlocutor:

"2d November 1841.—The Lord Ordinary having considered the report of Mr Melville, repels the defences, and decerns in terms of the conclusions of the libel: Finds expenses due; allows an account thereof to be given in, and remits to the auditor to tax the same, and to report."

The defender reclaimed.

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When the cause was advised, the Court were satisfied, without calling on the defender, that the pursuer was entitled to payment of his account for preparing the deeds, but desired to hear both parties as to the expenses of the reference, and the pursuer's title to insist for them.

The defender then *argued*, that the only parties to the reference were the superior and vassal, and that the superior's agent could have no title to insist for them in his own name.

The pursuer *answered*, that the preparation of the titles, and the references following upon it, were parts of the same transaction, and that the expenses of the former having been found due, those of the latter followed of course.

The Court concurred in the view taken by the pursuer, and *adhered*.

Lord Ordinary, Murray.—*Act.* Rutherford, Handyside; *Party Agent.*—*Alt.* Dean of Faculty (Wood), H. Robertson; Pearson and Robertson, W.S., *Agents.*—*B. Clerk.*—[H.B.]

14th December 1841.

FIRST DIVISION.—(H. B.)

No. 55.—ALEXANDER FARQUHAR CRAWFORD, Raiser, v. SIR SAMUEL STIRLING and OTHERS (Stirling's Trustees), and MESSRS PEARSON and ROBERTSON, Claimants.

Diligence—Mandate, Implied—Competition—The agents of a proprietor who had become insolvent continued, after arrestment of the rents by certain creditors, to make disbursements on the property, including payments of feu-duty, poors' rates and insurance, and took the receipts as for behoof of the proprietor. In a competition between the agents, claiming the amount of these disbursements, and the arresters—the arresters were preferred.

Captain George Stirling being indebted in a sum of £500, for which he had granted bond to Mr Warrand, Mr Forrester, W.S. (Mr Warrand's *curator bonis*), raised letters of inhibition and arrestment, and in May 1836 arrested the rents of a house in Windsor Street, of which Captain Stirling was the proprietor. The tenant, Alexander Farquhar Crawford, thereupon brought a process of multiplepoinding, and consigned as the fund *in medio* the sum of £88. 10s., being the amount of rents due at Martinmas 1836. Claims were lodged in this process by Sir Samuel Stirling and others (trustees under the marriage-contract between Captain Stirling and Mrs Stirling), and also by Messrs William Crawford and Alexander Pearson, two other creditors of Captain Stirling. During the dependence of the process, the trustees under the marriage-contract paid Mr Warrand's debt, on receiving an assignation to it, and to the diligence which had been used to recover it. Thereafter, in March 1839, the Lord Ordinary pronounced an interlocutor ranking and preferring

"the claimants, the trustees under the marriage-contract between Captain George Stirling and spouse, as onerous assignees of John Forrester, the original claimant, in respect of the bond of 1834, now in the said marriage trustees, and of the several arrestments used in the hands of the raiser by the said John Forrester prior to the assignation by him in their favour, to the whole of the fund *in medio*."

Meantime, other rents having fallen due were arrested in January 1838, and on the 25th and 28th January 1839, in the hands of Mrs Crawford, Alexander Far-

quhar Crawford's widow, and of the Reverend Thomas Crawford, his executor, who brought a supplementary process of multiplepoinding, and consigned as the fund *in medio* the rents which had fallen due during the years 1837 and 1838, and also at Whitsunday 1839. Previous to this last date, on the 17th January, decree had been pronounced adjudging Captain Stirling's house in Windsor Street to the trustees under his marriage-contract, and to his other creditors, Messrs William Crawford and Alexander Pearson. In the supplementary multiplepoinding a claim was lodged for Messrs Pearson and Robertson, who claimed to be preferred for the sum of £74 odds, which they had paid during the period embraced by the processes of multiplepoinding, for public burdens, including feu-duty, poors' rates and insurance, payable for the house in Windsor Street, and also for the sum of £11. 8. 7. paid for repairs to Messrs Burke and Son, upholsterers, and which payments, they averred, had been made by them while they had "the charge and management of the said house for the mutual behoof of all concerned," though the receipts were taken in the proprietor's name. On the other hand, Captain and Mrs Stirling's trustees, averring that these payments, if made by Messrs Pearson and Robertson, had been made by them merely as private agents for Captain Stirling, or perhaps for Messrs William Crawford and Alexander Pearson, claimed, 1st, to be preferred to the sums of £88. 5. 6. and £25. 13. 3., the amount of rent due respectively at Whitsunday and Martinmas 1838; and, 2d, to be preferred *pari passu* with the other adjudgers, to the half-year's rent due at Whitsunday 1839. In support of this claim

The trustees *pleaded*—1. The rents in the raiser's hands, of the house, No. 11, Windsor Street, which belongs in property to Captain George Stirling, having been duly attached by the arrestments at the instance of the claimants, and their author Mr Forrester, for payment of the debt contained in the bond founded on by them; and those rents not having been attached at the instance of any other party, the claimants are, in virtue of their said bond and diligence, and the said arrestments, entitled to be preferred to the whole rents *in medio* falling due at and preceding Martinmas 1838, in payment *pro tanto* of their debt. 2. The rents falling due subsequently to Martinmas 1838 having been in like manner attached by the arrestments of the claimants, Stirling's trustees, and not attached by any other arrestments, or in any other way, these claimants are entitled to be preferred to them also; at all events, they are entitled to be preferred thereon *pari passu* with Messrs Crawford and Pearson, the adjudications of both having been led on the same day, and conjointly; and this, whatever the extent of the rights of Messrs Crawford and Pearson, is all that is claimed by Stirling's trustees. 3. Whatever claim or claims may lie to Messrs Pearson and Robertson, or to Messrs Burke and Company, against Captain Stirling, the landlord of the house, for the payments and repairs said to have been made for or on account of Captain Stirling or his property, or against Messrs Crawford and Pearson, if these gentlemen chose to authorise them, no such claim can lie against the bygone rents of the house due to Captain Stirling, and duly attached by the arrestments of Stirling's trustees, and not attached by any other arrest-

ments, or otherwise; and *multo magis*, none such can lie in a question with Stirling's trustees—such payments, if made, having been made without the approbation, or even knowledge of them or their author, Mr Forrester.

Messrs Pearson and Robertson *pleaded*—1. The payments of public burdens made by the claimants, and the expenses for repairs, having been incurred for the general behoof of all concerned, are proper and preferable debts against the rents of the house falling due during the period. 2. The competing creditors of Captain Stirling having allowed the claimants to make the above payments during the whole of the above period without objection, are not entitled to object to their drawing repayment out of the rents which form the fund *in medio*.

The Lord Ordinary pronounced the following interlocutor:

"18th November 1841.—The Lord Ordinary having heard parties, and considered the process,—1mo, Ranks and prefers the claimants, Sir Samuel Stirling and others, as trustees of Captain George Stirling, and of the late Mrs Anne Gray or Stirling, preferably, to the sum of £88. 5. 6., and interest thereof, being the rents due at Whitsunday 1838; and also to the sum of £25. 13. 3., being the rent due at Martinmas 1838, and interest thereof. 2do, Ranks and prefers the said trustees, and Messrs Crawford and Pearson, *pari passu*, to the sum of £25. 13s. 3d., being the rent due at Whitsunday 1839, and interest thereof: Repels the claim of Crawford and Pearson *quoad ultra*. 3tio, Repels the claim of Messrs Pearson and Robertson, and finds them liable in the expenses of discussing this claim to Stirling's trustees; and finds these trustees also entitled to expenses in their competition with Messrs Crawford and Pearson, subject to modification; and appoints accounts to be given in; and when lodged, remits the same to the auditor to tax and to report, and decerns.

"*Note*.—The only disputed point at the debate, was the claim of Messrs Pearson and Robertson. Their claim is founded on their having for a creditor, their client, advanced money to repair the house and to pay its feu-duty, its insurance, and its poor-rates. But the Lord Ordinary does not think that such advances, not secured by any diligence, entitle them to interfere with the arresting creditor. It may be true, that unless these advances had been made there would have been no rent, but still, in making them, the claimants must be held to have looked to the personal credit of their employer, or of the landlord. There would have been no rent if the house had not been finished. But after it is finished, is a creditor of the landlord, who has arrested the rents, liable to be superseded by the mason or carpenter, founding, *without any diligence*, on the mere fact that they built the tenement?"

Messrs Pearson and Robertson reclaimed. At advising,

Lord President.—The only question is as to the arrested rents which fell due at Whitsunday and Martinmas 1838, and I cannot see any ground for altering the Lord Ordinary's interlocutor. With regard to these rents, there is no claim entitled to compete with the arrestments, which in themselves are admitted to be unobjectionable. The payments made by the other claimants, were made without any authority from the arresters, and I know of no principle which can entitle them to insist that the claim for these payments must be sustained, to the exclusion of completed arrestments. Had the competition been between the arrester and the superior claiming his feu-duties, the question would have stood in a very different position. But the superior is not in the field at all. Messrs Pearson and Robertson made these payments of their own accord, and the capacity in which they made them, is obvious from the receipts, which bear to be for payments made for behoof of Captain Stirling, and not for behoof of his creditors. I see nothing, therefore, in the circumstances, to take off the effect of the legal diligence completed by the trustees. Any payments made after the property was adjudged, stand on a different footing; but these are

not now before us. I confine my opinion entirely to the competition for the rents which fell due before the adjudication; and as to these, I am quite clear that we ought to affirm the Lord Ordinary's interlocutor.

Lord Gillies.—I hold the same opinion, but not without very great doubt. In strict law, Messrs Pearson and Robertson's claim for reimbursement cannot be sustained; but I rather think the equity of the case is with them. Perhaps they made these payments rashly; but having made them for a party in a state of insolvency, and partly to the superior, who, if they had not been made, could have enforced them by carrying off both the rents and the subject, it cannot well be said that the arresters are not *locupletiores*, to the extent at least of the payments of feu-duty. The payments for poor's rates and for repairs are in a different situation. Still, however, as these payments were made ultroneously, without the concurrence of the arresters, and without any legal compulsion by the superior, though I think there is something like a good claim in equity, I believe we must, on strict principle, adhere to the interlocutor.

Lord Mackenzie.—I have great difficulty—not as to the law, but as to the facts. As to the law, it is clear that when a beneficial payment is made for a proprietor, with or without employment, the party who pays is entitled to come against him; and in the same manner, if a payment is truly made for the benefit of an arrester, though without employment, I have no doubt that the arrester is liable, on the simple ground that the party who paid must be considered as truly his *negotiorum gestor*. But here there are opposite averments; and the facts are not clear. It is admitted that Pearson and Robertson were agents for the proprietor, and that they took the receipts in the name of the proprietor. Now, it does not follow, that because the rents are arrested, the proprietor is not to pay the burdens affecting the property. On the contrary, he is personally liable, and if he refuse, may be put in jail. In this case, the payment being made nominally for the proprietor, I am afraid it is incumbent on Messrs Pearson and Robertson to prove their averment, that it was "made for the behoof of all concerned,"—meaning thereby the arresters. I do not see this proved. Had they produced a letter from the superior, saying to all concerned with the property,—"You must pay me my feu-duty, or I will use my rights, and carry off the property from all and sundry;" and had they paid in consequence of that letter, I would have held that to be a payment for the behoof of all concerned, and that not only in the absence of employment, but even in the face of a warning to the contrary. Here, as there is no evidence of the payment having been so made, I hold it impossible that it can compete with the arrestment, though I have a strong feeling of the equity of the claim, and adhere to the interlocutor with great reluctance.

Lord Fullerton.—I am also for adhering, on the ground that the reclaimers have failed to make good their averment, that they made the payments, "while they had the charge and management, for the mutual behoof of all concerned." Most assuredly, if they had made out this, their claim must have been sustained. If they had been employed by all, their disbursements would have formed a preferable claim against all. They have failed to prove this employment. On the contrary, it appears that they were the agents of the landlord, and took receipts bearing to be for his behoof. In the face of these receipts, I cannot see how they can aver employment by all concerned. It may be observed, however, that had the arresting trustees been founding merely on the marriage-contract, the averment of employment for all concerned might have been more readily presumed; but the trustees, having got an assignment to the £500, are the true creditors in that debt, and entitled to the full benefit of the diligence used upon it. Not being able, then, to hold that the payment was made on the employment of all, I must concur with your Lordships in adhering to the interlocutor.

The Court pronounced the following interlocutor:

"Before answer as to the claim of preference by Pearson and Robertson for the half-year's feu-duty falling due at Whitsunday 1839, and paid by them on 24th May 1839, over the half-year's rent falling due at Whitsunday 1839, after the ad-

judications were led,—Remit to the Lord Ordinary to hear parties on that point, and to do therein as shall be just: *Quoad ultra*, adhere to the interlocutor reclaimed against, and refuse the desire of the reclaiming note; but find no additional expenses due."

Lord Ordinary Cockburn, for Jeffrey.—For Stirling's Trustees, Rutherford, Currie; John Forrester, W.S., Agent.—For Pearson and Robertson, H. Robertson; Party Agents.—B. Clerk.—[H.B.]

14th December 1841.

SECOND DIVISION.—(J.W.)

No. 56.—JOHN MORRISON and WALTER BRECHIN, *Suspenders*, v. JOHN GREGORY M'KIRDY and JOHN KIRKWOOD, *his Factor, Respondents*.

Obligation—Contract—Conditional—Lease—Proof—Parole—A party having made an offer for a lease of certain subjects, and given a reference as to his responsibility—Held that this was not a concluded agreement, and that parole evidence was inadmissible to prove that it was.

Walter Brechin took a lease of a stable and coach-house, situated in Hope Street, Glasgow, belonging to Mr M'Kirdy, from his factor John Kirkwood, for one year from Whitsunday 1840 to Whitsunday 1841. In the course of the year, Brechin subset part of the premises to Morrison, and in January 1841 the latter waited upon Kirkwood, and expressed a desire to take the subjects from Whitsunday 1841 to Whitsunday 1842. Kirkwood requested a reference to some one whom he knew, as to his (Morrison's) responsibility, and Morrison named Henry Paul, Esq., manager of the City Bank. No farther communing took place between the parties; and Kirkwood having almost immediately thereafter received another offer which he considered satisfactory, closed with it. On the 29th March, Brechin and Morrison were warned to remove from the premises, but on the removing day in Glasgow, which is the 28th May, the suspenders refused to flit. On the same day the respondents presented a summary petition for removing to the Magistrates of Glasgow, to which process they called as parties, Brechin the tenant, and Morrison as the sub-tenant in whole or in part of the premises. Both parties appeared to defend against this process, and a record was made up on the petition, answers and replies, with various successive additions to these papers. The fact on which Morrison mainly rested his case, was the alleged entry of his name in the factor's rental-book as tenant; and a diligence was granted to recover the notandum-book, as also all letters or other writings relative to the question at issue. On the 28th August 1841, the following interlocutor was pronounced:

"Having again considered this process, with the revised answers and revised replies, and documents produced, and that the record has been closed—Finds the averments of the defenders, although proved, would not amount to, or constitute a lease, or title of possession of the premises in question for the current year: Repels the defences as irrelevant and inconsistent, and to all appearance urged *mala fide*: Grants warrant of ejection against both defenders; ordains and decerns in the terms concluded for in the original petition, reserving to pronounce *quoad ultra*, with regard to damages and expenses."

With the view of staying the execution of this judgment, a note of suspension was presented. On the 28th September last, the Lord Ordinary refused the note, and found expenses due.

The suspenders reclaimed, and *pleaded*—That there

was a bargain between Morrison and Kirkwood, subject to a reference to Mr Paul, and which, if unfavourable in its result, Kirkwood was bound to communicate to Morrison. Various statements were made upon the record, showing the understanding of parties. The premises were never ticketed to let, and various repairs were undertaken to be made subsequent to Whitsunday 1841; and supposing these statements proved, as at present must be assumed, are they relevant to constitute an agreement for a lease of the subjects for another year?

Replied—The fair construction of the communing is, that if the reference was not satisfactory, there was no bargain. A second meeting was necessary, and there was therefore no concluded bargain. Proof by documents was allowed in the Inferior-court, and the only question now is, can that be supplemented by parole evidence.

Lord Justice-Clerk.—This is a conditional bargain,—Is it competent, therefore, to prove it by parole? The general rule is, that this is incompetent.

Lord Meadowbank concurred in thinking the interlocutor right.

Lord Medwyn.—I don't think there was a bargain. Certainly the utmost it can be called, is a conditional one. What were the respective duties of the parties after the communing. The factor did not apply to Mr Paul, but the offerer did not return and renew his offer. Then there was the warning to remove, which ought to have called him forth to ascertain the result of his reference, and if practicable, to have then concluded an agreement.

Lord Moncreiff.—It appears to me that there is no case for the suspenders. Brechin had the lease of the whole premises, and subset a part of them to Morrison. While in possession of this, he came to Kirkwood and made an offer for the whole. He also gave a reference; and we are told, that unless the reference proved unsatisfactory, the bargain was concluded. But if a servant comes and offers himself to a party, and gives a reference, is he to consider himself hired unless he hears that the reference has not been satisfactory? Nothing farther is alleged to have followed upon this communing, but the warning to remove, and the petition for ejection. Morrison founds on previous possession; but this is nothing to the purpose. He possessed only a part, and it is a new agreement which he wishes to prove by parole. The interlocutor, in my opinion, is perfectly right.

Lord Justice-Clerk.—Looking to the Inferior-court record, I rather think there was a bargain, although only a conditional one. A diligence was allowed to recover documentary proof, on the averment that the suspender was entered as tenant in the factor's book. When this book is recovered, it proves insufficient to sustain the averment, and at that stage the suspender asks to be allowed a proof by parole. In my opinion, it is quite incompetent to prove any such bargain by parole.

The Court adhered, with expenses.

Lord Ordinary, Gillies.—*Act.* Buchanan; John Cullen, W.S., *Agent.*—*Alt.* Penney; Gibson-Craigs, Dalziel and Brodie, W.S., *Agents.*—*T. Clerk.*—[J.W.]

14th December 1841.

SECOND DIVISION.—(J.W.)

No. 57.—FYFE v. WOODMAN.

Process—Suspension and Interdict—Caution—Consignation—Expenses—A party having executed a pouncing of furniture, the property of the daughter of his debtor, she presented a suspension and interdict, whereupon the pouncing creditor abandoned his diligence—Held that, with the view of trying the question of expenses, the complainer was entitled to have the bill passed without caution or consignation.

Woodman pounded, for a debt due by Fyfe, certain



furniture which Fyfe several years previously had made over to his daughters. One of them presented a suspension and interdict against the completing of the diligence, and a note was lodged by the pouncing creditor abandoning the pouncing, but containing no stipulation that he should be exempted from any claim for expenses. With the view of trying the question of expenses, the Lord Ordinary passed the bill on caution or consignation, and the suspender presented a reclaiming note, praying to have the bill passed *simpliciter*: Macauley v. Brown, 16th February 1833.

Lord Moncreiff.—If the pouncing was abandoned, the case resolves into a common question of expenses, where neither party is entitled to caution. The pouncing creditor was bound to know the condition of his debtor.

The Court remitted to pass the bill, without caution or consignation.

Act. Robertson.—*Alt. Anderson.*—[J.W.]

15th December 1841.

FIRST DIVISION.—(H. B.)

No. 58.—THOMAS MENZIES, *Petitioner*, v. JOHN MURDOCH (*Livingstone's Trustee*), *Respondent*.

Competition—Statute 1661—Inhibition—Agent and Client—Writer's Hypothec.—*Held*, 1. *That inhibition is not a sufficient diligence to establish a preference under the Act 1661*: 2. *That a writer's hypothec is not struck at by an inhibition, though used previous to it.*

Margaret Hynd, wife of James Livingstone, senior, died in 1800, survived by her husband and two children of the marriage—a son David, and a daughter Margaret. In 1803, these children succeeded, under the settlement of their grandfather, David Hynd, to two legacies of £50 each. James Livingstone, senior, married again in 1804, and died in 1822, survived by his daughter, Margaret, of the first marriage, and several children by the second—the eldest being James Livingstone, junior. By his trust-settlement he left only a legacy of £20 to his daughter, Margaret—the residue of his property being conveyed to his second wife and her children. The trustees under the settlement having declined to act, and James Livingstone, junior, having in consequence intromitted generally with his father's succession, Margaret and her husband, Thomas Menzies, in 1824, raised a summons of count and reckoning in the Court of Session, concluding for £400, more or less, as the share of the goods in communion belonging to her in right of her mother, and also for the payment of the two legacies of £50 each, left to her and her brother, since deceased, by her grandfather, and of which she alleged payment to have been made to her father by her grandfather's executors. On the dependence of this action inhibition was used in January 1825. A proof having been led as to the payment of the legacies, a judgment was pronounced by the Lord Ordinary in 1831, and affirmed by the Court in 1832, finding that *in hoc statu* there was no sufficient evidence of their payment to James Livingstone, senior, and assoilzieing the defender from the conclusions with regard to them, but reserving right to the pursuer to bring any action founded on an alleged undue or fraudulent erasure of an article in Livingstone senior's books, relating to the payment of these legacies.

While the other conclusion of the summons, as to the share of the goods in communion, was under dis-

cussion, the pursuer, Thomas Menzies, in his own name (his wife, Margaret Livingstone, being now dead), and as administrator-in-law for his children, brought a new action against the defender for payment of the legacies—founding on the reservation with regard to the alleged erasure. This action was raised, and inhibition on the dependence used in 1833.

In February 1837, Mr Thomson Paul, W.S., who had been the defender's agent in these actions, brought an action against him (using inhibition on the dependence) for the payment of his accounts, and obtained decree in absence for £285. 19s. In June following, the defender's estate was sequestrated under the Bankrupt Act; and on the 11th July, the same day when a meeting was held to nominate an interim factor, an interlocutor was pronounced in the original action, decerning for the pursuer to the amount of £296. Against this interlocutor a reclaiming note was presented by the trustee in the defender's sequestration, and the amount decerned for was reduced to £86 odds, with interest from Whitsunday 1809.

Claims having been lodged in the sequestration by Thomas Menzies, Thomson Paul, and Livingstone senior's legatees, a competition arose between them,—Menzies claiming to be preferred as a creditor of the bankrupt's father, and in virtue of an inhibition used within three years of the father's death; and Mr Paul claiming to be preferred in virtue of a hypothec over the title-deeds of certain heritable subjects which had belonged to the bankrupt, and which he had delivered to the trustee under reservation of his hypothec, which he alleged had been acquired by the delivery of the titles to him for that very purpose in 1834. Mr Murdoch, the trustee, in disposing of this competition, pronounced an award, in which he rejected the claim of preference for Mr Menzies, and sustained the claim of Mr Thomson Paul “for his law and business-accounts against the bankrupt, in virtue of his right of hypothec over the title-deeds of the bankrupt's heritable subjects, as preferable to the claim of the said Thomas Menzies, and entitled, so far as such accounts may be sustained, to be ranked *primo loco*.”

Thomas Menzies presented a petition against this award, in which he alleged that Mr Paul had no proper right of hypothec; and if he had, still it could not compete with his inhibition, which had been used before it existed. Answers having been lodged, the Court remitted to the Lord Ordinary to prepare a record.

Menzies pleaded—

1. The petitioner being a creditor of the bankrupt's father, and having used diligence to secure his debt within three years from the death of the bankrupt's father, is entitled, in virtue of his inhibition, to a preference over the creditors of the bankrupt. Under the Act 1661, cap. 24, inhibition is complete diligence.
2. The petitioner is entitled, in competition, to a preference over those creditors whose debts were contracted posterior to the inhibition used by him and his wife against the bankrupt in January 1825.
3. The petitioner is entitled to be ranked *pari passu* with any creditors of the bankrupt whose debts were contracted prior to the inhibition used by him against the bankrupt in November 1833, and, *secundo loco*, in preference to those creditors of the bankrupt whose debts were contracted subsequent to that inhibition.
4. The respondent, Mr Paul, whose claim has been sustained by the trustee, has no right of preference over the petitioner, in virtue of his alleged right of hypothec or otherwise.
5. The respondent, Mr Paul, never at any time held a legal right of hypothec over the title-deeds

in question. 6. Supposing that the respondent, Mr Paul, had held a lien over the disposition and settlement executed by the bankrupt's father, his lien over it would have been extinguished when he parted with it. 7. A right of lien over title-deeds is one of retention only, and it does not entitle the holder of the deeds to a preference over other creditors, except in so far as those creditors may have occasion to use the deeds. In the present case, there was no occasion for the use of the deeds alleged to have been in the possession of the respondent, Mr Paul, and his claim of preference, in virtue of his alleged right of lien, ought therefore to be repelled.

The trustee *pleaded*—

1. The petitioner, Menzies, is not entitled to claim a preference over the price of the heritable subjects belonging to James Livingstone, as being a creditor of his father, or having used diligence in terms of the Statute 1661, c. 24, in respect that he has not, in terms of that Statute, used diligence against the real estate belonging to the defunct within the space of three years after his death,—the inhibition used by him not having been followed up by decree of adjudication, and not being in itself completed diligence against the real estate, which the Statute requires. 2. The petitioner is not entitled to plead that he was not in a condition to obtain completed diligence, on the ground that his action of constitution was opposed, because he might have obtained decree of constitution and adjudication, reserving all objections *contra executionem*. 3. The inhibition used by the petitioner gives him no preference over those creditors of the bankrupt's father whose debts were contracted prior to its date; and, consequently, the widow and children of Livingstone, senior, who are onerous creditors on his estate, are entitled to be ranked *pari passu* along with other personal creditors on the estate of his son, who intermitted with the subjects belonging to his father. 4. Assuming that the petitioner is not entitled to a preference over the heritable subjects belonging to the bankrupt, on the ground of being a creditor of the ancestor who had used completed diligence against his estate within the statutory period, his inhibition could give him no preference in competition with the right of hypothec over the title-deeds belonging to the agent of the bankrupt,—that hypothec, if validly constituted, overruling and being preferable to all heritable securities granted by the bankrupt, whether prior or subsequent to the constitution of the right of hypothec. 5. The circumstances stated upon the record prove, that in this case there was a valid and complete right of hypothec over the titles constituted, in the usual course of business, in favour of the law-agent of the bankrupt, several years before the date of the sequestration. 6. In that situation of matters, the agent could not be compelled to part with the title-deeds of the bankrupt, without payment of his business-accounts, or an obligation, with proper security, to pay these accounts when the amount should be ascertained; and the express agreement entered into with the trustee for the creditors, which has never been attempted to be reduced or set aside, but, on the contrary, homologated and acted on by the creditors, effectually preserved to the agent the whole benefit of his right of hypothec, and of consequent preference. 7. The creditors, through their trustee, having become bound to admit the agent's rights of preference, as the condition of obtaining possession of the title-deeds, with a view to a sale of the heritable subjects belonging to the bankrupt, and that agreement having been acted upon, by the agent's having given up the title-deeds, and a sale having taken place in virtue of the titles so put into the hands of the trustee, it is irrelevant to inquire whether a sale could have been effected without these titles, or whether the agent could have made his preference effectual by retaining the titles, and resting upon his right of hypothec. 8. But, in the present case, as no effectual title could have been given to a purchaser, without obtaining possession of the titles in the hands of the agent, the whole creditors derived benefit from the transaction with the agent, inasmuch as the fund is *medio*, which forms the subject of competition, was thereby realised for the common behoof, and are therefore bound in equity, as well as *ex contractu*, to implement the obligation undertaken on their behalf by the trustee. 9. In the whole circumstances, the judgment pronounced by

the trustee, which was pronounced in terms of the opinions of eminent counsel, and after affording to the petitioner the amplest opportunity of stating any facts or grounds which might lead to a different conclusion, is well founded, and ought to be supported.

The Lord Ordinary ordered minutes of debate, with the view of reporting to the Court.

At advising,

Lord President.—I cannot see any good ground for altering the judgment of the trustee. As to the Act 1661, the petitioner has failed to show that he has done diligence under that Act. The first requisite is, that the diligence be done within three years of the ancestor's death; but it is also requisite that the diligence be effectual and complete. Inhibition is not such a diligence, though it has very important effects. It may be defeated in various ways, and it does not truly affect the estate. I see no good ground, therefore, for the preference claimed over the other creditors of the ancestor. At the utmost, the petitioner is only entitled to rank with them *pari passu*. Then, as to the deposition of the titles, I don't think the exceptions taken to Mr Paul's right of hypothec can be sustained. Were the question as to a writer's hypothec still open, there are various points connected with it which might require a great deal of consideration; but after the series of decisions which has been pronounced, it would be dangerous, at this time of day, to make the validity of the hypothec depend on the determination of allegations as to the mode in which the custody of the titles was originally acquired. The petitioner seems to maintain, that the hypothec cannot be sustained unless the titles were lodged with the agent in the very process for the expenses of which the hypothec is claimed. I cannot think so. If a party, when not actually bankrupt, goes to his agent confidentially, and raises a fund of credit by depositing his title-deeds, I cannot see how the agent, who incurs expenses in his behalf, relying upon the security of these titles, is to be looked upon as in an unfavourable situation. In the present case, I think the deposition is clearly made out, and that it is therefore just one of the cases where the principle is settled, and we cannot now venture to interfere.

Lord Gillies.—I agree, though I differed with the majority as to some of the cases decided. I believe none of them have been appealed; but the question which they raised is certainly of the greatest moment, and I have still great doubts of its having been rightly settled.

Lord Mackenzie.—If I really thought that sufficient diligence had been done within three years of the ancestor's death, I should not be able to hold that any thing done by the heir could cut the creditor out of the preference which he had thus established. I admit, however, that inhibition is not sufficient diligence in the sense of the Statute. Then, as to the effect of inhibition in a competition between the inhibitor and a writer, with the title-deeds obtained after inhibition, and for debts not relating to land, but for past and future writer accounts, though I agree with your Lordships that we cannot overturn the previous decisions, none of which, as far as I know, have yet been reversed, I must confess that I concur most reluctantly, and solely and simply because I think it necessary *stare decisis*—I do not say *deciso*; for I think a single decision should not have prevented us from reconsidering this question. What the principle of the decisions is, I don't profess to understand. Certainly, I could not agree to extend it farther. Now, the question here raised is, whether this right of hypothec is to be preferred to inhibition, and not merely to heritable bonds? and I certainly hesitate to decide in the affirmative, as I think it would extend the right farther than the decisions have yet carried it. One ground for holding that the hypothec prevails over the heritable bond, may be, that the heritable creditor, by allowing the titles to remain with the debtor, is in some degree answerable for the consequences. He should have insisted to have them placed either in his own hands or those of a joint custodian, and so put it out of the debtor's power to hypothecate them with a writer. But this observation does not apply to the case of inhibition. An inhibitor can do no more than inhibit. He cannot prevent the deposition. But then it may be said, that a prohibition to contract heritable debt does not

imply a prohibition interpellating the writer from receiving the titles. I rather think the inhibition does imply this; for it expressly prohibits the proprietor, as against all the world, from doing any thing that may lead to the eviction or diminution of the estate. But if the delivery of the titles is to have this effect, it is just a breach of the inhibition. But it is said the titles are only moveable. I don't see how this can be said, seeing that the effect of pledging them, if it be to a writer, is to give him a title to affect the land. Such a pledge given voluntarily after inhibition, is certainly something very like a breach of it. But it is said that the titles give to the agent with whom they are pledged, a right preferable to that even of singular successors; because, being moveable, they must be transferred by delivery; and not being delivered, their remaining in the original proprietor's hands is just the case of a conveyance of moveables *retenta possessione*. I cannot enter into this view; for I look upon the titles as just a piece of the estate. Then it is said that the beneficiaries under the ancestor's settlement are creditors, and must come in with the petitioner *pari passu*. I have some doubt as to that. The right given to them was merely gratuitous; and I doubt much if these legatees are entitled, in virtue of the right so conferred, to come in *pari passu* with onerous creditors. Legacies are always understood to be given under an implied condition that the debts are in the first instance paid.

Lord Fullerton.—I agree in opinion with the majority. The only point before us is the soundness of the judgment pronounced by the trustee in the competition. I have given the point all the attention in my power, and I cannot see any sufficient ground to alter the trustee's judgment. The first competition is between the petitioner and Mr Thomson Paul,—the latter holding a lien over the title-deeds, and the former being in right of a debt due by the father of the bankrupt. The petitioner's right was secured by inhibition in 1825, and Mr Paul's debt was not constituted by decree till 1833. The question which thus arises relates to the general effect of an inhibition in competition with an agent's lien—the one party holding that it is preferable, and the other that it is not. If the question were open, I think it would be difficult to hold the lien as entitled to prevail over the inhibition. It would rather seem that the inhibition should preclude the party inhibited from delivery of his titles, so as to subject them to lien. But the present point is not open, for it has been repeatedly ruled in decided cases; for I cannot see any difference, in point of principle, between those cases and the present. Inhibition does not extend to moveables, and consequently not to objects which are capable of being given in pledge. In order, then, to let in the plea of Mr Menzies, it would be necessary to make out, that titles which have been pledged may be reclaimed, on the ground that they are not heritable but moveable. Now, a great deal might be said in defence of this position, but it has been overruled again and again, in the cases referred to; for in them it was expressly argued, that the titles formed part of the heritable estate, and could not be separated from it, so that the party who had completed a right to the estate, had of course completed a right to the titles, and was entitled to reclaim them wherever they were, whether pledged or not. That argument was overruled, on the ground that they were to be regarded as moveable in a certain sense, and were capable of being pledged to the limited extent of forming a valid security to an agent for his accounts. If, therefore, it has been held that, in a competition with creditors who have done complete diligence, a writer's lien is preferable, the principle applies still more strongly when the competition is limited to the more imperfect diligence of inhibition. The second point raised relates to the effect of inhibition, considered as a diligence used within three years, under the Act 1661. Now I think it is impossible to doubt, that if inhibition were to take effect like adjudication, and were used within the statutory period, an heir would not be entitled to compete with it. The object of the Statute was to separate the property of the ancestor from that of the heir, and keep them separate for three years, during which period, if complete diligence be used, the ancestor's creditors must take in preference to those of the heir. The true meaning then is, that during that period there cannot be any competition between the creditor of the ancestor and the heir—the former being always preferable. But then the other

question arises, what is to be considered complete diligence in the sense of the Statute? Is inhibition entitled to be so considered? I cannot think so; and I am supported in this opinion by great authority, viz., by Lord Stair, who expressly says, that by diligence, in the sense of the Statute, must be meant "complete diligence by apprising or adjudication whereupon infestment or charge hath followed." The words of the Statute are, "providing the defunct's creditors do diligence against the apparent heir, and the real estate belonging to the defunct." Now, it is impossible to hold that inhibition is a diligence against the real estate of the defunct. It is merely a personal prohibition against the party inhibited, and is in no sense a diligence against a defunct's estate. In one sense it may be said to be real, as it prevents the subsequent alienation of a real estate; but in another sense, it is merely personal, as it falls by death. Inhibition, therefore, is not a real diligence, according either to the letter or the spirit of the Statute, or to the opinion of Lord Stair. As to the lien itself, I see no good ground for objecting to it; for I cannot see how the lien is to be confined to any particular account of business. It must be held to be a general lien. It is unnecessary to enter into another objection which has been taken, viz., that the trustee might have sold the property without getting possession of the titles. It comes too late; and though the trustee has reserved the question as to the legality of the lien, the petitioner is evidently endeavouring to give that reservation a meaning which it cannot bear. I am therefore inclined to think the trustee is right on both points. As to the question with regard to the character of the beneficiaries under the ancestor's settlement, I think they are not creditors, but gratuitous grantees. Still, *quoad* the parties competing with them here, they are to be regarded as creditors. No separation of the estates of the ancestor and heir having taken place under the Act 1661, the whole has been massed together, and all the parties now claiming must claim as creditors of the heir. But I cannot see how it can be denied that those claiming under the ancestor's settlement are creditors of the heir. The origin of the debt was no doubt gratuitous on the part of the ancestor; and if the two estates had been separated, and a competition had arisen between these gratuitous grantees and the ancestor's proper creditors, the objection that they were not creditors must have been sustained. The nature of the present competition is very different; and the circumstance of the right being gratuitous or onerous does not come into play. The property came into the hands of the son under the condition that he was to pay the legacies, and that condition, from the moment he intromitted with the property, constituted an obligation against him, and made him the debtor of the legatees. Suppose a person has received money or effects to pay to another party, what is it to him, whether the party to whom he has to pay, is receiving a present or the discharge of an onerous obligation? *Quoad* them he is a debtor, because the money which has been lodged with him is truly theirs. Here the heir, by intromitting with the father's estate, has become bound by the condition, of paying the legacies to the persons named in the settlement. These parties must therefore be treated as creditors; and it is quite obvious that the inhibition cannot affect their right, which was not used for some years after their right was competently established.

The Court dismissed the petition and complaint.

Petitioner's Authorities.—Orme v. Barclay, 18th November 1778; Dict. 6521. Bell's Com., Vol. I. p. 730, 725, 726; Vol. II. p. 153. Cannan v. Greig, 16th November 1794; F. C. M'Kenzie's Representatives v. Liddel, 26th February 1741; Kilk. 8. Erskine, B. II. t. 11, § 11, 7 and 9. Bell, II. p. 146, and p. 24. Stevenson v. Blakelock, 1 Maule and Selwyn, 535. Callman v. Bell, 28th November 1793. Bell's Principles, p. 721, § 1986. Creditors of Cult, Mor. 974. Wallace, 10th May 1821. Bruce, 13th December 1826. Erskine, B. III. t. 8, § 39. Bell, Vol. I. p. 639. Strahan v. Creditors of Strahan, 2d July 1754, Kilk.; 5 Brown's Sup., p. 274. Sir M. Bruce v. Mrs Bruce, 9th June 1831.

Respondent's Authorities.—Campbell v. Smith, 1st February 1817. Campbell v. Clason, 15th November 1822. Case of Cameron, 25th June 1824. Bell, I. 730. Bell's Principles, p. 701.

Lord Ordinary, Murray.—Act. Robertson, Paterson; John

Young, S.S.C., *Agent*.—*Alt.* Rutherford, Moir; Thomson Paul, W.S., *Agent*.—*B. Clerk*.—[H.B.]

15th December 1841.

FIRST DIVISION.—(H. B.)

No. 59.—SIR JAMES BOSWELL, *Nominal Raiser and Defender*, v. MONTGOMERIE and OTHERS, *Claimants and Pursuers*.

Expenses.—*Process*.—*A party who ultimately obtained a verdict in his favour, found liable in the expenses of a litigation, in which he endeavoured, but unsuccessfully, to show that the cause was unfit for trial by jury.*

This case had been tried by a jury, and a verdict returned for the defender, who now moved the Court for expenses generally. The motion was opposed by the pursuer, who maintained, that instead of being liable in the whole expenses to the defender, there were certain branches of the litigation for which the defender was liable in expenses to him. These branches were, 1st, the expenses incurred in trying the question whether the cause was to be tried by a jury or by the Court, on evidence taken by commission. At first the Lord Ordinary had ordered the cause to the jury roll, but the defender reclaimed, and the Court ordered the cause to be retransmitted. The pursuer then appealed to the House of Lords, who reversed the judgment, and ordered the cause to be tried by a jury. The expenses of this litigation, the pursuer maintained, were clearly due to him. 2d, The pursuer alleged that the defender had caused a great deal of unnecessary expense, by causing a multitude of witnesses and documents to be produced in order to prove debts, of the existence of which he ought to have been perfectly satisfied, and which he afterwards at the trial admitted, without going to proof.

Lord President.—I am quite prepared to give my opinion on the first branch of the case, namely, that relating to the expenses incurred in the litigation respecting the mode of trial. The original action was a multiplepinding, and in that action was raised the question of vitious representation, and consequent liability for the debt. The defender denied both the representation and the debt, and it became necessary for the Lord Ordinary to determine how both points were to be tried,—whether by a jury or an ordinary action, in which the evidence should be taken by commission. His Lordship pronounced an interlocutor, to the terms of which it is necessary to attend. It is as follows: "Having heard parties' procurators on the motion of the defender to retransmit the case to the ordinary roll, on the ground that it involves matters which cannot be satisfactorily investigated by a jury.—In respect that the pursuer does not confine himself to the written evidence in process, but demands a farther proof by witnesses, and that the defender does not maintain that the said written evidence is such as to exclude parole proof, Finds that farther investigation is necessary, and finds that no sufficient cause is assigned by the defender for departing from the general rule for ascertaining disputed questions of fact by the verdict of a jury, and therefore refuses the motion." This interlocutor was reclaimed against, and the Inner-House altered, and remitted to the Lord Ordinary to allow a proof on commission. An appeal was taken to the House of Lords, who reversed the judgment, and found that the points raised ought to be tried by a jury. Now I must say, that if I had sat here when the judgment was given, and had concurred in the opinion that the evidence ought to be taken by commission, yet, after the reversal of the House of Lords, I would have found myself bound to hold that a jury trial was the proper mode of deciding the points, and that the party who had opposed that mode could not be entitled to the expenses thereby incurred. The other point, as to the expenses caused by the denial of the constitution of the debt, rests on different grounds,

Lord Mackenzie.—I am of the same opinion. I was one of those who concurred in altering the Lord Ordinary's interlocutor. I thought that the evidence was of a kind more fit to be taken by a commission than by a jury. In that opinion we were wrong, for the House of Lords reversed our judgment, and returned to that of the Lord Ordinary. Accordingly, the cause went to a jury in the ordinary way; and I think that the party who refused to go, ought to bear the expenses occasioned by the refusal. In giving this opinion, I do not go on the general ground, that whenever a point of form is raised, the expenses ought always to be borne by the losing party. I know that this has been argued, but I cannot assent to it. In questions of jurisdiction, the parties must fight whether they will or no; and the litigation is carried on, not so much for their individual benefit as for the benefit of the Courts whose powers require to be determined. In such cases, I cannot see the justice of subjecting the losing party in expenses. This, however, is not a case of jurisdiction. The cause was going on in the ordinary way, but the defender thought proper to disturb it. He has ultroneously tried a point, and engaged in a litigation which was not necessary, and I think we are doing no more than acting in obedience to the House of Lords, when we find him liable in the expenses.

Lord Gillies.—I concur, though I must say it is not without some degree of reluctance. One thing is clear. The judgment we gave must be held to be wrong, and that of the House of Lords to be right. There is no doubt of that. We must put out of view the judgment which we formerly pronounced, and hold the matter to be in the same situation as if the point had never been raised or disposed of till to-day. At the same time, I recollect our decision perfectly, and may now explain the ground on which it was given. A question of accounting was involved, and we thought a question of that nature could be better decided without a jury than with one. The late Lord President, who had great experience in jury trials, thought it impossible to send the question to a jury. The House of Lords seem to have thought, that whether it involved an accounting or not, it must go to a jury. We must hold they were right in that opinion, and I think it follows as a necessary consequence, that the expenses caused by taking an opposite view, must be borne by the losing party.

Lord Fullerton.—I am of the same opinion. Where a party chooses to raise a point totally apart from the main question, and for that purpose occasions an expensive litigation, he must be understood to do it subject to the penalty of being found liable in expenses if he is wrong. Now it has been found that this litigation was unnecessary, and the expenses incurred by it is therefore just so much dead loss. When the cause was before me in the Outer-House, I thought it ought to go before a jury. I would not have thought so, had it been an ordinary case of accounting, where the only object of going into it was to ascertain the balance which might be due by either party; but the object of the accounting was to determine a matter of fact. On that ground, I thought it a proper case for jury trial. The pursuer, who thought proper to litigate in support of an opposite view, is clearly liable in expenses.

The Court found the defender liable in the expenses of the litigation, as to the mode of trial.

Act. Rutherford, Penney.—*Alt.* Robertson, T. Mackenzie.—[H.B.]

16th December 1841.

FIRST DIVISION.—(H. B.)

No. 60.—ARCHIBALD THOMAS FREDERICK FRASER, *Pursuer*, v. THE RIGHT HONOURABLE THOMAS ALEXANDER BARON LOVAT, *Defender*.

Proof.—*Witness*.—*A builder, proposed to be examined as a valuator, having been informed by the agent of the party proposing to examine him, of the valuations of previous witnesses, his evidence was held to be inadmissible.*

Entail.—Statute 10 Geo. III. c. 51.—*Repairs, though made at once, if not more than sufficient for ordinary tear and wear, are not chargeable against the succeeding heir of entail.*

Continuation of case, *ante*, Vol. VIII. p. 45, and Vol. XII. p. 379.

In this action, which related to improvements under the Montgomery Act (10 Geo. III. c. 51), the defender objected to various of the charges as not sanctioned by it. A conjunct probation by commission having been allowed, James Smith, one of the pursuer's witnesses, was objected to on the following grounds:—"That, having been employed by the late Honourable Archibald Fraser of Lovat to execute certain of the works in regard to which it is now proposed to examine him, he (the witness) made some affidavits before a magistrate, which are produced in process, in relation to certain facts connected with the business, and since the former proof in this case, these affidavits have irregularly and improperly been exhibited to the witness along with the documents to which they are attached, and he has been informed by the pursuer's agent of the statements made by witnesses previously examined in this case."

It was answered—"That the affidavits formerly made by the proposed witness, were with the view of being recorded in terms of the Act of Parliament allowing the representatives of heirs of entail to claim from their successors the moneys expended by them in improvements, and which having been made at a time when the present parties were not in the field, it is now competent to adduce the witness in the present proof, more particularly seeing that the proof formerly led by the defender, was led for the purpose of disproving the sums expended for improvements. Further, the examination of the witness is still more competent, from the Court having, while the affidavits were in process, allowed a general proof to the pursuer in support of the claim for improvements. In regard to the objection, that the affidavits and accounts were exhibited to the witness, it is denied that the affidavits were so exhibited, although it is admitted that the witness was precognosced from the accounts to which they bear reference, and it is farther denied that the witness has been told of the evidence of other witnesses. Upon the whole, it is submitted that it is quite competent to examine the witness in support of the accounts in general, and that the objection should be repelled."

Replied—"The first objection is not so much that the witness formerly made affidavits, but that having made affidavits, these were recently shown to him, whereby his evidence must be hampered. The remaining objection, that he had been informed what former witnesses had stated, the objector will endeavour to prove by an examination of the witness *in initialibus*, as well as the allegation that the affidavits were shown to him recently."

The commissioner, before answer, allowed the defender a proof of his averments, "that the affidavits in question, with the accounts and estimates, were exhibited, and the statements of the previous witnesses mentioned to the proposed witness, accordingly."

James Smith being examined *in initialibus*, deponed, "That certain affidavits were shown to him by the pursuer's agent, at least to the best of his recollection, which were emitted by him shortly after he did the work at Lovat: That they related to the new square of offices, and the east front wall, and, as far as he recollects, were appended to copies of the estimate furnished by him; and he adds, if they were shown to

him at all, they were so shown at that time: That to the best of his belief, certain accounts were shown to him, with affidavits attached thereto: That he does not recollect the time when this occurred, but it is not many months since: Interrogated, Whether this was when the pursuer's agent was precognoscing the witness? Depones, That it was; but that the pursuer's agent did not put many questions at that time; and upon the deponent stating that he did not recollect much about the matter, he put the said documents into his hands, and showed him the signature. Interrogated for the pursuer, depones, That he has since that time been several times examined by the pursuer's agent: That, to the best of his recollection, he read the oaths, but he is certain that he saw the accounts and estimates: That he does not recollect whether, when he saw the pursuer's agent with the documents, he asked to see them himself, or whether they were offered to him. In reference to the second averment admitted to proof, depones, That he has not been very often examined by the pursuer's agent: not much oftener than by the defender's agent: That he thinks that all his examinations by the pursuer's agent took place since last September, but since September, the defender's agent has not examined him. Interrogated, Whether the pursuer's agent informed him that Mr Thomas Macfarlane, Mr James Hardie, Donald Mackintosh, James Cameron, and David Robertson, or any of them, were examined in reference to this case? Depones, That the pursuer's agent told him that Mr Macfarlane, and Mr Cameron, slater, had been examined, but he is not certain as to the other names. Interrogated, Whether the pursuer's agent told him their estimates were very low? Depones, That he mentioned to him some of the prices which they made of the work, but did not say they were very low: That he did not say he was sure they were wrong: That he does not recollect of his having mentioned anything else; but he recollects that the prices which the pursuer's agent mentioned, as above, were read from a paper." "Interrogated by the commissioner, and requested to state how many interviews he had with the pursuer's agent during which reference was made to the paper above alluded to? Depones, That he thinks it likely there were two interviews at which reference was made to the paper: That he would say that these interviews lasted about an hour each time. Interrogated, How often, during the first of these interviews, reference was made to the paper? Depones, That generally, when interrogating the witness, on both the above interviews, as to the prices of hewing, quarrying, and cartage, he made reference to the paper, and thereafter told the deponent the prices at which the witnesses previously examined had stated them: That he thinks the two occasions above alluded to, were before and after the deponent had been at Beaufort. Interrogated, Whether, after the pursuer's agent stated the prices at which Messrs Macfarlane and Cameron had stated the above branches of work, his attention was called to the prices contained in his own accounts, to which his affidavit was annexed? Depones, That it was; and that he himself considered of the two at the time as in connection: That as far as he remembers, the deponent had his own, his original account in his hand, while the pursuer's agent had the paper aforesaid in his. Interrogated by the commissioner, on the suggestion of the pursuer's agent, and required to state, what the object was in the above comparison? Depones, That the object appeared to him to be, to compare how the prices charged by him in connection with the eastern wall, as to which wall more minute reference was made than to other parts of the work, stood with those mentioned by Macfarlane and Cameron. Depones, That he is not aware of any other object in making the comparison. And being specially interrogated, Whether his object was not to enable him now to make a fair estimate? Depones, That that was not his object, as he did not think his original estimate was an unreasonable one."

The commissioner made *avizandum* of this initial examination to the Lord Ordinary, who sustained the objection to the witness.

The whole cause having afterwards come before the Court by a reclaiming note,

Lord Gillies.—I have some difficulty. If the examination

of the witness were to be confined entirely to the prices, I would think his evidence inadmissible; but it is said that he was also to be examined as to the utility of a wall, as to which there was no tutoring. On the whole, however, I am inclined to think the Lord Ordinary did right in sustaining the objection. It is scarcely possible to determine how far the whole evidence of the witness may not be affected by the tutoring; and I think it sufficient to exclude him, that it affected any part of the evidence given by him, or expected from him. The late Act of Parliament, with regard to evidence, has no application here.

Lord President (Hope).—I am of the same opinion. The witness has been tampered with, and we cannot admit his evidence.

Lord Mackenzie.—I concur. The tampering here may not amount to positive corruption, but it was certainly a preparing of the witness, and would give a great advantage to the party doing so. The agent supposed, reasonably enough, that Smith would be a favourable witness, and went to him to put him in a situation to give that favourable evidence in the most advantageous manner. The agent may have thought this allowable, but I think it was not. It amounted to a concoction of testimony between them; for though it was not intended that the evidence should be false, the object unquestionably was, that it might be made better than it otherwise might have been.

Lord Fullerton.—I have great doubt of the correctness of the interlocutor. The objection is, that Smith was informed of the valuation made by other witnesses. Now it is to be observed, that what the witness was to be called to give evidence to was, not matter of fact, but of opinion. The previous witnesses were examined as men of skill, and it was proposed to examine Smith in the same way. Considerable latitude ought to be allowed in cases of this kind, and I cannot see how information of the opinions which others had expressed should disqualify him for giving his own, more especially as these opinions, being estimates of value, were given by witnesses of the opposite party, and would naturally tend, by being low, to put him on his guard against making his too high. The case is much the same as that of a witness who happens to remain in Court, and is removed, but not until he has heard evidence given on some insulated point. As to that point, I should think such a witness disqualified, but I should not think him disqualified absolutely.

The Court *sustained* the objection.

Among the items of charge by the pursuer was a garden-wall and cascade. To these the following objections were lodged:—"The defender objects to the charges for alleged building and repairing the garden-walls at Beaufort, and works connected therewith, or with the garden at Beaufort, including charges therefor, amounting to £268. 2. 6., contained in the account for 1802-3; and charges for a cascade, &c., amounting to £118. 16. 9., contained in the account for 1804-5, and that on the ground that these were all insufficient and temporary: That the said garden-wall was in a worse condition at the death of the late Lovat than it was when he succeeded to the estate, or before these accounts were incurred: That when the defender succeeded, it was in a ruinous state, having sundry large breaches in it, much of it off the plumb, so as to require to be taken down, and that it neither then was, nor ever had been suitable to the estate, or fit for the accommodation of the heir of entail: That a cascade, as well as other items included in said accounts, was incomplete, perfectly useless, was not of a nature to be charged under the Statute 10 George III. c. 51, had never been sufficiently executed, and was in a state of total ruin when the defender succeeded to the estate."

The pursuer *answered*—"The first sum mentioned in this article is inaccurately stated. The true sum is £268. 2. 6., of which £36. 5. 3. has already been disallowed, leaving £231. 17. 3. to be affected by the pre-

sent objection. The second item of £118. 16. 9., which is contained in the account 1804-5, is already disallowed from want of Lovat's signature to the general account for that year. The objections stated are irrelevant, and are denied. The pursuer has only to say in addition, that supposing that the garden-walls were (as the defender avers) in a worse condition at the death of Lovat, when he came into possession of the estate, if the repairs had not been made, the wall would have fallen altogether long before he succeeded to the title. Indeed, it appears from the voucher that the repairs were made to keep it from falling. The late Lovat might have pulled down the old wall and erected new ones in their stead, but this would have been much more expensive. Instead of which he made repairs, which kept the garden sufficiently protected, and without which it would have been no garden at the time of his death."

The Lord Ordinary *repelled* the objection.

The case being again advised by the Court, the pursuer *pleaded*, that the objection, besides being unfounded on the merits, was precluded by a final interlocutor of Lord Fullerton, in which his Lordship found (*vide ante*, Vol. VIII. p. 45), "that the building or repairing of the garden-wall was an improvement falling within the provisions of the Statute;" while the defender *maintained*, that that interlocutor did nothing more than find that repairs upon a garden-wall might form a proper item of charge under the Statute, without deciding in any way whether the particular charge for repairs here made could be sustained.

Lord Gillies.—I think the interlocutor just goes this length, viz., that a garden-wall is to be held to be included under the term offices, as used in the Statute. If it is in the same situation as offices, it does not surely follow that all the money expended in repairing it must form a good item of charge. As being within the scope and meaning of the Act, the actual expenditure on the garden-wall may be found a good item; but this depends entirely upon the nature of the expenditure, as established by proof. Now I am clear that repairs rendered necessary by ordinary tear and wear are not chargeable under this Statute. Every man—every tenant in the country is bound to bear the expense of tear and wear, and cannot claim deduction on account of it; and I cannot see why the same obligation does not lie upon an heir of entail. If he could show, indeed, that the sum expended was not only for repairing, but also for rebuilding part of the wall which had been thrown down by a flood, the point would be in a different situation; but though something of this kind is alleged, I don't see it forms any part of the charge in the accounts. The whole charge, as I understand it, is only for ordinary tear and wear, and as such I am clear that it cannot be sustained. Lovat was in possession of the estate for twenty years, and a sum of £200 for the repair of a wall of the nature and extent described, does not seem to me at all excessive. I doubt much if such a sum is sufficient to meet ordinary repairs during that period.

Lord President.—I agree entirely in the general principle, that the repairs of ordinary tear and wear do not form a good item of charge under the Statute. My only difficulty is as to the proof of the sum here expended being for ordinary tear and wear. Had it been expended from week to week and month to month during Lovat's possession, I think it would have been very hard indeed, *post tantum temporis*, to charge it all against the succeeding heir; but it appears that the whole was expended in the course of eighteen months, and regularly registered in 1804 in the Sheriff's register. This fact seems to take this claim out of the general rule, as laid down by Lord Gillies, in which I entirely concur; but the statutory requisites having been complied with, I rather think the charge must be sustained.

Lord Mackenzie.—The expenditure is said to have been made

in 1803, but, then, Lovat succeeded in 1792. This is a material fact. He goes on for a number years doing nothing, and then at length he does just what he should have been doing all along. If it were averred that the previous heir had neglected to keep the wall in proper repair, and that he, the heir in possession, being unable to get at him, had been obliged to expend a large slump sum, and after expending it, had still gone on keeping the wall in due repair, I would have been inclined to sustain such a claim; but I am not satisfied that this is the fact. If the only effect of his own just repair was to save him the expense of repairing from time to time, it cannot form a good item of charge under the Statute.

Lord Fullerton.—In the first place, I think it plain that my interlocutor only went to find, that the expenditure on the garden-wall was within the scope of the Statute; and that the parties put this meaning upon it, is evident from the fact that they afterwards went to proof upon this very expenditure. The objection now taken is, that the expenditure was not of the kind contemplated by the Statute, inasmuch as it was only equivalent to expenditure for ordinary tear and wear. I think there is pretty good evidence of this being the fact; and if so, I have no doubt that the claim cannot be sustained. Had the repair been made in consequence of an accident, the case would have been different, but the charges in the account prove that this was not the case. The sum expended is not more than would have been necessary for ordinary repairs, and ought therefore, in my opinion, to be looked upon as merely substituted for it. The fact of the expenditure being made at once, and not successively at short intervals, appears to me to be of no consequence.

Lord Mackenzie.—I agree with the majority, that the repairs given must be held to have been of a temporary nature, for it appears to be admitted that the wall was left by Lovat in no better condition than it was when he succeeded to the estate. He laid out the sum at once, but that was only in lieu of doing it from year to year. His possession was of considerable duration, and in the course of it various repairs of a temporary nature, harling for instance, must have required to be more than once repeated. Could it be maintained that each of these could be charged under this Act? I suspect we must hold that the repairs here charged were of a temporary nature, and as such must be disallowed. At the same time, I must say I have always thought this Statute to be of a very impracticable nature, but we must endeavour to make the best of it.

The Court found that the charges for the garden-wall must be disallowed.

Act. H. Robertson; Gibson-Craigs, Dalziel and Brodie, W.S., Agents.—Alt. Anderson; Aeneas Macbean, W.S., Agent.—B. Clerk.—[H.B.]

16th December 1841.

SECOND DIVISION.—(J. W.)

No. 61.—*MRS JANET POLLOK or TENNANT and HUSBAND, Advocators, v. DR WILLIAM POLLOK, Respondent.*

Service—Brieve, Advocation of—Process—Record—Review—Question as to the proper mode of investigating and disposing of objections stated to the service of a tutor-at-law, in an advocacy of a brieve of idiotry; and it being doubted whether the interlocutors of the Lord Ordinary in a service be reviewable—Advised to report each step to the Inner-House.

Continuation of case, No. 12, ante, p. 20. The Lord Ordinary reported this case upon two points: 1st, Whether, having been substituted in place of the Macer Court, it was incumbent upon him to conduct the service in the same manner as was observed in that Court, or whether he should proceed as in ordinary processes of advocacy, and make up a record, and leave his interlocutors subject to review? 2d, In what manner he should deal with the objections which had been lodged to the service of the tutor-at-law? They came with great weight, considering the parties by whom

they are urged,—the wife, the daughter, and the sister of the party sought to be cognosed. The objections are relevant if proved, but some proof is necessary; and the point for the Court to advise upon, is, in what form the investigation should proceed?

Maitland, for the advocates.—We are here on a question of competency, and we must assume the objections to be relevant and well founded. The point is, in what form are we to get at them? Under the former practice, such objections were disposed of as preliminary: Colquhoun, 22d February 1628; M. 6276. Moncrieff, 23d February 1710; M. 6286. Shepherd, 5th July 1836.

Robertson.—The question now will turn upon the point, whether, if competent, the Court will stop the service on any or all of the objections? We will insist that they be verified *instantly*.

Lord Justice-Clerk.—There are a great variety of objections; and after being considered by the Lord Ordinary, he may either order a condescence, or proceed in any other way he thinks best.

Lord Moncreiff.—He may order a condescence as an information.

Lord Medwyn.—The Lord Ordinary is not bound to proceed in briefs according to the Judicature Act. The assessors of the Macer Court, when any difficulty occurred, were in use to order memorials, which were disposed of by making *avizandum* with them to the Court.

Lord Meadowbank concurred.

Lord Cuninghame.—I will proceed to prepare the case as may appear most proper, and will report every step to the Court, lest there should be a question whether any interlocutor I might pronounce could not be got the better of except by a reduction.

Lord Ordinary, Cuninghame.—Act. Rutherford, Maitland, Moir; Wotherapoon and Mack, W.S., Agents.—Alt. Solicitor-General (M'Neill), Robertson; James Burness, S.S.C., Agent.—F. Clerk.—[J.W.]

16th December 1841.

SECOND DIVISION.—(J. W.)

No. 62.—*PLOCK and LOGAN, and MANDATORY, Petitioners, v. JAMES WALLACE, Respondent.*

Bankrupt—Sequestration—Statute 2 and 3 Vict. c. 41, § 5 and 7—A native of Scotland, who was a partner of a foreign company, received a charge for a company debt, and retired within the Sanctuary. After the lapse of sixty days, a petition for sequestration of his estates was presented by his creditors, but without his own consent—Held that, not having had a dwelling-house or place of business in Scotland within a year before the date of presenting the petition, he was not liable to be sequestrated.

Process—Bankrupt—Sequestration—Statute 48 Geo. III. c. 151, § 16—Reponing—The Lord Ordinary on the bills having refused a petition for sequestration, a reclaiming note was lodged with the clerk in the Bill-Chamber in place of one of the principal clerks of Session, which was refused to be written upon when moved. Thereupon an application was made to the Lord Ordinary on the bills for leave to submit the interlocutor to review, which, through the foresaid inadvertency, had been allowed to become final—Held competent; and that the provision of the Statute was equally to be applied to interlocutors in a process of sequestration as to any other.

Diligence, Legal—Partnership—Foreign—A bill drawn by a foreign firm upon a firm in London, consisting of the same individuals, was dishonoured. One of the partners having been found in Scotland—Held that a charge given him upon the bill was competent; and a note of suspension, presented without caution or consignation, was refused.

The respondent was a partner of the firm of James

Wallace and Company, wholesale stationers, general merchants and bill brokers, Kingston, Jamaica. He formed a house in London, on which the remittance-bills of Wallace and Company were drawn, and this department was conducted first by Mr Macdonald, a junior partner, in his own name, but afterwards a firm was adopted of Joseph Brooks and Company. Brooks was not a partner, but received £100 a-year for the use of his name. Wallace and Company received in Jamaica, during the last months of 1840, about £50,000 of currency, for which bills were drawn upon Macdonald or Joseph Brooks and Company. On the 21st November 1840, the respondent left Jamaica without making any provision for the bills which he had drawn on London, and arrived in Scotland in the beginning of January 1841. The petitioners are holders of various bills drawn in this manner, and on the 16th February 1841, they gave the respondent a charge on one for £500. The respondent was a native of Scotland, and had, previously to the charge, declared in a judicial examination under a petition against him as in *meditatione fugæ*, that he had no intention of leaving Scotland for any foreign country. He presented a suspension of the charge, and

Pleaded—1. A partner of a company is not liable, in the first instance, for the contents of a bill drawn by the company, supposing the bill to have been duly negotiated. The company must have been first called upon to pay, and have failed to pay, before the partners can be made liable: 2 Bell's Com. p. 619, 5th ed. Bell's Principles, § 356, 357. Thomson on Bills, 2d ed. p. 585 and 749. 2. The complainer, in the circumstances stated, is not amenable to the jurisdiction of the Courts of this country, and cannot be apprehended here on summary diligence for a civil debt, without at all events using arrestments against him *ad fundandam jurisdictionem*, which the chargers have not done.

In answer it was *pleaded*—1. A bill in which a company is an obligant, constitutes the debt directly against every partner of the company, and is a warrant for diligence against every such partner and his individual estate, nor is the creditor in any way bound first to discuss the estate of the company: 2d July 1812, Thomson v. Liddle and Company; 26th May 1836, Anderson v. Currie. More especially is this the case where, as here, the debtor admits that he was a partner of both of the companies, who are the drawers and acceptors, and that both are insolvent,—the estate of the one being, according to his own statement, in the hands of a committee of creditors, and the estate of the other never having been any thing. 2. The complainer was liable to diligence in Scotland for payment of the debt, (1.) in respect that, being a Scotchman *ratione originis*, and having his family and family establishment still in Scotland, he had been in Scotland more than forty days before the charge was given, and more especially as he declared that he had no intention to return to Jamaica; (2.) in respect that he has found caution to appear in any action which may be raised against him for payment of the debts due to the respondents.

The Lord Ordinary refused the note, in respect that it was presented without caution or consignment, and that the case seemed in other respects to fall within the rule of Thomson, 2d July 1812. On a reclaiming

note which was advised the 19th of June last, the Court *adhered*.

Thereafter, Plock and Logan presented a petition for sequestrating the estates of the respondent, on the ground that the said James Wallace has retired to the Sanctuary, and remained therein for sixty days, within twelve months immediately preceding the date hereof, and is liable to be sequestrated, even if he should not be notour bankrupt, in terms of the 7th section of the Statute, under and on which the present application is made.

The Lord Ordinary pronounced the following interlocutor:

" 29th July 1841.—The Lord Ordinary having heard the counsel for the parties, In respect that it is admitted that the debtor neither carried on business, nor had any dwelling-house or place of business in Scotland within a year previous to presenting this petition, and that he has not been made notour bankrupt, Finds that the mere circumstance of his having retired to the Sanctuary, and remained therein for upwards of sixty days, is not sufficient to make him liable to sequestration without his own consent, and therefore refuses the petition, and decerns; but finds no expenses due.

" *Note*.—The Lord Ordinary thinks that the seventh section of the Statute has merely the effect of putting retirement to the Sanctuary, as there qualified, equivalent to being made notour bankrupt, in reference to that part of the 5th section which specifies what shall be requisite to subject a debtor to sequestration without his own consent, but that it cannot possibly be held to *dispense with any of the other requisites* there enumerated. Retiring to the Sanctuary is clearly a more equivocal indication of insolvency than being made notour bankrupt; and therefore, if it be held necessary, for the legal sequestration of notour bankrupts, that they must have resided and carried on business in Scotland within twelve months, it is utterly inconceivable that it should have been intended to render debtors, of whose bankruptcy there is no other proof than retirement to the Sanctuary, liable to that process, although they had never carried on business, or had a residence in Scotland in their lives."

The petitioners intended to submit this interlocutor to review in common form, and they accordingly prepared, fee-funded, boxed, and intimated, a reclaiming note against the same, but, from mistake or inadvertency, the note was lodged with the clerk in the Bill-Chamber in place of one of the principal clerks of the Second Division of the Court, and the same was, in consequence, refused to be received or written upon when it came to be moved in course of the rolls, and the reclaiming days were thereby, through mistake or inadvertency, allowed to expire.

The petitioners thereupon made an application to the Lord Ordinary officiating on the bills, for leave to submit the interlocutor to review, in terms of the Statute 48 Geo. III. c. 151, § 16. His Lordship granted leave to reclaim, and pronounced the following interlocutor:

" 30th November 1841.—The Lord Ordinary having considered this note, with the answers thereto, and heard parties' procurators, allows the petitioners to submit the interlocutor of 29th July last, pronounced by Lord Jeffrey, as Lord Ordinary officiating on the bills,—and the reclaiming days against which have been allowed to expire from mistake or inadvertency,—to the review of the Second Division of the Court, in terms of 48 Geo. III. cap. 151, § 16.

" *Note*.—It was not disputed that this case fell properly to be treated as one of *inadvertency*. And that being the case, the Lord Ordinary sees no reason for holding that the provision of the Statute (which has already been held applicable in the more ordinary Bill-Chamber procedure, Arnott, 25th No-

ember 1825, and 4th February 1826,) is not equally to be applied to interlocutors in the process of sequestration under the Bankrupt Act as to any other. The objection, that the Lord Ordinary in such cases being, in vacation, vested with the full powers of the Court, and provision being made for a direct appeal from his judgment, such judgment must necessarily be final, and not subject to review of the Inner-House at all, was overruled, under the former Bankrupt Act, by Robertson's Trustee, 16th June 1827, and Cox, 10th December 1831; and there seems no room for deciding otherwise under the existing Statute. Another objection, that the extraordinary privilege introduced by 48 Geo. III. is superseded and repealed by the peremptory limitation of the reclaiming days in the more recent Judicature Act, is surely untenable. Nor, finally, can the Lord Ordinary discover that any countenance has ever been given to the notion, that the statutory privilege shall be allowed operation only in cases where there is no right of direct appeal from the Lord Ordinary.

"Should the objector, however, be dissatisfied with the view which the Lord Ordinary has thus taken of the case, it will of course be open to him, if so advised, to renew his objections on these heads, when the application to be reponed comes to be considered in the Inner-House.—Brock, 8th July 1826.

"It only remains to be noticed, that, notwithstanding the words of the Statute, the form of the application would seem now to be by reclaiming note, and not by petition.—Bennet, 19th February 1833."

On moving the reclaiming note, the objection to the competency which had been urged before Lord Ivory, was renewed, but not pressed.

On the merits it was *pleaded*—

That by the fifth section of the Bankrupt Act, the estates of any debtor "subject to the laws of Scotland, who is or has been a merchant," &c., may be sequestrated with the consent of such debtor. Under the former Acts the description was different, and it was held, that to warrant sequestration, the debtor must have been in Scotland, and have carried on business there. The terms used in the Act 1793 are—"if any person in Scotland, being a merchant," &c.; and in the Act 1814,—"if any person, being a merchant or trader in Scotland;" but the words of the present Act are,—"any debtor subject to the laws of Scotland," may be sequestrated with his consent, "or without his consent, provided that he be notour bankrupt, and have carried on business in Scotland in any of the said occupations, and have also, within a year before the date of presenting the petition for sequestration, resided, or had a dwelling-house or place of business in Scotland." By the seventh section it is enacted,—"that if any debtor subject to the laws of Scotland, and falling within any of the said descriptions, and not within any of the said exceptions, shall retire to the Sanctuary, and remain therein for sixty days, either continuously or not, within the space of twelve months, the estate of such debtor, although he be not our bankrupt, may be sequestrated without his consent." Any debtor, therefore, subject to the laws of Scotland, although he had neither a dwelling-house nor place of business in Scotland, may be sequestrated with his own consent. 2d, Any debtor subject to the laws of Scotland, and retiring within the Sanctuary for sixty days, may be sequestrated *without* his consent,—the seventh section being a substantive and independent enactment, complete in itself, and not incorporating the fifth section.

On the other hand it was *pleaded*—

That the seventh section referred back to the previous clauses for a description of the persons who might apply for, or were liable to sequestration. Nor was it admitted that any trader, though subject to the laws of Scotland, could apply for sequestration if he was not carrying on business in Scotland: Bell, 11. p. 316. Ewing, 6th February 1802, F. C. Keir, 27th May 1802, F. C.

At advising,

Lord Justice-Clerk.—I am satisfied with the interlocutor. I don't enter into the question raised under the first part of the fifth section, as to whether debtors subject to the laws of Scot-

land can apply for sequestration without having had a place of business in Scotland within a year before the date of presenting the petition. That is not the present case, which depends entirely upon the seventh section, taken in connection with the fifth section. Two things seem to be confounded—the description of the persons who may be sequestrated, and the acts which render them liable to be sequestrated. The retiring to the Sanctuary is one of the acts which render persons of the proper description liable to sequestration; but the carrying on business in Scotland is a part of the general description.

Lord Meadowbank.—I am of the same opinion.

Lord Medwyn.—It would be extraordinary if, while a notour bankrupt could not be sequestrated without having carried on trade in Scotland, a debtor who had merely retired to the Sanctuary could be so.

Lord Moncreiff.—I am of the same opinion. I don't think it necessary to go into the question raised on the first part of the fifth section. The seventh section appears to have been inserted for no other purpose than to declare retiring to the Sanctuary equivalent to notour bankruptcy.

The Court pronounced the following interlocutor:

"The Lords having considered the reclaiming note for the petitioners, Plock and Logan, with the proceedings, and heard counsel thereon, and on the objection to the competency of the note, Repel that objection to the competency, and adhere to the interlocutor of the Lord Ordinary complained of, and refuse the desire of the note: Find the respondent entitled to the expenses of the discussion on the petition before Lord Jeffrey, and to the expenses of opposing the reclaiming note,—of which allow the account to be given in and taxed by the auditor in common form."

Lord Ordinary, Jeffrey.—*Act*. Rutherford, G. G. Bell; Dundas and Wilson, and William Mason, S.S.C., *Agents*.—*Alt. Deas*; Adam Morrison, S.S.C., *Agent*.—[J.W.]

17th December 1841.

SECOND DIVISION.—(J. W.)

No. 63.—WILLIAM BRAKINRIGG, *Pursuer*, v. ROBERT DRYBROUGH MENZIES, *Defender*.

Process.—Arbitration—Judicial Reference.—Review—Landlord and Tenant.—*In an action of damages at the instance of a tenant against his landlord for breach of agreement, certain issues were adjusted, but instead of impanelling a jury, it was agreed to refer the whole cause to a referee mutually chosen. On the motion to have the authority of the Court interposed to his award, it was objected by the defender, 1st, That he had not allowed a rehearing after issuing his notes, as required, or at least that he had granted it under such conditions as practically amounted to a refusal: 2d, That it would appear from the proof, and the notes issued by him, that he had misunderstood the issues: More particularly, that he had decided upon the supposed liability of the defender, not merely for the subject of the lease being in proper order or repair, but for insufficiency arising from the original malconstruction of the subjects.—Held, That the objections were irrelevant; that the Regulations, 1695, applied equally to an award under a judicial reference as to a decret-arbitral; and that the notes issued by the referee could not be looked into in order to support objections not relevant to set aside the award.*

This was an action of damages at the instance of a tenant against his landlord, for failure to deliver in proper condition certain subjects, in terms of a contract of lease between them. The memorandum of agreement provided, that "the mill, machinery and buildings, were to be put in good working order, and set agoing at the expense of the landlord." Regarding the supply of water there was an express provision, that

"a cistern is to be made to supply the engine with water, in the event of any circumstance occurring to prevent the supply as at present from the docks, on the plan pointed out by Professor Russell, or the water to be drawn from the old harbour, or in

the option of the landlord, as he may be advised for the best; but on no account is he to be held responsible in damages for any loss of time or detention that such an alteration may require, or be necessary for the fulfilment of the work, should such an unforeseen circumstance occur, unless said delay is occasioned by the landlord."

No such change occurred, but the supply of water proved inadequate for the mill, either from the malconstruction of the pipes, or from the distance at which the mills were situated from the docks. It was contended for the landlord, that as the lease of the subjects had been taken as they stood, and as nothing was done by him to interfere with the supply, he implemented the contract by giving access to that supply through pipes which were quite sufficient for the purpose.

The following issues were adjusted in the cause:

"It being admitted that, on the 15th day of August 1838, the pursuer took in lease from the defender certain houses, mills and machinery, the property of the defender at Leith, from Whitsunday 1839, for the period and on the conditions stated in the writing, No. 23 of process:

"Whether, in violation of the agreement in the said writing, the defender wrongfully failed to furnish or repair all or any part of the subjects of the said agreement, to the loss, injury, and damage of the pursuer?

"Whether the pursuer expended the sum of £142. 1. 3., or any part thereof, contained in the account, No. 5 of process, for necessary repairs on the said subjects; and whether, under the said agreement, the defender is indebted and resting-owing to the pursuer in the said sum of £142. 1. 3., or any part thereof, with interest thereon?

"Damages claimed under first issue, £2000."

In place of impannelling a jury to try the issues, the parties agreed, by a joint minute, dated 28th July 1841, that "the present cause shall be referred to, and finally decided by, Patrick Robertson, Esq., advocate, as sole referee mutually chosen by them; it being understood that he shall proceed forthwith to lead the whole evidence, and decide the whole cause, just as if it had gone to trial before the jury."

The authority of the presiding Judge having been interposed accordingly, and the judicial referee having accepted of the reference, evidence was adduced before him on the part of the pursuer and defender. The referee personally visited and inspected the premises in presence of the parties and their agents, both before the proof commenced and after it was closed; and having heard counsel for the parties, he issued an interlocutor and note explanatory thereof, on the 18th October 1841, finding "that the defender wrongfully failed to deliver over to the pursuer the subjects let, in terms of the agreement, in good working order and tenable condition, and therefore finds damages due, and assesses the pursuer's claim at the sum of £1500 Sterling." The referee further found the defender liable in expenses, and remitted an account thereof to the clerk to the reference to be taxed. On the 4th of November a note was lodged for the defender, craving that the remit to the clerk should be recalled, and that the account of the pursuer's expenses should be remitted to the auditor of the Court of Session, which was given effect to. On the 10th, an application was made by the defender for a rehearing of the whole cause, and on the 12th, the referee appointed the rehearing to proceed on "Monday evening, the 15th instant," or if more convenient for the defender, on the evening

thereafter. The defender lodged a note on the 13th, craving the referee to alter the diet to Monday the 22d, and made no appearance on the evening of the 15th. The referee then refused to grant the additional delay craved, and on the 24th he pronounced his final award, finding the defender liable in the sum of £1500 in name of damages, and in the sum of £984. 4. 3. as the modified amount of the whole expenses. A notice of motion to apply the award having been served upon the defender, he lodged a note of objections, which was afterwards amended, and set forth the following reasons:

1. Because, as will appear from the proof and proceedings before the referee, and the notes issued by him, the meaning of the issues has been misunderstood, and the decision of the referee applies not to the questions raised by the issues, or to the matter really involved in the action, but to questions and matters essentially different; the referee having decided and awarded damages on the supposed breach of an obligation on the part of the defender, which did not form the ground of action, and was not put in issue. More particularly, the referee has decided upon the supposed liability of the defender, not merely for the subject of the lease being in proper order or repair, but for insufficiency arising from the original malconstruction of the subjects, especially as regards the mode by which the water was supplied. 2. Because the award does not contain separate findings applicable to the separate issues which formed the subject of the reference, though requiring distinct and separate consideration and decision, and, in particular, does not contain any finding from which it can with certainty be inferred that the second issue has been the subject of the referee's consideration, or to what extent he has or has not held that issue to be proved, nor consequently to what extent he has found damages to be due in respect of the wrongous failure put in the first issue, and because the issues are not exhausted. 3. Because the defender required to be reheard, as in a cause where the verdict had been against law and evidence, and subject, on that or other grounds, to be set aside; and it was essential to the justice of the case, that before finally reporting to the Court the view which the referee had formed, the defender should have been allowed the rehearing so required; and because, although a rehearing was nominally allowed, it was granted under such conditions as virtually and practically amounted to a refusal. More particularly was the defender entitled to have such rehearing, as the terms of the reference required that the case should be decided by the referee "just as if it had gone to trial before the jury." 4. Because, as will appear from the proceedings before the referee, the proof adduced, and his notes, the findings in the award are against evidence, and founded on legal views which are palpably erroneous. In particular, the findings as to damages are contrary to the evidence truly applicable to the issues; and the legal doctrines to which the referee has given effect, as to the extent of the obligation incumbent on the defender under the agreement of lease—as to the legal effect of the possession of the pursuer under the lease, and payment of rent under it without complaint—as to the extent and nature of the proof required from the defender as to that matter—and his construction of the agreement of parties as to the supply of water to the establishment,—are clearly erroneous. His views as to the absence of blame on the part of the defender, and his award of damages, are irreconcilable. The authority of the Court should not be interposed to the award without hearing the defender in support of the objections, especially seeing that he has never had an opportunity of being heard in support of them. 5. Because, as the referee has delivered his final award, and the reference is exhausted, it must be held to have altogether failed, if on any or all of the grounds above stated the Court should be of opinion that the award should not be enforced; and the pursuer, in that view, is not entitled to found upon that award, or the reference itself, to any effect or purpose whatever.

In support of the objections it was *pleaded*—
That there was a distinction between a decret-arbitral and a

judicial reference. At common law, a reduction of a decret-arbitral was competent, on the head of iniquity in the Judge, or of enormous lesion to the party: Ersk. IV. 3, 35. This remedy was cut off by Regulations 1695, § 25. But if a judicial reference be different from a submission, the Regulations do not apply. In the latest case, *Mackenzie v. Girvan*, 19th December 1840, it is admitted that they are not the same to all intents and purposes. In a judicial reference, it is not necessary to bring a reduction of the award as of a decret-arbitral. It is sufficient to state the objections to it on the motion to the Court to interpose its authority. A judicial reference is a depending process, and no result or effect can flow from the award until the authority of the Court can be interposed. A decret-arbitral, on the other hand, contains within itself the means of being enforced by registration. If, when an award comes before the Court, a great miscarriage can be shown, is it to be binding on the party or the Court? A judicial reference may be made in different circumstances, and in various terms. Here the minute of reference was very specific. The referee was to become both judge and jury, and was bound to try the cause as if it had been tried by a jury. In jury trial, the parties do not peril their case upon the hazard of a single die. There is the remedy of review in the shape of a motion for a new trial, and a bill of exceptions. The referee ought, therefore, to have granted a rehearing to the parties, as the Court would have done. A judicial reference is part of the proceeding of this Court, which interposes its authority first and last. In *Dickson v. Monkland Canal*, it was held, that although parties are bound by the reports of persons of skill, yet, if unsatisfactory, the Court is in the practice of re-mitting the matter back, again and again. The notes which we tender in evidence will show that the arbiter misunderstood the issue. As to the supply of water, the question was, has the pursuer got water such as the pipes could give? whereas the arbiter says, the pipes were inadequate, and the source remote. He gives damages for a bad subject, although that was the subject taken in lease. It is said this only amounts to a misconstruction of the terms of the agreement; but it is a great deal more: it is a mistaking of the issue. The referee puts a different question in issue,—a question which could not have been raised under the summons. This is the gravest of all miscarriages: it is a question of *ultra vires*. In objecting to the motion, the defender is here under all the privileges of a reduction, and is entitled to redress if he can show that he has sustained great injustice: if he can show, from the notes of the referee himself, that he has misunderstood the agreement and the issues,—that he has answered a question different from that put in the issues, and has awarded damages on a matter not under the summons,—but which may be in itself a good ground of damage if properly laid: *East. Vol. III. p. 18. Clyde's Trustees, 2 Shaw and M'Lean, p. 243.*

Answered—

The objections embrace two points,—1st, The right to a rehearing; and, 2d, The relevancy of the grounds stated for challenging the award. It is said that a judicial reference is totally distinct from a submission; but by the case of *Mackenzie v. Girvan* it was settled, that a judicial reference stands, in regard to the grounds upon which it is to be challenged, upon the same footing as a decret-arbitral. If a party be not heard at all, or in absence of the other party, or if the proof be irregularly taken, these are sufficient grounds of challenge, but they are common both to judicial references and to submissions. In *Glenny*, 24th February 1825, an award was overthrown because there was no hearing; and the same rule holds as to decreets-arbitral: *Langwell v. Sloane*, 21st May 1840. *Lord Dunmore*, 28th January 1835. *Speirman*, 28th February 1828. The objection here is, not that the referee has not heard, but that he has not sufficiently heard the parties. A rehearing was granted, and the defender declined availing himself of it. There was abundant time for preparation. Two counsel had been employed in arguing the case before; and the notes of the referee were in their hands twenty-three days before that fixed for the rehearing. At all events, the defender ought to have appeared by his counsel, and shown cause for delay. The objections first and fourth, contain no relevant

avermment for setting aside the award. Read those objections, and if sufficient, where is the award which may not be set aside? Can any line of distinction be drawn between a great and a small miscarriage? Or is it relevant to aver a misconstruction of the agreement referred, or that the award is against evidence, and proceeds on an error in point of law? This is not the law of Scotland. If it were, a judicial reference, instead of being the end, would in truth be the beginning of strife and litigation: *Kirkaldy*, 16th June 1809. *Morrison*, 28th April 1825; *W. and S., App. I. p. 143. Low v. Banks*, 2d June 1836. *Union Canal*, 3d December 1836. *Alston*, 17th December 1839. *Colquhoun*, 15th June 1825. *Mackenzie v. Girvan*, 19th December 1840. It is said in the first objection, that it will appear from the notes and proceedings, that the award goes upon what was not in issue; but there is no specific averment that the referee went *ultra vires*. The issue refers to the agreement, and the construction of it was, therefore, necessarily in issue. Had we gone before a jury, we might have argued on the agreement as to the supply of water. The Judge might have thought our argument wrong, but not on the ground that it was outwith the issue. He might have directed the jury that we took an erroneous view of the import of the agreement; and what more does the referee do than pronounce upon the soundness of such an argument. He may be right or he may be wrong, but it is an error in judgment only; and no distinction can be taken between a great error and a small one; for where is the line to be drawn? In *Miller*, 4th February 1836, there was an objection, that the arbiter had misunderstood the issue. As to the competency of producing the referee's notes, that is settled by the case of *Mackenzie v. Girvan*.

At advising,

Lord Meadowbank.—The question raised is very important; and were the objections to this award to be sustained, we would shake the whole law in regard to judicial references. The parties having come to trial, agree by a special minute to refer the matter to Mr Robertson. The terms of the reference are important,—“The parties agree that the present cause shall be referred to, and finally decided by, the said Patrick Robertson, Esq.” After considering the terms of the reference and the law applicable to such references, I can put no other construction upon it than this, that the parties agreed to refer the whole cause, without going through the machinery of jury trial. The reference was entered into in the knowledge of the principles of law applicable to such references. They had before them the case of *Mackenzie v. Girvan*, by which it was ruled, that if the terms of the award be accurate, and the form regular, and if the referee have determined every thing referred, and nothing but what was referred, then the Regulations of 1695 must be applied. Holding that such was the law then, and is the law now, has any thing been stated to induce us to open up this award? The complaint here is, not that the parties were not heard, but that they were not reheard; and is that sufficient to set aside a decret-arbitral? I don't say whether a party in a submission is entitled to a rehearing. In the case of *Speirman* it was found that he was not; but in the present case sufficient opportunity was given;—counsel were not brought to state that it was for their personal convenience that delay was asked. I think the referee did every thing he was called on to do. But taking it in the strictest way, an award could never be set aside on such a ground. Had the referee gone beyond the reference, and had there been a distinct averment to that effect, and had it been made out, we would have been called on to consider the question in a different manner,—we would at least have been bound to entertain it. The issues, together with the whole cause, being referred, the point is, whether we are not bound to look also to the agreement and summons? I can't say that I could have arrived at a different opinion from the referee; but, at best, it was an error of judgment in the interpretation of the agreement. That is not a ground for reducing a decret-arbitral; and the same rule applies to a judicial reference.

Lord Medwyn.—I entirely agree. A judicial reference partakes so much of the nature of a submission, that nearly the same rules apply to both. The Court will not blindly interpose its authority to a reference, if cause can be shown why it

should not. There is a late case where *locus penitentia* was held to apply, before the sanction of the Court was interposed to the reference. (*Reid v. Pirie Henderson*, 26th June 1841.) And on the motion to interpose the authority of the Court to the award, no reduction is necessary for the purpose of opening it up or setting it aside. The Court may remit to the referee to hear parties, or to supply some deficiency. But I know of no distinction between a judicial reference and a submission, to warrant us in refusing to interpose our authority to the award, except upon the grounds stated in the Regulations 1695. As to the rehearing, it is no doubt true, that if the referee refuses to hear the parties, or the one and not the other, this forms a good ground for withholding our authority from the award, but we cannot say to the referee how often he shall hear the parties. The claim to a rehearing, as a matter of right, was repelled in the case *Speirman*. It is said, that by the terms of the reference, the referee was "to decide the whole cause, just as if it had gone to trial before the jury;" but I cannot understand that this was meant to import into the reference the whole machinery of jury trial, reserving to the Court a power of review, as on a bill of exceptions. I don't think the Court would have interposed its sanction to such a reference. It is said that counsel could not attend; but there was no communication from the counsel to that effect; and in the absence of any such, I cannot think that the referee did wrong in refusing delay. In regard to the award being *ultra vires*, there is no distinct averment to that effect. It is tried to restrict the reference to the issues: but the whole cause was referred. Accordingly, the award does not allude to the issues. Nothing sufficient is stated to warrant us in allowing the party to look at the notes of the arbiter. If we did so in such a case as the present, a judicial reference, as stated by counsel, would be but the beginning of strife.

Lord Moncreiff.—I agree with all your Lordships, and I don't think any legal ground has been laid to induce us to refuse to interpose our authority to this award. I gave a full opinion on this subject in the case of *Mackenzie v. Girvan*; and although that judgment is under appeal, I have seen no ground to alter that opinion: on the contrary, it has been confirmed by the discussion in the present case. By a submission a contract is entered into between the parties to abide finally by the decision of the arbiter; and since the Regulations, 1695, no decret-arbitral can be challenged, except on the ground of corruption, bribery or falsehood. Being a contract between the parties, it shall not be disturbed except on grounds which go to the root of the contract. In *Sharpe*, 3 Dow, p. 107, the essence of the case really consisted in a distinct averment of falsehood, that the arbiter had never heard the parties. There may be on the face of a decret-arbitral such plain injustice, that it is not a fulfilment of the contract. But this is the exception—the rule stands firm, that no error of judgment will suffice to set aside an arbiter's decret. Nothing here is surmised that would affect a decret-arbitral; but it is said this is a judicial reference, and the terms of the reference are special. There no doubt is a difference in some points between a reference and a submission; but the defender gets no benefit by them. The reference is a contract, by which the parties make a bargain to take the judgment of the referee instead of that of the Court. Clearly it is a submission under the Regulations,—undertaken solemnly in the face of the Court. No doubt it is under the cognizance of the Court; but the contract is complete: the parties have transferred the jurisdiction; and all that the Court can do is to see the contract fulfilled. There is no power of review either as to law or fact. This were to divest the referee. I see no distinction, therefore, between a submission and a judicial reference. The last is the more solemn contract of the two. But it is said there are specialties in the reference, and that the referee was to come in place of the judge and jury, and, in some way or other, that the privilege of moving for a new trial after judgment, was reserved. But the determination of the whole cause implies that the referee was not only to be both judge and jury, but that he was to be judge to the end of it. Besides, the reference of a case standing for trial, is surely the strongest of all against a party coming to this Court for review. The inducement in such a case is, to avoid the expense and risk of a new trial and bill of excep-

tions. Indeed it would be bad policy, after a cause is prepared for trial, to go into a reference if the whole course of jury trial was to be preserved. In *Anderson*, 6th February 1836, the case was set down for trial, when a reference was made to the Sheriff of Forfar; and after judgment was pronounced, it was tried to challenge the award, among other grounds, that he had departed from the terms of the issues. That was a case of construction of the issues; and there is no difference between it and the present. But the defender wants production of the referee's notes; and he says, I will thereby prove that he misconstrued the agreement, and ultimately decided erroneously. What is this but error of judgment? We can take no cognizance of the grounds of his judgment, for he is the sole judge. I think the defender has no legal right to demand the notes of the arbiter: *Alston*, 17th December 1839. There is no averment of *ultra vires*, but a demand for a review of the cause on the evidence. With regard to the rehearing, if the arbiter fairly heard the parties after the proof, it was in his discretion to refuse a farther hearing. But he did allow it; and the opportunity, though given, was not embraced. I have no idea that the Court can look into such particulars.

Lord Justice-Clerk.—In explicit terms, I entirely concur with all your Lordships. The minute bears "that the cause shall be referred to, and finally decided by, Patrick Robertson, Esq., as sole referee mutually chosen." This I hold to be, in substance, principle and effect, a submission. There are certain advantages in a judicial reference, as the preserving diligence used upon the summons, &c.; but these do not affect the substance of the contract. I must therefore regard an award in the same light as a decret-arbitral. With reference to the grounds stated for refusing to interpose our authority, we have allowed the referee's notes to be produced, to show that a party was not heard; because that is a relevant objection. Here it is not said that the party was not heard, but only that he was not reheard. Statute has taken from this Court the power to rehear after judgment has been pronounced; and a party before a referee cannot be more favoured. The objection, founded on the demand to be reheard, is not relevant in point of law; and I do not enter into the propriety of refusing it. It is said the reference is in special terms; but the referee had in himself all the functions of judge and jury. It is said, that after considering and disposing of the matter as judge and jury, he must sit as judge to review his own actings. This is altogether extravagant. The whole object of the reference is, to sink the distinction between judge and jury, and get a speedy disposal of the cause. I never can agree that the issues alone were referred. The issues often do not exhaust the cause; and the Court often dispose of a cause after getting an answer to the issue. As to the objection founded on what is called a miscarriage or misunderstanding, it just comes to this, that the interpretation put upon the agreement by the referee is contrary to law and fact, and that injustice is thereby done. But this is not relevant to set aside an award. As to the question, what would be the effect upon the reference if the award were set aside? the tendency of my opinion is, to hold that the reference would not fall if a good award could be got.

The Court pronounced the following interlocutor:

"The Lords interpose their authority to the judicial award pronounced by Patrick Robertson, Esq., advocate, the judicial referee in this cause, and, in terms thereof, decern against the defender for payment," &c.

Act. Dean of Faculty (Wood), Pyper; Thos. Ranken, S.S.C., Agent.—Alt. Rutherford, Patton; Alexander Simson, Solicitor, Agent.—[J.W.]

18th December 1841.

FIRST DIVISION.—(H. B.)

No. 64.—DUGALD M'KELLAR, *Pursuer*, v. DONALD M'KELLAR and OTHERS, *Defenders*.

Reparation—Wrongous Apprehension—Public Officer—Justice of Peace Clerk—Statute 43 Geo. III. c. 141—An action of damages against a Justice of Peace dismissed, on the ground that he had tendered twopence of damages, and the acts complained of were not libelled to have been done "maliciously, and without any probable cause."

Donald M'Kellar, spirit-dealer, Lochgilphead, on 26th February 1841, presented the following petition to the Justices of the Peace for Argyleshire:

"That John Sinclair, late in the employment of the petitioner as his shopkeeper, has embezzled the property of the petitioner to a considerable amount, and has since absconded. That the petitioner followed the said John Sinclair to Glasgow, where he got him, and recovered upwards of £50 of his money from him, and farther, he informed him that he had deposited £16 of the petitioner's money so embezzled and abstracted by him into the hands of Donald Campbell, saddler, Lochgilphead; also a silver watch, purchased by the said John Sinclair with the petitioner's money, and deposited into the hands of Dugald M'Kellar, student, Lochgilphead; and £4, or upwards, deposited by the said John Sinclair into the hands of Catherine M'Niel, servant in the inn, Lochgilphead.

"That though the said Donald Campbell, Dugald M'Kellar, and Catherine M'Niel admit having the said money and property, so feloniously abstracted from the petitioner by the said John Sinclair, and so deposited into their hands, yet they refuse to give up to the petitioner his said property, so unjustly by them retained.

"May it therefore please your honours to grant warrant to constables of Court to search for, apprehend, and bring the said Donald Campbell, Dugald M'Kellar, and Catherine M'Niel, before the Justices, for examination on the facts before stated, to be by your honours punished for the said disgraceful crime of reset; to ordain each and all of them to deliver up to the petitioner all and every money, goods, gear, and effects, so deposited into their hands by the said John Sinclair; and do otherways in the matter as to your honours shall appear to be proper."

Neil M'Lachlan, J. P., granted warrant in the following terms:

"Having considered the foregoing petition, grant warrant to constables of Court to search for, apprehend, and bring each of the before-designed Donald Campbell, Dugald M'Kellar, and Catherine M'Niel, complained upon, before the Justices for examination, and grant warrant to cite witnesses for both parties to compare to give evidence in the said matter, with certification."

Dugald M'Kellar was accordingly apprehended, and brought to the Court-room in Lochgilphead, where he saw Mr M'Lachlan and Peter M'Pherson, a shopkeeper in that town, who acts as Justice of Peace-clerk, and was told to appear again on the 2d March. He appeared accordingly, but the Justices pronounced the following deliverance:

"In respect the Court understand this case has been taken up by the public prosecutor, the Justices therefore dismiss this action against the said Donald Campbell, Dugald M'Kellar, and Catherine M'Niel, and free and relieve of this warrant."

Dugald M'Kellar thereafter brought an action of damages against the petitioner, Donald M'Kellar, Mr M'Lachlan and Peter M'Pherson, in which, after narrating the petition and the proceedings under it, and averring, that the deliverance,

"to the effect that the case had been taken up by the public prosecutor, was made on the authority or instigation of the defenders, one or other of them, and was utterly false and unfounded, at least no proceeding has been yet adopted by the public prosecutor, or by the defenders, or by any other party

SCOTTISH JURIST.

whatever, against the pursuer, in relation to the matters referred to in the foresaid petition, other than the proceedings which have been described: That the whole of these proceedings on the part of the defenders were utterly lawless, and grossly oppressive and malicious, as respected the pursuer, who was thereby grievously injured in his character, prospects, and feelings: That more particularly, the pretended warrant under and in reference to which the pursuer was apprehended and detained as aforesaid, was inept and entirely extrajudicial; no competent or regular complaint or charge had been preferred against the pursuer at the instance of the public prosecutor, or otherwise; no crime or offence warranting his apprehension or detention as a prisoner for a single moment was laid to his charge; no communication was in any way made to him of any crime or offence having been charged against him; no prosecutor, either public or private, appeared to insist in any charge against him; he was not subjected to any examination, and no declaration was taken down from him; in short, the whole proceedings were from first to last extrajudicial, lawless, and incompetent, got up and resorted to from malicious motives on the part of the defenders, and for the purpose of oppression and concussion as against the pursuer: That by and through the illegal and wrongful acts of the defenders, before detailed, the pursuer has suffered in his means and estate, and his reputation, character, and feelings have been wantonly and maliciously outraged and injured: That more particularly, the pursuer having been, at and about the time the foresaid proceedings were adopted and directed against him, in the course of undergoing his trials before the Presbytery of Inveraray, with a view to obtaining his license as a preacher of the gospel, and the said proceedings having come to the knowledge of the Presbytery, or some of the members thereof, his trials were postponed or superseded, till the pursuer's character and conduct, especially in relation to the foresaid proceedings, should be investigated and reported on by the kirk-session of Lochgilphead, to whom a remit was made for that purpose by the Presbytery; and although, upon the said investigation taking place, the pursuer's character and conduct were cleared and established to the entire satisfaction of the Presbytery, yet his feelings were grievously injured, his mind greatly distressed, his prospects seriously endangered, and a public vindication of his character rendered indispensable: That to enable him to adopt the necessary steps with a view to such vindication, the pursuer, immediately after the lawless proceedings, before detailed, had taken place, applied both verbally and by writing, personally and by his agent, to the defenders for access to the foresaid petition, and warrants or interlocutors, but, on one evasive pretence or other, such access was refused till very recently; and the pursuer was thereby prevented from sooner instituting and following out the present action: That the whole proceedings complained of having been illegally, oppressively, and maliciously got up and carried into effect against the pursuer by the defenders, in manner before particularly set forth and described, and having been productive of serious loss and damage to the pursuer, as before particularly explained, the defenders are liable and responsible to him in reparation;"

he concluded against the defenders "conjunctly and severally, or severally and respectively, and in such terms as may be determined by the Court or a jury," for payment of £500 in name of reparation, damages and solatium.

Messrs M'Lachlan and M'Pherson pleaded the following preliminary defence:—"1. The action ought to be dismissed as against the defenders, Messrs M'Lachlan and M'Pherson, in respect that the summons does not state grounds relevant to support its conclusions as against them, in terms of 43 Geo. III. c. 141, and the subsequent Acts of 9 Geo. IV. cap. 29, § 26, and 11 Geo. IV. and 1 Will. IV. cap. 37, § 13." They afterwards lodged a minute, in which, without departing from their defences, they "with reference to the Act 43 Geo. III. c. 141, and subsequent Acts," judicially tendered "the sum of twopence, in name of damages to the

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pursuer," and protested that the pursuer should be liable to them in the whole expenses of the suit.

The Lord Ordinary pronounced the following interlocutor:

"23d November 1841.—The Lord Ordinary having heard counsel on the preliminary defences urged for the defenders Neil M'Lachlan, Esq., and Peter M'Pherson,—In respect the defender Mr M'Lachlan has tendered twopence of damages to the pursuer, and in respect it is not specially set forth in the libel that the acts of Mr M'Lachlan, complained of, 'were done maliciously, and without any probable cause.'—Sustains the first preliminary defence stated for the said Neil M'Lachlan; and dismisses the action in so far as directed against him, and decerns: Finds no expenses due to either party in the question between the pursuer and Mr M'Lachlan, and decerns; repels the preliminary defences stated for Peter M'Pherson, and appoints the cause to be enrolled, that the other parties may be heard as to the ulterior procedure for completing a record on the merits; and in respect that Peter M'Pherson has intimated that he does not intend to acquiesce in this interlocutor, finds him liable in the expenses of discussing his preliminary defence, as the same may be taxed by the auditor, and decerns.

"Note.—It is thought that the case of the defender, Mr M'Lachlan, clearly falls within the protective Statutes, by which Justices and other inferior Magistrates in Scotland are exempted from responsibility for innocent mistakes and errors in the execution of their duty. The law on this subject was long very incomplete in Scotland, but it is now singularly broad and comprehensive.

"By a decision of the House of Lords in 1755, (Duke of Douglas v. Lockhart, Dictionary, p. 7640,) it was fixed that the Act of 24th Geo. II. c. 44, which forms a great safeguard to English Justices, did not apply to Scotland. The only statutory protection, therefore, given to Justices in this part of the kingdom, was that afforded by the Act 43 Geo. III. c. 141, which provides, that in any action brought against Justices for any conviction by their orders, or for any thing done by them in the levying of any penalty in carrying such conviction into effect, the plaintiff should recover 'no greater damages than twopence, unless he shall have expressly alleged that such acts were done maliciously, and without any probable cause.' As that Act was interpreted by the Courts of law in England, it only applied to erroneous or incompetent proceedings of Justices in following up 'convictions,' and not to the numerous other proceedings in matters of police, excise, and summary jurisdiction, in which they are often called upon to act.—See Massey v. Johnston, 12 East. 71. Gray v. Cockson, 16 East. 21.

"This was the state of the law till 1828, when the Act of Geo. IV. cap. 29, was passed, which enacted (§ 26.) that the provisions of an Act made in the 43d year of the reign of his late Majesty King George III., entitled 'an Act to render Justices of the Peace more safe in the execution of their duty, shall extend to all inferior Judges and Magistrates in Scotland, in regard to any sentence pronounced, or proceeding had in any criminal trial.' By this Statute the protection, such as it was, which Justices enjoyed by the Act of 1803, was bestowed on all inferior magistrates in Scotland, and it was made competent, not only in proceedings following on convictions, but in regard generally to any proceeding had in any criminal trial. Still, looking to the multifarious duties and powers of Justices, it is obvious that that was but a limited and imperfect remedy.

"It was probably from this view of the law that the Act of 1830 (11 Geo. IV. and 1 Will. IV. cap. 37,) was passed, which enacted that the said recited Act passed in the 9th year of the reign of his late Majesty, in so far as it provides for rendering 'all judges more safe in the execution of their duty, shall extend to all acts done by any Judge and Magistrates in apprehending any party, or in regard to any criminal cause or proceeding, or to any prosecution' for a pecuniary penalty.

"The Lord Ordinary is of opinion that this Statute clearly applies to such a wrong or mistake as the Justice of the Peace fell into in the matter complained of, if indeed there was an error in his proceeding. It is true that the petition presented to him by M'Kellar, as a criminal libel, was incompetent and absurd, in so far as it prayed for the punishment of the parties.

But still it contained information of a serious nature, requiring some investigation, and precautionary measures in a remote district, in which a Justice of Peace was entitled, and perhaps bound, to interfere to a certain effect. It set forth the fraud and breach of trust of a servant, that he had embezzled £52, and deposited part of his master's money with one individual, and a watch, purchased with the embezzled funds, with another; and the Lord Ordinary is not prepared to say that any magistrate was not entitled to order any of the parties to be apprehended for examination, leaving the ulterior proceedings to be regulated by himself after examination. The incompetent part of the prayer, as to punishment, did not absolve the magistrate, in a district where there was no professional Judge, from taking a precognition, even *ex proprio motu*, on information being laid before him that a crime had been committed, and that a part of the *corpora delicti* was at that time within his reach. On the contrary, it is notoriously agreeable to the daily practice of Scotland for Justices of Peace to take *precognitions*, and make preliminary investigations, and it would be of bad example if they were readily exposed to personal prosecutions, even for innocent mistakes in that most important department of their duty. The right and the duty of the Justices of the Peace in Scotland to take *precognitions*, and the protection they enjoy from the law in so acting, are well explained by Mr Alison, Vol. II. p. 148-9.

"This seems a sufficient answer to the plea, that as the magistrate had no jurisdiction to try the charges set forth in M'Kellar's petition, it must be held that he was not acting as a Justice of Peace at all. But it may be doubted whether in all cases, even of excess of jurisdiction, a Justice is deprived of the benefit of the protecting Statutes. It is often enough to show that he has acted colourably, and in the supposed discharge of his duty, though it may be ultimately found that he had no jurisdiction. Hence in England, a Justice sued for acting as a single Magistrate, when jurisdiction was only given to two Magistrates, was found entitled to the notice required by the Statute to be given to English Justices; Weller, 9 East. 384; and in the case of Wedge against Berkeley, where a Magistrate seized the plaintiff's goods, alleging that they were stolen, and when the jury found that he had no reasonable ground to suppose this, yet as he acted without malice, he was held to have acted as a Magistrate, and to be entitled to the notice which the English Acts require to be given to Justices, (1) Nev. and P., 665.

"There are various decisions in our own Courts, which appear to have proceeded on very strict rules of responsibility attaching to Justices. But while these of course depended on their own specialties, the greater part of those quoted by the pursuer were prior to the Act of 11 Geo. IV., and 1 Will. IV. cap. 37, and therefore cannot rule the present question. The later cases, however, of Anderson v. Main (3d February 1837), and of Malonie (21st January 1841), afford examples of the effect given in our Courts to the protective Statutes even in cases of great irregularity.

"As the protective Statutes do not apply to the clerk, and malice is libelled in the summons against him, the action, as against the clerk, is for the present sustained. This case is distinguished from some others that have occurred against clerks of Court, in so far as it appeared in these that the clerk acted solely by instruction of the Magistrates. But a contrary allegation is set forth in this summons. No expenses have been given to the Justice, as the Statute on which the action has been dismissed, does not direct such costs to be given, while the Magistrate, by his tender, declines going to issue on the irregularity of his proceedings on all points.

"As it was stated at the bar that the fate of the pursuer's license from the Presbytery depends on the result of the present action (which seems rather an unreasonable condition), it may be proper to add, that the dismissal of the action, as against the Magistrate, on the grounds now assigned, infers no impropriety on the part of the pursuer. On the contrary, in acquitting the Magistrate at present, the Lord Ordinary assumes the entire innocence of the pursuer."

The pursuer and the defender, M'Pherson, reclaimed—the former in so far as the interlocutor sustained the preliminary defence of Mr M'Lachlan, and the latter

in so far as it repelled the preliminary defences stated for him.

At advising, the Court first took up the case of the Judge:

Lord President.—This case requires attention, but I see no sufficient ground for differing from the Lord Ordinary as to the protection afforded by the Statute. It is vain to quote from English practice, unless it could be shown that the circumstances are precisely the same. This much appears to hold in both ends of the island. If the question relates to the form of the proceedings, the Judge is within the protection of the Statute, and unless malice and want of probable cause be expressly libelled, he is entitled, on tendering twopence, to be assolized. We must not look here for an observance of the strict rules of regular criminal procedure; for when an application was made in the name of a private individual wishing investigation, great allowance must be made for any thing unprofessional in the form of the petition. The Magistrate, without scrutinizing its terms very strictly, was entitled to deal with the statement according to its substantial meaning. The petitioner then tells the whole story,—how his clerk had misconducted himself, and, among other things, how he had purchased a silver watch with his money,—meaning, evidently, money which he had embezzled, and had given this watch to M'Kellar. Although he does not say that M'Kellar was actually concerned in the embezzlement, or that he resettled the watch, well knowing it to have been purchased with embezzled money, it is plain that he meant this, for he says clearly enough, that he kept the proceeds of the embezzlement, and prays for warrant to have him examined and punished. In a formal criminal petition for examination, the addition of the words "to be punished," would be most irregular; but then look at the warrant, the granting of which was the only act done by the Magistrate. I see nothing in it so very disconform to practice. It gives authority to apprehend the pursuer, and bring him up for examination, and, at the same time, to cite witnesses on both sides. So far as the Magistrate is concerned, this is the whole head and front of his offending. Then, what happens on the 2d of March? It is stated that the prosecutor had taken up the question, and the Justices *dismiss the action*. This is certainly loose phraseology, but it is impossible to mistake its meaning. There was, properly speaking, no action, as an action for debt; but there was a kind of action, or, in other words, a proceeding. I am clear, on the whole, that the Magistrate is within the protection of the Statute; and since the pursuer has not averred that he acted maliciously, or without probable cause, he is entitled, in consequence of his judicial tender, to be assolized.

The other Judges concurred.

The Court then proceeded to consider the case of Peter M'Pherson, the clerk,—his counsel contending that he was in the same situation as his principal, the Magistrate; while the pursuer's counsel contended that he stood in a different situation, inasmuch as it was libelled in the summons, not only that he acted as clerk, but that he had, moreover, assisted the petitioner in concocting his charge.

Lord President.—I think this charge of concocting, places the clerk in a different situation from the Justice.

The other Judges concurred, and the Court pronounced the following interlocutor:

"Adhere to the interlocutor reclaimed against, in so far as the Magistrate is concerned, and find the defender, the Magistrate, entitled to the expense incurred since the interlocutor of the Lord Ordinary, and modify the same to four guineas: Quoad the defender's reclaiming note, recall the interlocutor therein reclaimed against, so far as therein craved; and remit to the Lord Ordinary, before answer, to receive from the pursuer a specific statement of facts in support of his action against the clerk, and to proceed farther as shall be just."

Lord Ordinary. Cuninghame.—*Act.* R. Macfarlane; John Patten, W.S., *Agent.*—*Alt.* Horn; James Burness, S.S.C., *Agent.*—B. Clerk.—[H.B.]

18th December 1841.

SECOND DIVISION.—(J. W.)

No. 65.—A v. B.

Process—Proof—Diligence for Recovery of Writings—Agent and Client—Confidentiality.

A diligence for the recovery of documents from a law-agent, relating to the concoction of a deed of renunciation, alleged to have been impetrated from a wife, and under reduction, was allowed up to the date of the action: *Jarvis v. Robb and Anderson*, 10th June 1841, *ante*, Vol. XIII. p. 443.

18th December 1841.

SECOND DIVISION.—(J. W.)

No. 66.—LORD LOVAT, *Pursuer*, v. THE REVEREND ALEXANDER GARDEN FRASER, *Defender*.

Service—Brieves, Advocacy of—Commission and Diligence—Review.

Vide ante, Vol. XIII. p. 132.

An application having been made to prorogue the time for reporting a diligence which had been granted by the Inner-House on a reclaiming note against a Lord Ordinary's interlocutor, it was observed, that it had been questioned how far the Inner-House had the power to review the interlocutors of a Lord Ordinary pronounced in a service—*ante*, p. 20. The Court, of consent, granted the prorogation, and remitted the case to the Lord Ordinary.

18th December 1841.

SECOND DIVISION.—(J. W.)

No. 67.—CHRISTOPHER SETON, *Pursuer*, v. WILLIAM DAWSON and OTHERS, *Defenders*.

Trust—Trustees—Liability—Reparation—Culpa lata—Circumstances held to amount to gross negligence on the part of trustees, so as to render them personally liable for moneys lost to the trust-estate, notwithstanding of the protecting clause in the trust-deed.

The pursuer is the only son of the late Major Christopher Seton of Balmblae. His father died on the 18th May 1819, at which time the pursuer was three years of age.

Major Seton, by his trust-deed and settlement, conveyed his whole property and effects, and particularly his lands of Balmblae, the superiority of Kirkforthar, and a dwelling-house and offices in Falkland, together with all other lands and estate which might belong to him at his death, to Messrs William Blair, Thomas Barland, John M'Ritchie, James Kyd and Robert Taylor, and to such other persons as might be afterwards appointed or assumed as trustees, for the following purposes,—1st, The payment of the testator's debts and funeral charges. 2dly, The payment of such legacies, gifts or provisions, as he might appoint; "and, for that purpose, his trustees were authorised to sell and dispose of such parts of his means and estate, heritable or moveable, as they may think necessary." 3dly, For payment, annually, of such a sum for the support and education of his son, Christopher Seton (the pursuer), as they shall see proper; and upon his son attaining the age of twenty-one years, the trustees were

to "denude themselves of the residue of the heritable property herein before conveyed, to and in favour of the said Christopher Seton; whom failing, to the other heirs after mentioned, by a deed of entail in manner after specified." *4thly*, On the pursuer attaining majority, the trustees are directed to execute a deed of entail of the truster's remaining heritable property in favour of the pursuer, and the heirs-male of his body; whom failing, the heirs-female of his body; whom failing, to the defender, Mr Blair, and the heirs-male of his body; whom failing, to the defender's son, William, and the heirs-male of his body; whom failing, to any other heir-male of the body of Mrs Blair, who was Major Seton's niece; whom failing, to the heirs-male of his niece, Melvin Seton, wife of the defender, Mr Dawson, and the heirs-male of their bodies; and failing the whole of the heirs-male in the above order of succession, there is a substitution in favour of the heirs-female of the defenders. *5thly*, The trustees were to make payment to the testator's sister, Mrs Barland, of a legacy of £100, at the first term of Whitsunday or Martinmas that should happen two years after his death, and also of an annuity of £20 to Jean Storrar, the mother of the pursuer. *6thly*, The trust was to continue till the pursuer arrived at the age of twenty-one years. *7thly*, The whole residue of the testator's effects was to accumulate for the benefit of the pursuer, and to be paid over to him at the age of twenty-one years. "And the better to expedite this trust, I hereby authorise and empower the trustees before appointed, and such others as I may add to that list, and the survivors or survivor of those accepting, to add and assume such other person or persons, one or more, as they may think fit, to be trustees, either along with themselves, or in their place, and with the same powers as if they had been originally named and appointed by myself; and I declare that the trustees, whether original, added or assumed, shall not be liable for omissions, neglect of diligence of any kind, nor *singuli in solidum*, but each only for his own actual intromissions; neither shall they be liable for any factors or attorneys to be appointed by them, farther than that they be reputed responsible at the time of entering upon their office." It is then declared that debtors and purchasers shall not be concerned with any of the purposes or provisions of the trust. "And I hereby nominate and appoint my said trustees to be tutors and curators to the said Christopher Seton, my son, during his pupillarity and minority."

Of the persons named trustees, Mr Kyd and Mr Taylor alone accepted; and thinking it expedient to exercise the powers which the trust conferred on them, of assuming additional trustees, they requested the deceased Mr George Seton, the defender Mr Dawson, and the deceased Mr Andrew Thomson, W.S., to act along with them. Mr Seton and Mr Dawson were the truster's near relatives, and were included as substitutes in the entail to be executed of his estate. Accordingly a meeting was held of the two original accepting trustees, and of those proposed to be assumed, at Perth, on the 6th of September 1819, when Mr George Seton, the defender Mr Dawson, and the deceased Mr Thomson, were formally assumed into the trust. The minute of assumption repeats the protecting clause, whereby it is declared that the trustees should not be liable for omissions, neglect of diligence of any kind, nor *singuli in solidum*, nor for any factors or attorneys, but each only for his own actual intromissions. Mr Kyd submitted to the meeting a statement of the affairs

of the trust, and of the accounts betwixt Major Seton and himself, from January 1816 until the period of the Major's death in 1819.

On considering the state of the trust-affairs, it was resolved immediately to sell certain portions of the heritable estate, "and to apply the price in extinction of the Major's debts." From the minutes it appears that the trustees resolved to sell, (1.) A house in Falkland which had belonged to the truster, and they "direct Mr Kyd to advertise it to be sold by public roup." (2.) The superiority which belonged to the truster of lands in the county of Fife, exceeding £500 of valued rent, on the ground, that to retain the vote which the superiority afforded for seventeen years, or until the pursuer attained majority, would be improvident, and therefore they "appointed Mr Kyd to advertise the superiorities to be disposed of, either together or in lots, as purchasers may incline," and "to apply the price in extinction of the Major's debts." (3.) The meeting had their attention drawn to certain matters regarding which there had been a dispute betwixt the truster and Mrs Buchanan of Kirkforthar, which Mr Thomson was requested to consider, and endeavour to get settled by arbitration, and if not, to take measures for bringing them to a close in a court of law.

Mr Kyd forthwith proceeded to carry out the directions given by the trustees on 6th September 1819. On the 2d December he sold by public roup the superiority of Balmblae for £254, and a disposition was granted in favour of the purchaser, which was subscribed by all the trustees, original and assumed. It commences with these words: "We, James Kyd and Robert Taylor, writers in Cupar, with the consent after mentioned, considering that by a disposition and settlement by the deceased Christopher Seton," &c.; and after narrating the nature of the trust, and the sale of the superiority under articles of roup, and the purchase of Mr Watt, the deed proceeds thus:

"And now seeing that the said Thomas Watt has instantly made payment to us of the foresaid purchase-money of £254, with interest, &c., therefore we, the said James Kyd and Robert Taylor, the original accepting trustees as aforesaid, with consent of the said William Dawson, George Seton, and Andrew Thomson, trustees assumed by us as before mentioned, have sold and disposed," &c.

In like manner, the disposition in favour of Mrs Buchanan Lindsay, of the superiority of Kirkforthar, which Mr Kyd also sold by public roup, proceeds on the same narrative with the disposition in favour of Mr Watt. Kyd and Taylor are the disponents, but Mr Kyd alone, in this instance, received the price. The clause is in these words:

"And now seeing that Mrs Buchanan has made payment to me, the said James Kyd, for behoof of the trust-estate of the said Major Christopher Seton, of the foresaid sum of £300 Sterling, it is necessary that we grant the disposition underwritten: Therefore wit ye us, the said James Kyd and Robert Taylor, the two accepting original trustees named by the said Christopher Seton with consent," &c.

The deed is subscribed by Mr Kyd and Mr Taylor, as disponents and recipients of the price, and by Messrs Seton, Dawson and Thomson, as consenters.

The house in Falkland was sold by Mr Kyd to Francis Deas for £160, and the disposition in the purchaser's favour is granted by Kyd and Taylor. The price is acknowledged to have been received by Mr

Kyd alone, and the disposition is subscribed by Mr Thomson as consenter. It was not subscribed by Messrs Seton and Dawson.

The matters in dispute between Mrs Lindsay Buchanan and Major Seton were made the subject of a compromise, after a process had been instituted in the Court of Session. The trustees agreed to accept from Mrs Buchanan the sum of £900, in full of all their claims as trustees,—she, on the other hand, discharging all her claims against them. The discharge by the trustees in Mrs Buchanan's favour, which was executed in May 1822, runs in the names of Mr Kyd and Mr Taylor, as the accepting and acting trustees of Major Seton. It narrates the proceedings which terminated in the compromise, and then the receipt of the money is acknowledged in these terms:

"And the said Mrs Georgia Lindsay or Buchanan having accordingly now made payment to me, the said James Kyd, as factor for the said Christopher Seton's estate, and for behoof thereof, of the said sum of £900 Sterling, and of the legal interest thereof from the said term of Whitsunday 1821 to the date of delivery of these presents, whereof we do hereby acknowledge the receipt, renouncing all exceptions to the contrary: Therefore we have exonerated and discharged, likewise do hereby exoner, acquit, and *simpliciter* discharge," &c.

The deed was subscribed by Messrs Kyd and Taylor as the granters, and by Mr Kyd as the receiver of the £900, and by Messrs Thomson, Seton and Dawson, the assumed trustees, as consenters.

The several deeds referred to were prepared by Mr Kyd, and transmitted, after being executed by himself and Mr Taylor, to Messrs Dawson and Seton for their signatures as consenters. Mr Kyd had been the confidential agent of the truster, and the trustees continued that confidence, not only in matters relating to the trust, as has been seen, but also in some of their own private concerns. Unexpectedly he became bankrupt in 1827, when it turned out, that instead of applying the proceeds of the subjects directed to be sold at the meeting in September 1819, in extinction of the truster's debts, he had retained the greater part of the same in his own hands. No second meeting of the trustees was held until the 6th July 1828, before which time Mr Kyd had become bankrupt. He read to the meeting the previous minute of 6th September 1819, and stated, that he considered it unnecessary to call any formal meeting of the trustees since then, as they all resided at a distance, and there was nothing of material consequence connected with the trust which he thought required their consideration. He then laid before the meeting a state of his accounts, from which it appeared that he owed a balance of nearly £1400 to the trust-estate, besides interest,

"which the meeting regret, and are dissatisfied to find so great, considering that Mr Kyd should have apprized the trustees occasionally of the state of the trust-funds, and at any rate, ought to have applied any surplus in payment of the Major's debts." "In consequence of Mr Kyd's failure, the meeting are of opinion that it would be better for Mr Thomson, who is now resident in the country, and at no great distance from Falkland, to take the management of the trust-estate, than that Mr Kyd should continue to do it, and authorise Mr Thomson to act accordingly." "The trustees consider it expedient, and agree to hold at least an annual meeting in the month of October, and oftener if they see cause."

The pursuer having arrived at the years of majority, raised the present action against the trustees, and the

representatives of such of them as had died, concluding against them for payment of the funds which Mr Kyd had received, and which, in consequence of his bankruptcy, had been lost to the trust-estate. To this personal demand the Lord Ordinary gave effect by the following interlocutor:

"12th February 1839.—The Lord Ordinary having heard the counsel for the parties on the closed record, productions, and whole process, decerns against the defenders, James Kyd and his trustee, for whom no appearance has been made, in terms of the conclusions of the libel: and with regard to the other defenders, finds that the whole of the said defenders, except Henry Blair, are personally bound to account to the pursuer for the sum of £956. 6. 10., which they admit to have received from Mrs Buchanan Lindsay, in August 1822, on account of the trust-estate, by a regular receipt and discharge running in their names, and subscribed by each of them individually: Finds, in like manner, that the said defenders (with the exception of Henry Blair, as above), are personally bound to account to the pursuer for the farther sums of £284 and £241, being the prices of two freehold qualifications, after deducting expenses, belonging to the trust-estate, which were sold and conveyed to the purchasers by dispositions acknowledging receipt of the said prices, and subscribed by all the said defenders, as trustees and consenters thereto; except that the defender, Taylor, is stated, in the narrative of the latter of these dispositions, to have actually received payment of the price jointly with James Kyd, for behoof of the trust, and subscribes that disposition accordingly, as a principal disponent, along with the said Kyd;—and to this extent repels the defences of these defenders, and decerns: but before farther answer, appoints the cause to be enrolled, in order that it may be explained what farther decree or procedure in the accounting may be necessary to give effect to these findings, and to exhaust the merits of the cause.

"*Note.*—Cases of this kind, when there is no allegation of fraud or sinister object, are always painful, and often perplexing, from the difficulty of determining to what extent effect can safely or properly be given to such protecting clauses as occur in the trust-deed now under consideration,—a difficulty which the Lord Ordinary feels to have been rather increased than diminished by the course of the recent decisions.

"The nearest approach to a consistent or practical principle that he has been able to deduce (and that not with a perfect assurance that the deduction is warranted) from those decisions, appearing to him to be this:—That where there has been no actual intromissions, or direct interference with the state of the trust-funds by any individual trustees, they will not be liable for losses arising from the neglect or dishonesty of others of their number, or of factors or agents appointed by the whole, unless their omission to check or prevent such misconduct amounted, in the circumstances, to such *crassa negligentia* or *culpa lata*, as both in law and in common sense is equiparate to fraud; but that where there has been such actual intromission or interference, they will be liable for a smaller measure of neglect or omission, being in such a case to be dealt with as having voluntarily charged themselves with the particular funds with which they had thus intermeddled, and being consequently bound to discharge themselves, by showing that they had made such a reasonable disposition or application of them, as again to exempt them from responsibility for the parties by whose faithlessness or rashness they may have been afterwards lost.

"The Lord Ordinary cannot say that he is satisfied with the soundness of the distinction which a rule or principle like this would seem to establish, between the degree of negligence which should make a trustee liable where there has been what is called actual intromission, and where there has been nothing thought to come under such a description. To him it has always appeared that more importance has been ascribed to such actual intromission, than upon any sound view it was entitled to,—that the degree of actual negligence which should infer responsibility in one case, ought to infer it in every other, and that actual intromission is truly of little consequence, except as affording clear evidence of the personal knowledge in the individuals, of the risks to which the funds under their management

must then be exposed. The express provision which occurs in most trust-deeds, that the trustees shall not be liable for each other, but each only for his own actual intromissions, is intended (it is conceived) merely to exclude the hazard of any claim being made on them, as answerable *singuli in solidum*; and not at all as affecting the measure of their liability for actual or individual neglect, which is usually left to be regulated (as in the present case) by a separate declaration, that they shall not be bound to do diligence, nor answerable for omissions, or the insolvency of factors, agents, &c.; and if it be settled (as it is understood to be), that such a provision will not protect against any *blameable* and *extraordinary* degree of negligence, it would seem to follow, that it can be of no real importance whether this has occurred after an actual intromission (which might be in itself quite innocent and laudable), or under any other circumstances which still left it as a case of equal (though not greater) aggravation.

"Take the remarkable case of Blane, for example, to illustrate this view of the matter. The trustees were there held (and justly) to have actually intromitted with the funds, by individually subscribing certain bank orders, and receipts, and discharges, for the purpose of calling them up from the investments on which they had previously stood; but it was not, in any degree, for this mere *intromission* that they were found liable. If they had immediately seen them invested on new and more beneficial securities, their conduct would have been not only blameless, but meritorious; nor would this intromission have afforded a pretext for subjecting them for any loss that might have arisen at a distance of time, by the ultimate failure of the new securities, or the dishonesty of the factors who managed them. The sole ground of liability, in short, in that case, was their *extraordinary negligence* in allowing the money so raised to pass at once into the hands of Paterson, one of their own number, without seeing that he reinvested it safely, and without requiring any security from him, for its application or safe keeping. But would the case, in this respect, have been at all different, if, instead of themselves co-operating in *drawing* the money, they had merely received a report from Paterson that it had been paid up to him some time before, and was then lying in his private cash-account? In such a case it would not be said that they had themselves had any *actual intromission*; but the fact of the actual state of the money being thus brought as clearly and fully to their knowledge, as if they had themselves furnished him with the means of drawing it, could they be less liable for the consequences of their actual neglect, in taking no steps for its safe investment, or requiring any sort of security from the holder, than if the *very same measure of neglect* had occurred after such an actual intromission?

"But though the Lord Ordinary has thought it right to throw out this view of the principle which he apprehends should govern such cases, he holds that there was, in this case, quite as much actual intromission on the part of the defenders as occurred in that of Blane, or in most of the others, in which trustees not accused of fraud or partiality, and having the same clause of protection in the deed, have been found personally liable. In the settlement with Mrs Buchanan Lindsay, they all, in express terms, 'acknowledge themselves to have received' the sum of £956, there specified, and sign the receipt and discharge accordingly, without any sort of qualification. Their so doing might or might not have been proper or necessary. But, of itself, that act could have inferred no responsibility. If they had seen the money better reinvested, it would have been laudable. If they had even given it to Kyd, with directions to look out for such an investment, and to lodge it in the bank in the *interim*, they might not have been liable, though he had immediately run away with it, or imposed upon them by the exhibition of false documents, purporting that their directions had been obeyed. If they had even allowed him to keep it in his own hands, upon finding security, they might have been safe. But to give it over to him, as they did, without any direction or security whatever, and never once to inquire what he did with it for the five or six years which intervened before his bankruptcy, when it appeared that it had been traded upon and lost, was an actual neglect, at least as flagrant as that in the case of Blane, and, in the Lord Ordinary's apprehension, would have made them liable, though it had not

been preceded (as it was) by an actual intromission, very nearly identical in its circumstances, and to the full as strong as that which occurred in that case.

"The other transactions, as to the sale of the freehold qualifications, are substantially in the same situation. There, too, the defenders interfered personally in drawing and realising the money, and affixed their individual subscriptions to dispositions admitting the payment of the prices; and without which subscriptions they were aware those prices would not have been paid. It is obviously of no consequence that most of them signed those instruments as consenters only, in respect that they were not individually infest. It is enough to make the case identical with that of the receipt to Mrs Buchanan Lindsay, and a case of actual intromission, *first*, that they so signed, in order that the money might become part of the trust-funds, over which, as a quorum of trustees, they had full and exclusive powers, and for the safety of which, when thus drawn in by their proper act, they were bound in some reasonable way to provide; and, *second*, that they were necessarily as completely *certiorated*, both of the fact of the money being thus realised and given over to Kyd, and of their power to make him take a proper security for it, as if they had not only signed the receipt as principals, but had actually had the money on the table at their meeting, and had themselves handed it over to that person.

"The Lord Ordinary would have been inclined, on the principles now explained, to have extended their liability to the price of the house in Falkland, and even to the prices of the moveable estate, not realised till after the assumption of the new trustees in September 1819. But as they do not appear to have actually put their names to the deeds by which these funds were realised, or otherwise interfered personally in the transactions, he was unwilling to risk going beyond the warrant of the recorded decisions of the Court, by subjecting them, on what he conceives, however, to be conclusive evidence of their knowledge of the insecure state of these funds, and their total and continued neglect of all measures for their security or just application. It is also of less consequence, that the liability should be thus extended, as it is understood that, under the interlocutor as it stands, nearly as much will be recovered as to replace to the pursuer all that has been lost by Kyd's insolvency. It is a singular, and it is believed unprecedented feature in this case, that after their first meeting in September 1819, these trustees *never met*, or were called together again, till after Kyd's bankruptcy in 1828; though they acted, in the meantime, so as to put into his hands, without the least precaution, funds which, without their interference, he could never have obtained, and actually went on afterwards to assume a new trustee in his room, and have continued to this day in the management of the pursuer's property. Blair, who was thus assumed after Kyd's catastrophe, can, of course, have no share of the responsibility of those who trusted him."

On this judgment being submitted to review, the Court appointed the argument to be stated in minutes of debate, in order that it might be communicated to the Lords of the First Division, and permanent Lords Ordinary, for advising of the whole Court,—the question for consideration of the consulted Judges being, "whether the interlocutor of the Lord Ordinary should be adhered to or altered?"

Pleaded by the pursuer—

That the loss in this case has not arisen in spite of efforts made by the defenders to discharge their duty, and of these efforts misgiving, from causes over which they had no control. On the contrary, the loss has arisen from their sitting with their hands across, just as if they had never accepted of the trust, and had not been bound to take any step whatever in regard to those trust-funds, which, by their own act, they had placed in the hands of Mr Kyd. By subscribing the several deeds acknowledging the receipt of the money, by means of which Mr Kyd was enabled to draw it, they must be held to have had actual intromission. Every person who subscribes a document by means of which money is drawn, plainly draws the money which he thereby authorises to be paid, as much as if it were paid

into his own hands. *Blane v. Paterson*, 28th January 1836. *Sim v. Charles*, 13th May 1830. *Moffat v. Robertson*, 31st January 1834. *Donaldson v. Kennedy*, 18th June 1833. It is admitted that every claim against a trustee must turn upon the issue, whether he has been guilty of gross negligence. But if this be the principle which is to determine the personal liability of trustees, where is there a case to be compared to the present for gross and culpable negligence? The fact is undoubted, that after their first meeting on the 6th September 1819, when they authorise the trust-estate to be converted into money, and after subscribing the several deeds whereby Mr Kyd was enabled to possess himself of these trust-funds, the defenders not only never required Mr Kyd to secure these funds, but never even took the trouble of inquiring what had become of them. After enabling him to possess himself of the trust-funds, the defenders acted precisely in the same manner as if they had resigned the trust, or as if they never had been concerned in it. Gratuitous trustees, acting under family settlements, are entitled to have their conduct not only liberally, but even indulgently considered. But to hold them not liable for such gross negligence as here occurs, would be to extend the indulgence shown to them farther than is consistent either with expediency or equity. The defenders have referred to the law of England; but it appears that the law of England is just as unfavourable to them as the law of Scotland. *1 Schoale and Lefroy*, 341. *Willis*, pp. 167, 182, 185, 187, 194. *Hampson*, pp. 51, 63. *16 Vesey*, 477. *1 Eden*, 149.

Pleaded for the defenders—

That though in point of form this is an action of accounting against the defenders, it is, in point of fact, a penal action, whereby the pursuer seeks to establish against them a personal liability for certain portions of the trust-funds which were intrusted with by the two original acting trustees. There is no question with any creditor or special legatee of the trust; and the pursuer, as his father's gratuitous donee, is bound to give full effect to the broad protecting clause contained in the settlement. The pursuer must either instruct actual intrusions by each of the trustees, or otherwise, that, by their conduct, they have violated some direction of the trust, or done what in law is equivalent to fraud. They did not actually intrude with one farthing of the trust-funds; as trustees, they have already accounted for the funds. They were authorised to employ factors or attorneys, for whom they were not to be responsible; and they employed Mr Kyd, as Major Seton himself had done. They directed him, with the price which he received for the property sold, to pay the trustor's debts, and they believed that he had done so, while it turns out he had not. But the trust declares,—and the trustees accepted in reliance on the protection afforded by the declaration,—that they were not to be liable for factors or attorneys, further than that they should be reputed responsible at the time of entering upon their duties; and that Mr Kyd was so reputed in 1819, and that he continued in good credit for years thereafter, is not disputed. It is exclusively because of the terms of the two dispositions of the superiority, and of the discharge by the trustees to Mrs Buchanan Lindsay, and in respect these deeds were subscribed by the defender Mr Dawson, and by the late Mr George Seton, that the plea of actual intromission is raised. But the funds realised by the sales of the heritage never were, in point of fact, touched or actually intrusted with by them. They signed, as consenters, the dispositions to the purchasers of the superiority, merely as necessary acts of administration in the course of the trust. The receipt of the money was acknowledged by Mr Kyd alone, or in one instance by Kyd and Taylor. In the case of *Lord Lyndoch and others v. Auchterlony*, it was held that a trustee was bound to give his concurrence to necessary acts of administration. But it never was contemplated, that, by his act of concurrence, he subjected himself in personal responsibility for the actual intromissions of his co-trustees. If the signing of a deed as a consenter thereto, when in *gremio* the receipt of the money is acknowledged by another, makes a case of actual intromission, and such as to subject trustees in a personal liability to account for the moneys received by their factor or attorney, there is now no distinction between actual and constructive intromission. Actual intromission is a matter of fact, and the amount of it must be specially instructed; otherwise to infer

the fact from authority given, in terms of a power conferred to that effect, is, instead of protecting, in truth ensnaring trustees into a course of management, or into the acceptance of a gratuitous office, which, had they known the nature of it, they would have shunned instead of accepting. The amount of the offending has been, that the trustees did not personally see that the prices of the heritable subjects sold had been applied by Mr Kyd as he was directed. It was but an omission or neglect of diligence. They violated no direction of the trust; and if an omission of this kind is to be held sufficient to subject trustees in a personal responsibility, when the trustor himself has declared that they shall not be liable for omissions or neglect of diligence of any kind, few persons will hereafter be induced to discharge the duties of gratuitous trustees, even with the broadest protection with which the trustor himself can shield them; and this the more especially, where their personal responsibility is pleaded by a gratuitous residuary donee like the present pursuer. *Dalrymple v. Murray*, 4th August 1784, M. 3534. *Lord Traquair's Trustees v. Cheap and Others*, February 1835; *Shaw*, 13, p. 417. *Cowan v. Crawford*, 13th May 1836. *Home v. Pringle*, 1st December 1837; affirmed in the House of Lords, 22d June 1841. *Willis on Trusts*, pp. 193, 146. *Williams*, Vol. II. p. 1124. *Leigh v. Barry*, 3 Ath. 582.

The following opinions were returned by the consulted Judges:

Lord Cockburn, Lord President (Boyle), Lords Mackenzie, Fullerton, Cuninghame and Murray:

"Without exactly adopting all the observations in the Lord Ordinary's note, we are of opinion that his interlocutor is right, and ought to be adhered to.

"This cause has been delayed until we should have the benefit of the opinion of the House of Lords, in what was stated to be the somewhat analogous question of *Home v. Pringle*; and the judgment of this Court was affirmed there last June.

"In their circumstances, the two cases are quite dissimilar. But the valuable remarks made by the Lord Chancellor, confirm us in the conviction, that the general principle of our law is, that neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amounts to *culpa lata*. This part of the case of *Home v. Pringle* was decided on appeal upon this very ground. For the trustees were assailed there, solely because the facts did not imply negligence of this description. The principal charge against them was, that though they had appointed a solvent factor, they had failed to subject him to proper periodical accountings. But the House of Lords agreed with this Court, in holding this fact not to be established; because there were only delays of a few months, and, on the whole, though he might have been looked after more strictly, there was no culpable failure.

"But here we think that there was. It is not necessary for us to specify the circumstances in detail. Their substance is,—that certain sums belonging to the trust-estate came into the hands of the trustees, or of one of their number, with the knowledge and consent of the rest, as is proved by deeds signed by them acknowledging the receipts; that though the trustee said to have personally received these moneys was allowed to interfere so much, that he has been held out as the trust-factor by the defenders in this action, he had never been regularly appointed to any such office, so as to bring him, or them, responsibly within the operation of that part of the protecting clause which frees the trustees from being accountable for factors who were reputed safe when appointed; that this person having thus received the money with the knowledge of his brethren, they totally failed to take any subsequent charge of it; inasmuch, that though they continued to act in other respects as trustees, they made no inquiry as to what had become of the moneys, or even held a single meeting from 1819, when the sums were received, till 1828, by which time the trustee they had chosen to rely upon was bankrupt.

"We hold this total disregard of the trust, after their attention had been called, by their being required to sign the deeds, to the fact that these sums had been received, to amount to

culpa lata. Though aware of the indulgence due, under such a clause, to trustees, we think that no trust-property would be safe, if such gross negligence were not to make those who are guilty of it, liable to the party injured."

Lord Ivory, concurred in by *Lord Gillies* :

"I concur generally in the above opinion. But I would not, perhaps, lay so much weight on the circumstance of Kyd's not having been regularly appointed to the office of trust-factor.

"In point of fact, the discharge granted by the trustees to Mrs Lindsay in May 1822, bears payment to have been made to 'the said James Kyd, as factor for the said Christopher Seton's estate, and for behoof thereof;' and the previous disposition to Mrs Buchanan in 1820, in like manner proceeds on the narrative, that payment had been made (of course by authority of the subscribing trustees) to 'the said James Kyd, for behoof of the trust-estate.' It is difficult to hold this (*quoad* these payments at least) as other than equivalent to a formal warrant to recover the money in the character of factor. And, indeed, even as to those others of the deeds which contain no words of similar import, it rather appears to me that the authority to uplift the money, implied in the very subscription of the trustees, must receive substantially the same effect.

"After all allowance, however, has been made on this ground, I can still see no reason for coming to any other conclusion than has been done, as to the legal responsibilities incurred, by the utter neglect of their own proper duty on the part of the trustees. The trustees were left in charge of the estate of a pupil; and that pupil, as the trustees knew, had no natural protectors to look after his interests, being an illegitimate child. In such a situation, the trustees were inexcusable for their total and reckless neglect of the estate which they had undertaken to administer. And even, therefore, had they, by the most formal deed, nominated Kyd (one of their own number) as factor, I should still have been of opinion, that their not holding a single meeting, as trustees, for nine years after their acceptance, and their placing the whole funds of the estate into Kyd's hands (for their concurrence in the deeds, which alone enabled him to get the money, amounts to no less), without ever from that moment taking a single step to compel him to account, or at all to ascertain what he was doing with the estate, was enough to bring the case up to that full measure of *crassa negligentia*, which undoes all legal or equitable claim on their part to protection, even under such a clause in their favour as is here founded on. Clauses of this kind do not protect against positive breach of duty. And where one accepts of the office of trustee, and thereby undertakes, as he surely does undertake to some extent, to administer, or superintend the administration of the estate which the trust places under his charge, what is it short of a breach of duty, when he stands wholly aloof and does absolutely nothing, leaving the estate in the meanwhile to run to ruin, not less effectually than if he had never taken upon him the office of trustee at all?

"I may just farther explain, that I do not regard the circumstances of the case as sufficient to bring the trustees within the category of parties liable for actual intromissions. Their subscription of the deeds I regard merely as a subscription for conformity. Accordingly, had Kyd failed with the funds in his hands within any reasonable period after their having thus authorised and sanctioned his receipt of the money—there being no room in this case for any charge of gross negligence on their part,—I think they must have been free. I should have been of the same opinion, even had the money actually passed through their own hands,—they being perfectly entitled to call in the assistance of Kyd or any other third party, as factor or agent, in order to the practical appropriation and disbursement of the money in terms of the trust. But in no view can I hold them excusable,—after putting the money into the hands of such third party,—for having allowed it, or the greater part of it, to remain there for a space of nine years wholly uncared for, and without so much as an account having during all that time been rendered. It is here that the *gravamen* of the case, as regards the trustees, in my opinion lies. For, could I get over the plea of *culpa lata* as applied to this *species facti*, I should have been disposed, in other respects, to allow them the protection of the clause which the trust-deed contains in their favour; that pro-

tection being only to be withheld when there is a clear case of *culpa lata*,—which, however, I think, there unquestionably is here."

Lord Jeffrey absent from indisposition.

At advising,

Lord Justice-Clerk.—I concur in the result of the opinions of the consulted Judges, but not in the details of the opinion of Lord Gillies, or of the Lord Ordinary's note. The action is to compel the trustees to *denude* and account; and I think they are liable personally to make good the sums concluded for. Two of the original trustees named by the truster accepted, and assumed other three individuals to act along with them. The pursuer was an infant, and a natural son, and the trustees were appointed his tutors and curators, and were his only guardians. The trust contemplated a long period of management, and was peculiarly onerous. During the first nine years, there was only one meeting, at which the trustees authorised the sale of certain subjects, and instructed Kyd to advertise them. But Kyd had no commission allowed him, nor was he appointed factor. I say nothing of the legality of appointing one of a body of trustees to be factor, with a salary. If a factor be appointed, there is a regular settlement of accounts, which, from a feeling of false delicacy, is not the case generally with a managing trustee. To bring the trustees within the protecting clause in the trust-deed, Kyd ought to have been regularly appointed factor. He took steps for the sale of the subjects, and when it was effected, the deeds of conveyance were signed by the trustees. The receipt and discharge of the trustees formed the foundation of the payment of the price. Kyd had no authority to receive the money, and grant a discharge. In one of the deeds he is called factor; but in a question between the pursuer and the trustees, this is of no moment, and cannot give them the benefit of the regular appointment of a factor. Are the trustees then chargeable with these sums in accounting? When money is paid to trustees on a concurring receipt, payment is made to all. The money here was paid to Kyd, but on the joint receipt of the trustees; and they were in the knowledge that the money was in his hands, awaiting their disposal. In *Blane v. Paterson*, the signing a receipt was held personal intromission with the money. Is there not actual intromission when money is paid, and lies at the disposal of the parties for whom it is paid? But if there be actual intromission, the result is, that they have the money, and must be liable for it;—if they have it not, what did they do with it? They must show how they are to be discharged of it. Actual intromission is of the essence of liability. The defenders quote the clause, declaring they shall not be liable for factors; but they must show they acted on the clause,—that they appointed a factor, and that the particular instance was a factorial transaction. Kyd was not factor; and the money was received by the trustees. How, then, can it be called a factorial transaction, and that they put it under his factorial charge? I am not prepared to take this off their hands here. They say that the money did not come into their pockets; but they were the more bound to look after it on that account. They cannot say they made a loan of it to Kyd; for they gave no directions to that effect. When there is actual intromission, there must be care and charge; but there was utter neglect here for nine years, which is *culpa lata*, and amounts to *dole*.

Lord Meadowbank.—I thought this a case of great difficulty, and had indicated an opinion rather against the interlocutor; but now I concur generally with your Lordship, except as to one point—the legality of appointing one out of a number of trustees as factor, with a salary.

Lord Justice-Clerk.—I am not prepared to say that such an appointment, with a salary, is legal.

Lord Medwyn.—We have the opinions of the consulted Judges making the trustees personally liable, but by no means on the same grounds. When two or more trustees concur in granting a receipt for money, they may not be liable for what is received by one of their number. The truster may limit their liability only for actual intromissions, and not omissions. When trustees are called on to grant receipts for the purpose of carrying on the trust, they cannot be liable on account of intromission—for it is not actual. Here there is no actual in-

intromission. I think Kyd was factor, although not formally so. The money came into his hands; and I see no meaning in the protecting clause, if it does not cover the other trustees in the transaction. They may be liable, no doubt, for loss incurred by great negligence; but negligence will be measured very differently where the intromission is actual, and not merely constructive, and also where the trustees are gratuitous and not salaried. In the present case, Kyd got the money in the due course of management, and while in good credit. I concur with the Judges who hold that the trustees cannot be liable on the ground of actual intromission. The signing of the deeds acknowledging receipt of the money, was merely negative intromission. If the trustees are not to be protected against claims, except for what they actually received, then, instead of getting benefit from the protecting clause, as understood by plain men, they will only have been allured by it.

Lord Moncreiff.—I cannot concur with the majority of the consulted Judges, but am of the opinion of Lord Medwyn. The question is, are the trustees to be liable for the unforeseen failure of Kyd, the favoured agent of the truster during his life, and of his trustees after his death. A claim of this sort must be rested on clear grounds of law. The pursuer must say something more than that the money was lost; for the trustees will clearly not be liable, unless the loss was incurred through something more than mere contingencies. If they had put the money out on personal security, or had they lodged it in the Five Bank, it might have been lost; but the trustees would not be liable, even without any protecting clause. They are gratuitous trustees, and are liable only for ordinary diligence, as in the management of their own affairs. But the law of Scotland—looking to the comfort of families in the establishing of trusts—the necessity of their enduring for a long period—and the hazards attending them,—has gone beyond this, and appointed a special protection to trustees. The protecting clause in a trust-deed must mean something more than if it had not been there. The pursuer here is a gratuitous donee, and not a third party: he is therefore in the same situation as if old Seton himself, supposing he had been absent for awhile, were to return and call these trustees to answer to him. With reference to the clause in the deed, and the circumstances of the case—(reads protecting clause.) From the technical frequency of this clause, we are apt to overlook its import; but it has a special meaning. It is the contract on which the trustees act, and is to be favourably construed so long as the trustees act honestly. They are to be answerable only for actual intromission,—not for omission, nor *singuli in solidum*. The truster knew that deeds of sale, &c., must be signed by a quorum of the trustees, and he puts in the clause protecting the trustees, where they sign without having actual intromission. These words must be construed as they presented themselves to the truster himself, or to trustees designing to do a kind act, such as the defenders, who allowed themselves to be assumed as trustees on solicitation. If the truster himself were here instead of the pursuer, could he put such a gloss upon his own language as to say, that if the trustees signed any deed by which money came to be received by his own friend, they actually intromitted with it, although they never touched it? The point of intromission must first be decided, and afterwards the negligence—for the two are wholly distinct. If there was actual intromission, then the trustees must be liable. But look at the documents on which it is attempted to be made out. They are not simple deeds of receipt and discharge: they bear expressly that the money was received by Kyd and Taylor, and, in one instance, by Kyd alone. The other trustees are consenters; and the point is, looking to the protecting clause, does the fact that they did concur, nay, must have concurred, amount to actual intromission? It is declared in the deed, that the money was paid to Kyd, and the protecting clause declares, that the trustees are not to be liable for one another's intromissions. But it is said that Kyd never had any regular deed of factory. I think this is not of much importance. He was factor for many years to the truster himself. He is expressly designated factor in one of the deeds signed by the trustees; and I have no idea that the protection against the insolvency of factors can be explained away, merely because there was no regular deed of factory. For these rea-

sons, I am of opinion that there was no case of actual intromission. A quorum of trustees may sign deeds for hundreds of thousands of pounds, who never dreamt that in so doing they incurred actual intromission,—who, while necessarily putting their names to deeds and discharges, never imagined they were ruining themselves and their families. If such is to be the law, can the office of a trustee be any longer undertaken by respectable men? The question of negligence is a different matter. Both opinions go on *crassa negligentia*, and such has been found to be a ground of liability as in the case of Home. But here the money was not unnecessarily uplifted: it was on a minute of the trustees,—nor was it made over in loan to Kyd. He was in the active management of the trust as intended by the truster, and it was understood that he should apply it to trust purposes. It is not even upon the record that Dawson was in the knowledge that it had not been so applied. What, then, is the negligence which is thought to be so intolerable? The estate was in good order; and the trustees believing the debts to have been paid, there was nothing farther to do. Kyd was in perfect credit, and was intrusted by Dawson himself with his own pecuniary affairs to a great extent; and yet the Lord Ordinary says they would not have so acted in their own affairs. The *gravamen* of the charge is, that the other trustees, relying upon Kyd as the truster himself had done, and having no occasion to meet, did not meet and call him to a strict account. I grant there was neglect of what, in strict duty, ought to have been done; but the truster, under a full sense of the infirmities of human nature, puts in a clause of protection for the express purpose of encouraging them to accept of the trust. The Lord Ordinary seems to construe the clause as protecting only against neglect of legal diligence. I say it does not mean this, but neglect amounting to *culpa lata*. It is so put in the opinions of the Judges; but the facts do not amount to it. The only fault of the trustees, was that along with all the world—they relied too much on Kyd. What is this but omission? The maternal relations of the pursuer saw this, and did not interfere. The defenders themselves so acted in their own affairs. Without wasting more time, I cannot better express my opinion than in the words of Lord Corehouse in the case of Traquair:—"As the defenders therefore had no actual intromission,—as they had transgressed no order of the truster or of the Court,—as they were guilty of no fault, except neglect or omission to see that" Kyd had paid the truster's debts, "which they had directed him to do,—as it is not alleged that they had reason to entertain any suspicion of his credit till his bankruptcy took place,—there is no ground for subjecting them to the loss which has occurred. From exuberant confidence in their factor, they acted imprudently and carelessly; but it was an omission only, and certainly it was no act of transgression, far less a dishonourable act."

The Court pronounced the following interlocutor:

"Adhere to the interlocutor complained of, and refuse the desire of the note: Find no expenses hitherto due; and remit to the Lord Ordinary to proceed further in the cause."

Lord Ordinary, Jeffrey.—*Act. More;* Andrew Grieve, W.S., *Agent.*—*Alt.* Whigham; James Fergusson, W.S., *Agent for Dawson.*—Penney; Geo. Lyon, W.S., *Agent for Taylor.*—*F. Clerk.*—[J.W.]

18th December 1841.

SECOND DIVISION.—(J. W.)

No. 68.—ELIZABETH STAIG or SCOTT and OTHERS, Pursuers, v. THE GENERAL COMMISSIONERS of POLICE for the BURGH of DUNDEE, Defenders.

Landlord and Tenant—Lease—Police Statute—Construction—Tenement of Land—Held that the words "tenement of land," occurring in certain clauses of the Dundee Police Act, 1837, mean, and are applicable only to, a single or individual building, although containing several dwelling-houses, with, it may be, separate means of access, but under the same roof, and enclosed by the same gables or walls, and that they do not extend to, or comprehend any square, range, or angle of buildings consisting of several houses completely divided from each other

by party-walls and separate roofs, whether the same belong to one individual or body of individuals, or to many.

Process—Competency—Parties not called—*The commissioners of police of a royal burgh having let the fulzie of the burgh and suburbs vested in them by Statute, subsequently passed a resolution, declaring that they had no right, under the Statute, to a part of the suburban fulzie, which the tenant conceived had been let to him—Held that the tenant was entitled to pursue an action of declarator of the extent of the subject let to him against the commissioners, without calling the suburban inhabitants.*

The police of the burgh of Dundee is regulated by an Act of Parliament, passed on 12th July 1837. By section 112 it is enacted,

“ That the whole dung, fulzie, soil, dirt, ashes and filth, within the limits of the burgh of Dundee, before described, shall be vested in the said General Commissioners,—saving and excepting the refuse of the public or general slaughter-house for the time, within the said burgh, and of tan-yards and spinning-mills, and the dung from stables and cow-houses, subject to the provision after mentioned;—and also, saving and excepting the whole dung, fulzie, soil, dirt, ashes and filth, from places situate beyond the boundaries of the ancient burgh of Dundee, belonging to any person having an ash-pit or necessary for the use or accommodation of his family, and for receiving the dung, fulzie, soil, ashes and filth of such family exclusively, or belonging to any persons inhabiting the same tenement of land, and having an ash-pit or necessary for the use or accommodation of those inhabiting such tenement, and for receiving the dung, fulzie, soil, ashes and filth of such inhabitants exclusively, and deposited by such person or persons in such ash-pit or necessary; provided such ash-pit or necessary be removed from any public street, lane, or passage, and not exposed to the view of foot-passengers therefrom, and in such a situation as not to admit of deposition by neighbours, or to be in any respect offensive to neighbours or the public;—and also, saving and excepting the dung, fulzie, and others collected by the trustees for the harbour, as therein provided.

By section 115 it is provided,

“ That if any person shall be convicted before the Judge officiating in the Police Court, of having mixed, or allowed to be mixed, with the dung, fulzie, and refuse of slaughter-houses, stables, or cow-houses belonging to private parties, any dung, soil, dirt, ashes, or filth, vested by this Act in the said commissioners; or if any person shall be convicted before such Judge of depositing, or allowing to be deposited, in any ash-pit or necessary, beyond the bounds of the ancient burgh of Dundee, other than such as he shall or may have provided, as aforesaid, for the exclusive use of himself and his family, or as shall have been provided for the tenement of land of which he inhabits a part, as aforesaid, any dung, soil, fulzie, dirt, ashes, and filth from places not occupied by himself or his family,—such person or persons shall be liable for every such offence in a penalty not exceeding five pounds, and not less than five shillings.”

By the 118th section, it is declared lawful for the commissioners, from time to time,

“ to grant leases for any period, not exceeding three years, of the dung, fulzie, soil, dirt, ashes, and filth hereby vested in them, either with or without such as shall come to belong to them by forfeiture; such leases being made by public roup to the highest bidder, under such limitations, restrictions and conditions, as to the said general commissioners shall appear proper.”

Acting under this last-recited power, the town manure was exposed to roup, for the first time under the Statute, upon 12th January 1838, as upon a lease for three years, to commence from and after 15th May 1838. The upset price was £1800; but after competition, William Robertson was preferred to the lease as the highest bidder, at the yearly rent of £2225. The deceased Mr Scott subsequently acquired right to the lease from Robertson, and, with his consent, a con-

tract of lease was entered into between Mr Scott and the Commissioners of Police, acting through their committee on cleansing, which bears to have been executed on the 7th and 8th February 1838. The contract narrates the power of leasing conferred by the Statute, and the proceedings at the public roup, with the right subsequently acquired by Mr Scott, and sets to him, his heirs or assignees,

“ all and whole the dung, fulzie, soil, dirt, ashes and filth within the limits of the burgh of Dundee, so far as vested in the General Commissioners of Police, as well as what may become vested in them by forfeiture, saving and excepting;” and then follow the exceptions contained in the Statute. It also contains a clause of warraudice “ from all facts and deeds done, or to be done by them, in prejudice hereof,” &c.

The lessee was taken bound to employ a sufficient number of horses and carts to collect and carry away the fulzie, and one scavenger was to be appointed by the commissioners, and paid for at their expense, to attend each cart and assist the carter in loading it.

After the date of the lease, but before the term of entry, a question arose at the Board of Commissioners in regard to the effect of the expression “tenement of land,” in the exception (§ 112) applicable to places situated beyond the boundaries of the ancient burgh. At different places of the extended royalty, there are extensive piles or clusters of buildings which form considerable angles, ranges, and squares, and consist of different houses, divided from each other by gable or party-walls, and under separate roofs. These clusters of buildings were either erected by, or now belong to, joint-stock companies, and to individuals, and are held by the proprietors, some as separate possessions, and others under joint *pro indiviso* titles. They are let out in small dwelling-houses to work-people and others, and some of them contain about two hundred families, or upwards of eight hundred individual inhabitants. The question stirred by certain of the commissioners was, whether the fulzie of these ranges of buildings fell under the description of “tenements of land,” to which the statutory exception applied?

On the 11th April 1838, a motion was made at a meeting of the board,

“ that the commissioners, in the bye-laws to be made by them, ought distinctly to declare that any square, range, or angle of buildings in the extended royalty, belonging to one proprietor or joint *pro indiviso* proprietors, having one common ash-pit and necessary, so as to enable the inhabitants to provide, as at present, for their convenience, comfort and cleanliness, shall be reckoned as one tenement for the purposes specified in section 112 of the Police Act.”

This motion was carried, and a declaration in terms of it was annexed to the laws and bye-laws which were afterwards published. The lessee having heard of the intended resolution, caused his law-agent to address a letter to the clerk of the commissioners, dated 17th April 1838, in which he represented that the attempt to take away and deprive him of so considerable a part of the dung to which he had right under his lease, was illegal and unauthorised, and intimated that he held the commissioners liable for all the loss and damage which he might suffer by and through the resolution.

Soon after the commencement of his lease, Mr Scott made an application in the Police Court, as for penalties against certain of the parties by whom the fulzie

collected from the buildings in question was appropriated, but without effect. In February 1839, he again called upon the commissioners to review their resolution of 11th February 1838, but having failed to obtain redress, he raised the present action, which is now insisted in by his widow and son. The summons is dated and signeted 29th April 1839, and the conclusions are both declaratory and petitory. By the declaratory conclusions it is sought that it should be declared,

1. "That the words 'tenement of land,' which occur in the exemption or exception declared by the said recited Act, section 112, mean, and are applicable only to a single or individual building, although containing several dwelling-houses, with (it may be) separate means of access, but under the same roof, and enclosed by the same gables or walls." 2. "That the said exemption does not extend to, or comprehend any square, range, or angle of buildings, consisting of several houses completely divided from each other by party-walls and separate roofs, whether the same belong to one individual, or body of individuals, or to many." And, 3. "That the declaration or resolution of the said general commissioners of 11th April 1838, in relation to the said exemption, is contrary to the true intent and meaning of the said recited Act, and that it is illegal and inconsistent with the pursuer's just rights, under the foresaid contract of lease."

The petitory conclusions are twofold,—*First*, That the Commissioners of Police be decerned to rescind the resolution complained of, and

"to cause their scavengers and others to assist in receiving and delivering into the pursuer's carts, the dung, fulzie, &c., of the said squares, ranges, and angles of buildings; and to gather, collect, deposit, and deliver the same to the pursuer, as usual, in regard to other buildings and places within the bounds of police; and, generally, to give the pursuer all the aid and assistance in regard to the collection and delivering of the fulzie, &c., of such squares, ranges, and angles of building, or the enforcing of regulations of police, and enforcing the sanctions of the laws enacted by the said recited Act, as they are bound or accustomed to give in regard to the fulzie, &c., of other buildings and places within the said bounds which are not exempted from the operations of the said Police Act."

And, *second*, that the commissioners be decerned to make payment to the pursuer of the sum of £1500 Sterling, or such other sum, more or less,

"as shall be ascertained to be the loss, injury, damage, and expense sustained and incurred by the pursuer in the premises, during the period from the commencement of the foresaid contract of lease on 15th May 1838, to the date of this summons, or which he may sustain and incur in the premises for the period from this date until the expiry of his lease, or until the said resolution or declaration shall be rescinded and recalled, and until due and full effect shall be given to the pursuer's contract of lease in relation to the fulzie, &c., of the squares, ranges, and angles of building, illegally exempted as aforesaid."

The cause having been debated upon the closed record before the Lord Ordinary, the following interlocutor was pronounced:

"18th July 1840.—The Lord Ordinary having heard counsel upon this record, and thereafter considered the whole process—Finds, that by the subsisting Police Act for the town of Dundee, neither the Commissioners of Police, nor any tacksmen under them, are entitled to claim the dung, soil, and ashes put out from the dwellings of families inhabiting squares, courts, or any continuous range of building erected by, or belonging to one proprietor, or to *pro indiviso* owners, and let out by them to separate tenants, whether the same are divided by party-walls or not, provided the said proprietor has furnished an ash-pit and necessary for the exclusive use of the families so resident on his own property, and in no respect offensive to the

neighbours or the public: Finds, in particular, that the proprietors of Dudhope Crescent, Watt's Court, and Seafield Square, are entitled to provide one ash-pit and necessary on each of these properties, for the exclusive use of the families occupying the several dwellings contained in these continuous ranges of building respectively: Finds it not alleged that the existing ash-pits and necessities provided for these continuous buildings respectively, are in any respect offensive to the neighbours or the public: Therefore, so far sustains the defences, and assolizies the defenders from the action, and decerns: Further, appoints the cause to be enrolled in the motion-roll in November, in order that the pursuer may be prepared to state if he wishes any inquiry to be directed, or any special judgment pronounced, as to other tenements or ranges of building set forth in his schedule: Finds neither party liable in the expenses hitherto incurred, and decerns.

"*Note*.—It is probable that some difference of opinion may arise as to the proper construction of the Police Act on which the present question turns, as it is expressed in terms calculated to give a plausible support to a plea contrary, as the Lord Ordinary conceives, to the object and probable meaning of the parties whose rights were meant to be provided for by the Statute at the time it was passed.

"This Act was passed so recently as July 1837. At that period it would appear from the schedules produced, that there were an unusual number of tenements or ranges of building belonging to proprietors in the suburbs, and beyond the old royalty of Dundee, which had been built for the occupation of artizans, or of tenants in the middle or more humble classes of society. It rather appears at present, that while proprietors within the old royalty of Dundee had been all along obliged to give their dung and refuse to the persons employed in the daily cleansing of the town, the proprietors beyond the royalty insisted on an exemption being made as to their case, and that they should be entitled to retain the manure made on their respective properties, if they provided an ash-pit and necessary not offensive to the neighbourhood or the public. From the very nature of the thing, the subject intended to be reserved must have been the *dung*, and the condition or precaution intended to be provided must have been, that any common dung-pit set apart for a multiplicity of tenants must be such as would not be offensive to the neighbourhood or the public. But under that limitation, it is rather thought that the Act is entitled to a liberal interpretation, so as to secure proprietors in the possession of the manure reserved to them by the Act.

"In another view, it may often be necessary, for the comfort and cleanliness of the neighbourhood, that proprietors should have a certain discretion and choice as to the place to be selected and used for the deposition of the dung of their tenants, living all in contiguity with each other. For instance, if the ranges in the neighbourhood of Dundee are similar to Holyroodhouse, or Milne Square, or St James' Court in Edinburgh, it would be rather unreasonable to hold that the proprietor of such buildings was bound to establish separate dung-pits, within a narrow space, for every range of floors inclosed within subdivision walls, when a common one for the whole court would be less offensive, and run less hazard of getting into disorder by being confined to one place, subject to the constant superintendence of all the parties interested.

"It has been contended that the term '*tenement*,' used in the Statute, has reference rather to the size and form of the building, than to the fact of the proprietorship being vested in one owner, and that while dwellings consisting of a set of floors may be alienated to different proprietors, the portions thus given away would not lose the character of being still a part of the same original tenement; while, on the other hand, a party possessing originally one part of a range could not bring another part under the same tenement, by a subsequent purchase of another part of the range in contiguity with it. It is hardly thought, however, that there would be any difficulty in the practical adjustment of such cases. Undoubtedly, although the floor of any large tenement were alienated, it would still be viewed as a part of the original tenement in any question arising under this Act; but it is not very apparent that there would be any inconsistency, or any hazard to the public, in holding that any tenement, as built by the original owner,

might be extended, either by a protraction of the building, or by a fresh purchase. The object of the Act, in relation to the matter in question, would probably be effectually attained when the same proprietor has the command of the whole of a continuous or enclosed range of building, and can thus compel his tenants to deposit their filth in such places as are most convenient for the occupants themselves, and least offensive to the public. That, however, is not the case before the Court in the present instance."

This interlocutor was brought under review by the pursuers on its merits, and by the defenders on the point of expenses.

At advising on the 23d January 1841,

Lord Justice-Clerk (Boyle).—I am of opinion that the construction of the Statute contended for by the Police Commissioners is not warranted, and that the resolution complained of by the lessee is a diminution of the subject for which he bargained. By the present action, we are called on to find that he was a loser, and to give redress. It is said we cannot do this without making the inhabitants who are interested, parties to this suit; but we are not taking any thing from them: we are merely to declare the meaning of the Statute against the commissioners. The question is, what is the true construction of the term "tenement of land" occurring here in a local Act of Parliament? I go on the plain construction of that term on the face of the Statute and the context, which provides, first, for the case of a proprietor and his own family, then for tenants of a tenement belonging to one proprietor; but this cannot extend to *pro indiviso* proprietors, otherwise it would extend to joint-stock companies. We are not warranted, in my opinion, in applying it to whole crescents and squares containing hundreds of inhabitants. I do not go into considerations of cleanliness.

Lord Meadowbank.—I think the action properly brought, and that the lessee had a clear interest to get the matter determined. The resolution adopted by the commissioners materially abridged his right; and I think he was entitled to bring them into Court as the parties to the contract of lease. I throw out of view all considerations of cleanliness. The Act was passed on a joint agreement between those residing within the burgh, and those without. And the first declaration of the Statute is, that all *fulzie* within burgh belongs to the Police Commissioners. Those within burgh surrendered the whole of their *fulzie*, with a few exceptions; but the proprietors beyond burgh reserved the whole of theirs, except what was taken from them by the Statute. The Statute must consequently be interpreted favourably as to them. In property beyond a burgh, "tenement of land" means a place, and I would not put a restrictive meaning upon it, seeing there is an exclusive right to their *fulzie* in such proprietors.

Lord Medwyn.—The question is as to the construction of the term "tenement of land." The resolution of the commissioners has no reference to any previous agreement with the proprietors beyond the burgh. The construction put upon it by the commissioners was declared for the information of the public, and though not a regular bye-law, it had the effect of one. In my opinion, the construction is wrong. The derivation of the two expressions, land and tenement, can admit of no doubt,—the one being clearly referable to the use of the building erected on the land, and the other to the *terra* or ground on which it rested. And the synonymous use of the terms, land and tenement, may be traced through many of the older Statutes, and more early decisions of the Court. The term tenement of land means a house,—one building only, though consisting of different dwellings. Now, are these words used in this Act to comprehend crescents and streets? The exception applies, first, to proprietors, and second, to inhabitants of the same land; and it would be wide of the policy of the Act to extend it to crescents or joint-stock proprietors. As to whether the commissioners are the proper parties to the action, it is to be observed, that the conclusions are, in the first place, declaratory; and in such a question of general interest, individuals could not be good defenders. The commissioners voluntarily passed the resolution complained of when there were no parties claiming the exemption. Their scavengers, in consequence, stop collecting the *fulzie*, and I see

no ground for holding that they are not the proper defenders—at least to the extent of the declaratory conclusions. They are parties to the contract, and withhold a part of the subject let. They must therefore be answerable, and make good the loss.

Lord Moncreiff.—The first question is as to the construction of the term "tenement of land," and is said to involve the interest of the pursuers to the amount of £1500; but the proprietors from whom the *fulzie* must be taken, have an interest precisely to the same extent. The second question is as to whether the commissioners are the proper defenders in the action. The pursuers require the Court to declare the construction of the term used in the Statute as preliminary to a claim of damages. If they be wrong in their construction, absolvitor follows. Now I think the Lord Ordinary and the Commissioners of Police have rightly interpreted the Statute, and that the pursuers are wrong. Attending to the whole clause, the purpose was to reserve the patrimonial rights of parties without the burgh, otherwise the Statute would not have been agreed to. I don't go into the etymology of the words, but I cannot hold that houses alone are carried by tenement of land. I go upon the fair meaning of the Act of Parliament; and there is a marked distinction between the exemption of all *fulzie* belonging to proprietors beyond burgh, and the limited reservation of it to those within. It shows that it was matter of agreement, and that it was only a limited effect which was intended by the Statute.—(Reads exceptions, § 112.) I give some weight to the opinion of the Commissioners and Police Magistrates, as having an interest the other way, and also having a personal acquaintance with the place. It is a delusion in comparing these buildings even to Holyroodhouse. Their utmost length is only seventy yards. Take James's Court,—say the north side, which is all under one roof, and belongs to the same proprietor,—is that not a tenement of land? Second, I doubt whether this action can go on to its conclusion in its present shape. The summons calls on us to declare the term "tenement of land" to be applicable only to a single dwelling-house, and does not extend to any square, range or angle of buildings, whether the same belong to one individual or body of individuals, or to many. In the second place, it concludes that the commissioners should be decreed to rescind their resolution, and to cause their scavengers to assist in collecting the *fulzie*; and on these, as *rationes*, it farther concludes for damages against the commissioners. Now, this assumes that the commissioners can compel the proprietors to submit to this collection, and is this to be decided in a declarator, without calling the proprietors? The commissioners and the lessee both stand in the same interest. Suppose the commissioners had published no opinion, and the proprietors had resolved to resist the collection, the action must have been raised by the proprietors against both commissioners and tenant. If the Court say that the commissioners are wrong, another action must arise with the proprietors, in which it may be found that the commissioners were right at first, and that neither they nor their tenant could disturb the patrimonial rights of the proprietors. This appears anomalous. The declarator must go for nothing against the proprietors, and yet you decide, *ab ante*, that the commissioners are liable in damages for presuming to have an opinion. Damages may be found due, and the lease at an end. And after all, when the commissioners demand *fulzie* from the proprietors, it would be no answer to their resistance, that the commissioners had obtained a construction of the Statute favourable to their right in an action between themselves and their own tenant. I think it doubtful whether the commissioners might pass a bye-law binding upon any one. They might control their own servants, and thereby the lessee may have incurred loss; but in recovering, I think that he must call the proprietors.

In consequence of this difference of opinion, an interlocutor was pronounced appointing minutes of debate, with a view to the pleadings being laid before the whole Judges for their opinion.

The following opinions were returned by the consulted Judges:

Lord Fullerton, Lord President (Boyle), Lords Gillies, Mackenzie, Murray and Ivory:

"We are of opinion that the interlocutor of the Lord Ordinary ought to be altered. It is there substantially found, that the term '*tenement of land*,' employed in the 112th section of the Statute, and in the pursuer's lease, embraces 'squares, courts, or any continuous range of buildings erected by or belonging to one proprietor, or *pro indiviso* owners, and let out by them to separate tenants, whether separated by party-walls or not:' a construction for which we see no sufficient ground, and to the accuracy of which we cannot assent.

"The expression occurs in a Statute relating to the police of a burgh. It is evident from that circumstance, as well as from the context and from other passages of the Statute, that it is used to denote some limited portion of building: a sense in which it is well known, and in common use in Scotland. And however difficult it may be to define its limits with absolute precision, one thing is to us perfectly clear, that single or *pro indiviso* proprietorship, the circumstance referred to in the resolution of the Police Commissioners, and the interlocutor of the Lord Ordinary, forms no element of that definition. 'A land,' or 'tenement of land' is commonly, indeed most frequently, applied to buildings, which are not merely occupied by different families, but owned by different proprietors. And while the admission of this element would in many cases narrow the definition too much, it would lead to its most unconscionable extension in others. For the application of the term 'land,' or 'tenement of land,' to a range of houses, the side of a square, or a whole street, merely because they had been originally built, or had been subsequently acquired by one proprietor, is a novelty which, we will venture to say, was never heard of before the resolution of these Police Commissioners.

"Proprietorship, then, may be thrown out of view as entirely irrelevant; and the true meaning must be sought for in the term itself, and in the circumstances of the buildings to which it is usually applied.

"Without entering minutely into any antiquarian inquiry, it seems to us sufficiently evident, from the passages quoted by the pursuers, that the expression 'tenement of land,' or 'land,' as applicable to houses or buildings in a town, arose naturally enough from the extension of the term 'land,'—the proper designation of the *solum*, to the superstructure; which formed, in the general case, the most important and valuable of the two component parts of the heritable possession. It clearly involves, then, the combination of the area or *solum* with the whole building erected upon it. And when the question is, what shall be held to be one 'tenement of land,' or the 'same tenement of land,' we see no more satisfactory answer, than that it is an area, or portion of *solum*, with its whole superstructure; that superstructure being such, that the area or *solum* does not, while the superstructure remains, admit of farther division or separation. It is 'one land,' or the 'same tenement of land,' because, from the arrangement of the building, there cannot well be any further division of the one area on which the building stands. And according to that view, we are disposed to adopt, as sufficient for all practical purposes, the description concluded for in the summons, viz., that the term is properly applicable 'to a single or individual building, although containing several dwelling-houses, with, it may be, separate means of access, but under the same roof, and enclosed by the same gables or walls.' And while we are disposed to adopt this affirmative part of the conclusion, we have still less doubt of the negative which follows, that it does not 'comprehend any square, range, or angle of buildings consisting of several houses completely divided from each other by party-walls and separate roofs, whether the same belong to one individual or body of individuals, or many.'

"Holding this opinion on the true construction of the disputed term employed in the 112th section of the Statute, and in the pursuer's lease, we do not feel the force of the supposed difficulty (suggested since the record was closed), of sustaining these conclusions, directed as they are against the Police Commissioners, and without calling any of the inhabitants interested in the exemption. That difficulty appears to us to be removed by the proceedings of the defenders which gave rise to the action, and by the particular nature of the action itself.

"The Statute contains, in the 112th section, a grant of certain rights to the Police Commissioners, under certain ex-

ceptions. The true extent of one of which exceptions, depends on the force of the term 'tenement of land.' The extent of the exception varies with the latitude or limitation of this term. The lease held by the pursuer conveys the rights vested in the Police Commissioners, under the exceptions repeated in the very terms of the 112th section of the Statute. And certainly, if matters had been left by the defenders to stand upon the words of the lease, an action by the lessee against them, for declaring the particular construction of the right at once most favourable to the lessee and the lessor, would have been a useless and incompetent proceeding. But matters were not so left by the defenders. A very short time after the lease was granted, by which the lessee was bound to pay a large rent, they, by their resolution of the 11th April 1838, chose to declare that a certain description of buildings should 'be reckoned as one tenement for the purposes specified in this part (the 112th section) of the Police Act;' a construction confessedly unfavourable to the lessee. And this resolution they, notwithstanding the protestations of the pursuer, finally adhered to and promulgated, as they themselves state in the defences, 'by a note inserted in the printed copies of the bye-laws which came into operation at Whitsunday 1838.'

"By this the defenders, under whose authority alone the rights made over to the pursuer by the lease could be exercised against the inhabitants, intimate to the public their view of the meaning and effect of a particular term in the Statute and the lease, by which the exemption available against the pursuer is materially extended, and her rights proportionally confined. Now, we entertain no doubt, that in these circumstances the pursuer, the lessee, had a good title and interest to declare the true meaning of the Statute and lease against the defenders, the lessors; and to demand the recal of that resolution, if she could show that it was erroneous. The defenders might have rescinded it if they chose; and then the question, *quoad* them, might have been put to rest. But if they refused, they could only refuse on the ground that their construction was the true one; so that there necessarily arose, between these two parties, an apt subject of legal discussion and adjudication. It may be at once useless and incompetent for a tenant to declare, in an action against his landlord, a favourable construction of the rights in which both have an interest. But if the landlord chooses to adopt a particular view of those rights, unfavourable to the tenant, and to act upon that construction, there seems no doubt, either of the reasonableness or competency of the tenant calling the landlord into Court, to defend his view of the extent of the lease, if he does not choose to recal those acts by which he has infringed it. For it seems to us that he must be held to have infringed it, and the implied warranty contained in it, if he has wrongfully attempted to narrow its provisions, to the disadvantage of the tenant. The objection, that the judgment in this action may not form a *res judicata* against the inhabitants, and that therefore they ought to be called, is irrelevant. To support an action against one person or set of persons, it is not necessary that the judgment to be pronounced in it should be *res judicata* against all others who may plead the same principle in defence. The only point to be considered is, whether there is not a good ground of action between the pursuer and defenders, and we apprehend that, keeping in view the nature and object of the present action, demanding the recal of the resolution of the 11th April, and insisting for certain conclusions, supposed to be consequential on the refusal, the defenders are the parties and the only proper parties.

"What steps the pursuer might think proper to take against the inhabitants, if any of them adopted the construction of the Police Commissioners, it is unnecessary for us to inquire; but we can entertain no doubt, that the pursuer had a good title and interest to demand at once the recal of that resolution, which necessarily afforded the sanction of the commissioners to a resistance which otherwise never might have been thought of, and which the commissioners are bound to recal, unless they can show that it was warranted by the Statute.

"It is hardly necessary, in such a case, to resort to analogies; but one is too obvious to be overlooked. In the case of a lease of tolls by the trustees of a public road, it might happen that the trustees thought it their duty to adopt a particular view of

one or more statutory exemptions, materially affecting the lessee's interest, and to promulgate that as their construction of their own and the tenant's rights. Can there be a doubt that the tackaman would be entitled to ascertain, by declarator against the trustees, the true construction of the Statute; and could the objection be listened to, that no such action was admissible, unless he called into Court all those persons who *might* travel the road and *might* be called upon to pay? The same answer must, we think, be given in that case and in the present, viz., that whatever may be the result of a discussion with others, there is a good cause of action existing under this summons, as between the pursuer and defenders, on which the Court is bound to adjudicate.

"On these grounds, we think the interlocutor of the Lord Ordinary ought to be altered, and that decret ought to be pronounced in terms of the two leading conclusions of the libel,—the first declaring the meaning of the term 'tenement of land,' and the second calling on the defenders to rescind the resolution of the 11th April 1838, and to give the pursuer the usual assistance, and that, *quoad ultra*, the case ought to be remitted to the Lord Ordinary."

Lord Cockburn :

"I concur in this opinion, in so far as relates to the meaning of the term 'tenement of land,' and to the propriety of altering the interlocutor. But I do not see how the question of damages can be properly tried without calling the inhabitants, who are the only parties interested in maintaining that the fulzie belongs to them; and if they be right in this, no damage can be due, whatever judgment may be pronounced as between the parties now before the Court."

Lord Cuninghame :

"Notwithstanding the ample discussion which this case has lately undergone, I am constrained to adhere to the opinion expressed (as I now think with unnecessary limitations and caution) in my interlocutor and note of 20th July 1840.

"The question turns on the proper construction of the Police Act of the burgh, suburbs, and extended royalty of Dundee, passed in 1837, in its provision as to the dung, soil, and refuse of houses situated within the limits of the Act. By sect. 112, the whole filth of this description is vested in the Commissioners of Police, under certain specified *exceptions* enumerated in the Act, among which the following occurs:—'And also *saving* and *excepting* the whole dung, fulzie, soil, dirt, ashes and filth, from places situated *beyond* the boundaries of the ancient burgh of Dundee, belonging to any person having an ash-pit or necessary for the use or accommodation of his family, and for receiving the dung, fulzie, soil, ashes, and filth of such family exclusively, or belonging to any persons inhabiting the same tenement of land,' &c.

"The pursuer, as representing the lessee who took the police dung of the town of Dundee for three years from Martinmas 1838, has brought the present action to have it found and declared that the preceding exception applies only to the fulzie of tenements of houses contained within the same roof, and enclosed within the same gables and party-walls (see summons), and not to any lot or combination of houses built on the same 'tenement of land.' It now humbly appears to me, not only that the pursuer's plea is at variance with the plain language and object of the Statute, but that the exemption should have been expressed in wider terms than are used in the interlocutor of 20th July. That judgment was framed in reference to the peculiar pleas raised in the summons and defences, to which the argument of the parties in the Outer-House was in a great measure confined; while the later discussion before the Court has suggested a more careful examination of the Statute than the parties previously entered into.

"I. In the first place, it is thought that the words of the Statute are clear, positive, and unambiguous. When all persons inhabiting the same 'tenement of land' get a particular privilege, the import and extent of that right is, in the general case, as well understood in Scotland as in any other part of the empire. It is supposed clearly to comprehend, in the ordinary understanding of men of business and the public, at least the whole inhabitants of such properties as have been feued or leased

out, or are otherwise held under the same proprietor,—and, without violence to the words, it may comprehend all inhabitants occupying houses which, at the date of their erection, were held under the same superior or mid-superior;—in short, it must include all who occupy houses which, by the act or arrangement of the proprietor, or immediate superior of the locality, form parts of the same heritable estate, or tenement of land, set apart for dwelling-houses, with their own *peculiar* and *common* pertinents.

"In fact, tenement is a term so common in its use, and so well understood in its import, that there seems to be little difference in the meaning attached to it, either in this country or in England. Blackstone says (B. II. chap. 2),—'Land comprehends all things of a permanent, substantial nature, being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent; and though, in its vulgar acceptation, it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies every thing that may be *holden*, provided it be of a permanent nature.' If that be the interpretation put on the word 'tenement' *per se*, it is clear that the legal import of the term 'tenement of land' must be still less ambiguous.

"It is contended that a different construction must be put upon the term under this Act of Parliament, as the words 'tenement' and 'land,' in the phraseology of the ancient Statutes of Scotland (as well as in the language of the common people at this day), generally refer to a single building, consisting of tiers of floors, occupied by separate families, covered with the same roof, and, in the language of the summons in this cause, 'enclosed by the same gables and walls.' But it humbly appears to me that there are insurmountable objections to this view of the clause. It is very true that in many of the ancient Statutes of Scotland relative to buildings within burgh, the words 'land' and 'tenement' were often used indiscriminately and synonymously to describe the large buildings inhabited by several families on each floor, which are so common in Scotch towns, and in many of the cities of the continent; but the Act of Parliament on which the present question is raised, is not a Scotch, but a British Statute, and it is expressed throughout in the modern language of the Legislature. Hence its terms must be judged of according to the present import of the words used, and not according to that of the ancient Scotch. I am not aware, indeed, that there is any instance since the Union, of any Statute, either general or local, having been passed in which the terms 'tenement' or 'land' has been used in the sense contended for by the pursuer.

"Besides, even if the most ancient and familiar dialect of Scotland were examined, it is not thought that the term 'tenement of land' would be found ever to have been in use to denote single buildings. A 'land' of houses was, and is to this day, a word in familiar use in Scotland,—and 'tenement' is a term equally well understood both in Scotch and English towns—but there does not appear to be an example, either in the ancient or colloquial language of Scotland, of a 'tenement of land' being used to denote a single 'tenement of building,' enclosed within the same gables or party-walls.

"II. In the next place, however, proceeding from mere words to the substance of the enactment, on which the question depends, it seems impossible to sanction the plea of the pursuer without doing great violence to the probable meaning and object of this clause of the Statute; which, it is rather thought, has not as yet been brought sufficiently into view. The object of the Act was to provide for a police, not only within the ancient town of Dundee, but within the whole district of the burgh, as recently extended under the Reform Act. This comprehends what is at present a large *landward* district, extending (as appears from the first clauses of the Police Statute) from the village of Lochee on the north-west, to the village of Broughty Ferry on the east. The parliamentary plan, which bears reference to these boundaries in the Reform Act, shows that this is a district comprehending some miles in point of extent, and of course must contain many 'tenements of land' belonging to different parties, bodies corporate, and others. These facts being indisputable, they afford, in my humble opinion, unerring criteria for the construction of the Statute here libelled on.

"It is not denied that the dung of the extended district was

not vested in the Commissioners of Police prior to the Act. Under the Police Act, however, it was for the first time given to the Commissioners of Police, under large reservations, in favour of proprietors and private parties living in the extended district; and one of these was a reservation of the dung 'belonging to any persons inhabiting the same tenement of land' beyond the old burgh, provided only they had a necessary and ash-pit of their own, in a situation not used by others, nor offensive to the neighbourhood. Now, as this was a reservation of a common-law right of property previously belonging to the private parties, it must be construed as broadly as the words fairly admit. And construing this Act, as it must be interpreted, according to the nature and situation of the territory to which it applies, it humbly appears to me, that where the proprietors and inhabitants scattered over several thousand acres of a suburban and rural district, got the dung reserved belonging to all who inhabit the same 'tenement of land,' it must be understood that that term was used in the Statute in its most extensive, as well as in its legal and popular acceptance. In particular, it does not seem reasonable to hold that the term 'tenement of land' was used as synonymous with a single 'tenement of building,' which would have rendered the reservation of the least possible value to all inhabiting the neighbourhood and their successors.

"If a contrary interpretation were adopted, no parties living in the villages of Lochee or Broughty Ferry, or in any of the lands lying in the wide intermediate space, could claim the dung of any such property, which he had laid out in dwelling-houses with every suitable convenience in the places of his tenement, most satisfactory to the inhabitants, unless each house, enclosed within the same roof and walls, had a separate ash-pit. But construing the Act with reference to the situation and extent of the subjects to which it applies, the preceding construction does not appear to me to be consistent either with its letter or spirit.

"It is thought that we are not excluded, but bound in determining the legal import and extent of this, and of every Act of Parliament of the same kind, to look to the *state of possession* at the time it was passed, in explanation of the probable object and import of any part of the Statute that may be disputed. There have been produced in this cause, *diagrams* of five or six tenements of land in the extended district of Dundee, on which houses have been built with all the statutory pertinents, and it was added in debate, that there were hundreds of other tenements in similar circumstances within the extended police district. But if there be, and if the proprietors or inhabitants of these tenements had come forward and claimed their exemption in this Court as they did before the Police Commissioners, it is very difficult to see on what ground their claim could have been resisted. They inhabit the same 'tenements of land,'—there are established on each tenement, necessities and ash-pits satisfactory to the inhabitants, and these are 'not offensive to the public.' How then is it possible to refuse the benefit of the exemption to parties who are within every one condition of the Statute?

"In a case of this description, with deference, it appears to be out of the question to apply the limited construction to the term 'tenement' (even if that word stood alone), which might be reasonable, if the subject to which it applied stood in the midst of an old-built and crowded town. But that is not the case here. The whole tenements in the *old* part of Dundee (with certain trifling exceptions) were given over to the commissioners; and the reservations now under consideration were made to apply solely to the inhabitants of tenements of land situated in a district comprehending, of course, many houses and streets, but also applicable to a tract of country extending over miles of a suburban and rural district.

"Neither is there any authority in the other clauses of this Statute, to warrant the construction, that tenement of land does not mean a tenement of ground in its legal and ordinary sense. On the contrary, there is direct proof afforded by other clauses, to show that the framers of this Act did not use either the term 'tenement' or 'land' to express single buildings of successive tiers of floors. Thus, in section 119, as to cleansing the pavements, and in section 123, as to the supply of water into buildings occupied by separate tenants on each floor, such subjects

are referred to, not as tenements or 'lands,' but as houses divided into *separate floors*. And then again, the term 'land' is also used in its modern and ordinary sense in section 163-168, and intervening clauses, giving the commissioners power to purchase 'all such lands, houses, tenements, and other heritages as may be necessary for the purposes of the Act.' In these sections, lands are obviously referred to in contradistinction from houses.

"On these grounds, I am humbly of opinion that the Commissioners of Police acted *within* their powers, when they declared that 'any square, range, or angle of buildings in the extended royalty, belonging to *one proprietor*, or joint *pro indiviso* proprietors, having one common ash-pit and necessary, so as to enable the inhabitants to provide, as at present, for their convenience, comfort or cleanliness, shall be reckoned as *one tenement*, for the purposes specified in this part (section 112) of the Act.' It humbly appears to me, that the inhabitants of houses even disjoined, if built on the same tenement of land, and possessed of a suitable ash-pit and other conveniences, are entitled to retain their own dung and ashes; and *multo majus* must dwelling-houses be exempted, which are continuous and built on the same property, and so fall within the cautious regulation of police complained of in this summons."

Lord Jeffrey absent from indisposition.

At advising the cause of this date,

Lord Meadowbank.—I adhere to my former opinion.

Lord Medwyn.—I retain my opinion.

Lord Moncreiff.—I retain my opinion, and concur with Lord Cuninghame in thinking, that tenement of land is used in this Statute different from its ordinary sense. I remain also of opinion, that the mode of trying the question is incompetent. The commissioners may have to pay damages to the extent of £1500, and on again letting the subject, it may be found that they have no right to let it. The case of the toll-bar is different,—the right of way belongs to all the world; but here the question is as to heritable property, and the Police Commissioners are proceeding to try it with their own tenant, without calling the party having the real interest.

Lord Justice-Clerk.—I concur with the opinion of the majority of the consulted Judges, that the interlocutor of the Lord Ordinary must be altered. As to the necessity of calling the inhabitants, the commissioners let the *fulzie* under the Act—they retained the power of cleaning in their own hands, and also the control over the scavengers. The summons says that the *fulzie* can only be collected through their assistance. This the pursuer must prove. But if a landlord publicly declares that he has no right to part of the property which he has let to his tenant, the tenant is entitled to proceed against him. The commissioners appear as contradictors; and this of itself raises the right of the pursuer to have the extent of his right declared. In the second place, he is entitled to have declared the extent of assistance to which he is entitled from the scavengers. He is entitled to these findings as *matter of pleading*,—in the first place, to make his claim against the commissioners, and in the second place, to clear his title against third parties. As to the claim of damages, that is for the jury.

The Court pronounced the following interlocutor:

"In respect of these opinions, alter the interlocutor complained of: Find, and decern, and declare, in terms of the declaratory conclusions of the libel, as to the meaning of the term 'tenement of land,' and find the defenders bound to give the pursuer the aid and assistance incumbent on them under the contract of lease: *Quoad ultra*, remit to the Lord Ordinary to proceed further in the cause: Find expenses due to the pursuers, from the date of the Lord Ordinary's interlocutor, and also remit to the Lord Ordinary to proceed accordingly; reserving other claims of expenses till the conclusion of the cause."

Pursuers' Authorities.—*Leges Burgorum*, c. 137 and 29. Acts 1551, c. 226; 1663, c. 6. Jamieson's Dict. *voce* Tenement. Sup. p. 545. Burns' Letters, I. p. 63. Arnott's History, p. 241. Lamb, Dict. 4812. Williamson, Dict. 4815. King, Hume's Dec. p. 257. Bell's Dict. *voce* Roof. Common Interest. Dean of Guild. Bell on Deeds, I. p. 493. Juridical Styles, I. p. 594.

Defenders' Authority.—Ersk. II. 9, 5 and 6.

Lord Ordinary, Cuninghame.—Act. Robertson, Cowan; William Miller, S.S.C., Agent.—Alt. Rutherford, Deas; Brown and Miller, W.S., Agents.—F. Clerk.—[J.W.]

12th January 1842.

SECOND DIVISION.—(J.W.)

No. 69.—ROBERT DALGLEISH and MANDATORY, Pursuers, v. LIEUT.-GEN. DUNCAN DARROCH, Defender.

Special case, in which the rule that money-advances can only be proved by writ or oath, was applied.

Act. Anderson, Neaves; George Macallan, W.S., Agent.—Alt. Dean of Faculty (Wood), Penney; Andrew Clason, W.S., Agent.—F. Clerk.—[J.W.]

13th January 1842.

FIRST DIVISION.—(H.B.)

No. 70.—THOMAS ROBERTSON, Raiser, v. LIEUT.-COL. JOHN GORDON and ALEXANDER MILLAR, Claimants.

Bankrupt—Sequestration—Statute 1 and 2 Vict. c. 41—Diligence—Arrestment—Assignment—Competition—*In a competition in a process of multiplepounding, the trustee in the sequestration of a deceased debtor preferred to a creditor who had used arrestment, and obtained an assignation in security in the debtor's lifetime.*

James John Fraser, W.S., having certain claims against James Earl of Fife, used arrestments in the hands of his Lordship's tenants on the estate of Carreston. Afterwards, in July 1830, Mr Fraser, by a deed bearing to be for onerous causes, but said to be merely in trust for his own behoof, assigned these claims, with the arrestments, to Mr Hugh Macqueen, W.S. The tenants brought a process of multiplepounding, and in 1833 decree was pronounced preferring Mr Macqueen to the fund *in medio*, amounting to £113. 14s. 1d.

In August 1830, Colonel Gordon of Cluny brought an action of count and reckoning against Mr Fraser; but after the action had been some time in dependence, an agreement was entered into, by which the parties consented to a judicial reference, and Mr Fraser assigned to Colonel Gordon, "in security of any balance" which might be found due to him, the sum of £500, of the first and readiest parts of a sum of £500 and upwards, said to be due to Mr Fraser by Mr Hugh Macqueen. In July 1838, an award which had been pronounced by the referees, finding a sum exceeding £18,000 to be due to Colonel Gordon, became final. On 12th February 1839, Colonel Gordon, in virtue of this award, used arrestments in the hands of Mr Thomas Robertson, accountant, who had been appointed judicial factor on the estate of Carreston, and on the 14th, Mr Robertson raised a process of multiplepounding, in which the fund *in medio* was stated to amount to £128. 10s. 6d., being the sum of £113. 14. 1. which had been found due by the tenants of Carreston, with the interest which had accrued upon it since the date of the decree. In this process appearance was made by Colonel Gordon, who claimed to be preferred in virtue of the arrestments, and of the assignation in security which he had obtained on agreeing to the judicial reference. On the 3d of June 1839, during the depen-

dence of this process, Mr Fraser died, and, in April 1840, his estates, as those of a deceased debtor, were sequestrated under the recent Bankrupt Act, 2 and 3 Vict. c. 41. Mr Alexander Millar, S.S.C., having been appointed trustee, entered appearance in the process of multiplepounding, and claimed to be preferred to the fund *in medio*, in virtue of the 78th section of the Statute, which enacts, "that the moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, shall, by virtue of the act and warrant of confirmation in favour of the trustee, be transferred to, and vested in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title and interest, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible."

In opposition to this claim Colonel Gordon *pleaded*, that this section of the Bankrupt Act "cannot be construed as entitling the trustee on a sequestrated estate to uplift funds belonging to the bankrupt which had been previously attached by the diligence of arrestment, or vested in an assignee before the common debtor was rendered bankrupt; and there is no principle of expediency for extending the provision of the Statute, as contended for by Mr Fraser's trustee."

The Lord Ordinary, "at the request of both parties, and in respect of the difficulty and importance of the point at issue, as expressed by the Court in the analogous case of Lindsay v. Paterson, 10th July 1840," appointed the parties to prepare mutual cases for the First Division of the Court.

Pleaded by Colonel Gordon—

The recent Bankrupt Statute has only a prospective, and not a retrospective effect. It was to come into operation "from and after the end of the present session of Parliament" (1839), whereas the securities on which the claim of preference is founded, existed long before that date. The trustee does not plead that these securities are null and reducible, to the effect of entitling Fraser's other creditors to a share of the fund *in medio*, and in the absence of such a plea, it is not easy to discover on what grounds he can resist decree in the multiplepounding in favour of the present claimant. The bankrupt himself could not have objected to the securities, or to a warrant and decree in an action of forthcoming or distribution founded on them. The process of multiplepounding is similar in its nature and effects to such an action; and if the bankrupt could not have resisted it, his trustee, who is only a subsequent assignee, cannot plead a higher right than would have been competent to his cedent. The clause of the Statute on which the trustee founds, does not support his claim. *First*, it is only in "so far as attachable for debt" that the moveable estate and effects of the bankrupt are to be transferred to the trustee. But the present fund *in medio* was not properly attachable for any debt but that of the present claimant,—for, (1.) it was formally assigned, and (2.) it was arrested by a legal diligence, subject to no intrinsic nullity. Again, the Act provides, that the transference and veating in the trustee shall be "for behoof of the creditors absolutely and irredeemably, as at the date of the sequestration." In the present instance, it is impossible for the trustee to maintain that there was vested in him an absolute and irredeemable right to this fund for the behoof of the creditors generally. Again, the Act confers on the trustee, right, title and interest only, "to the same effect as if actual delivery or possession had been obtained, or intimation made at that date" (of sequestration). But if the transference takes place only as at this date, the trustee cannot compete, for payment or possession, with creditors or assignees who have secured posses-

sion, or hold securities intimated at an earlier date. Accordingly, the transference and vesting in the trustee is expressly declared to be "subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible." On the interpretation of the Act contended for by the trustee, not only will the present claimant be compelled to place himself as a creditor claiming under the sequestration, and submit his claim of preference to the party actually opposing it in the present litigation; but, on the same principle, every person holding a security resulting from possession or right of lien, will be obliged to act in the same way;—in other words, will be obliged to deliver up his security to the trustee, and betake himself to a remedy subject to all the risks and consequences attending a claim on a sequestrated estate. It is impossible to believe that this can be the fair construction of the Statute. The case of *Lindsay v. Paterson*, on which the trustee rests his claim of preference, does not bear it out. In that case the *species facti* were essentially different from the present, and the opinions, in so far as they appear favourable to the trustee's claim, can only be regarded as *obiter dicta*. (1.) In that case there was no regular or proper process of competition between the parties. The question came before the Court by a summary application, reported on cases from the Bill-Chamber, to have a Scotch banking company, who had petitioned for the sequestration, interdicted from following forth a separate process in England in the Lord Mayor's Court. (2.) The attachment founded on by the bank was within sixty days of the sequestration, and was, in this respect, essentially different from the securities of the present claimant. 3. It was pleaded there, and is not pleaded here, that the securities are null and reducible. On these grounds, the trustee can derive no aid from that decision.

Pleaded by the trustee—

The obvious meaning of the 78th section of the Statute is, that the bankrupt's effects, wherever situated, shall be transferred to the trustee, and vested in him, subject always to existing preferable securities which are not null and reducible. If, after the vesting, Colonel Gordon shall establish a preference, the trustee, in his judicial capacity, will at once give effect to it; or, if he refuse, speedy redress will be obtained by a summary complaint to the Court. It is thus impossible that any substantial damage can be sustained by any creditor claiming a preference. But, even if it were otherwise, the trustee is not called upon to discuss the expediency of the provisions in the Statute. If these provisions exist, effect must be given to them. The case of *Lindsay v. Paterson* is directly in point; and the fact that it has not been appealed, notwithstanding of the ample means of the litigants, leads to the inference, that the question, as decided, does not admit of the slightest doubt. The judgment was unanimous, and was adopted on the express ground that the 78th section of the Statute did not admit of any other interpretation. But it is said, that to sustain the trustee's claim, would be to give the Statute a retrospective effect in the face of a direct provision in it to the contrary. This argument evidently proceeds on a misinterpretation. It is true that all sequestrations awarded prior to 1839, were to be carried through under the former Statute; but it is also true, that all sequestrations awarded subsequent to that date, were to fall under the new Statute. The present sequestration was so awarded. In fact, it could not have been awarded otherwise,—the estate being that of a debtor deceased. On the view taken by Colonel Gordon, there could be no competent sequestration of the estates of a debtor who died before 1839; but the contrary has been already decided more than once. *Newall's Trustees*, June 13, 1840. *Case of Aichison*, same date.

The cause being advised,

Lord President.—After giving all the attention in my power to the present case, I am unable to see anything in the specialities of it to distinguish it from the case of *Paterson*. I think it clear that the trustee has put the right construction on the 78th section of the Statute. If Colonel Gordon has a good ground of preference, effect will be given to it; or if the trustee adopt an erroneous construction, he will be corrected by the Court. To decide differently from the case of *Paterson*, would, in my opinion, just be to run in the face of the Act of Parliament.

SCOTTISH JURIST.

The other Judges concurred, and the Court pronounced the following interlocutor:

"Find the claimant, Alexander Millar, as trustee on the sequestrated estate of James John Fraser, the common debtor, entitled, under the 78th section of the Bankrupt Statute, 2 and 3 Vict. c. 41, to the fund *in medio*, subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible, and rank and prefer the said trustee accordingly; and grant warrant to, and authorise and ordain the cashier of the Royal Bank of Scotland to pay over the fund *in medio*, consigned in said Bank, to the said trustee, with interest since the date of consignation, and authorise the clerk, custodian of the deposit-receipt, to deliver up the same to the trustee, and decern."

Lord Ordinary, Cockburn.—*For Colonel Gordon*, Anderson, Hector; John Hunter, W.S., *Agent*.—*For Trustee*, Maidment; *Party Agent*.—N. Clerk.—[H.B.]

13th January 1842.

FIRST DIVISION.—(H. B.)

No. 71.—COLIN M'ARTHUR and THOMAS GEMMILL, *Pursuers*, v. JOHN MELVIL M'ARTHUR, *Defender*,—*Et è contra*.

Process—*Jurisdiction*—*Heir-Apparent*—*Foreign*—*A foreigner having right, as heir-apparent, to an heritable estate in Scotland, is subject to the jurisdiction of the Court of Session, though he has neither taken possession nor made up any title.*
Jurisdiction—*Foreign*—*Question, Whether the Scots Courts have jurisdiction over a foreigner, where the forum originis, locus contractus, and locus solutionis are Scotch?*

In January 1817, the estates of Robert Macfarlane and Company, carrying on business as merchants at Greenock, and of Robert Macfarlane as an individual residing there, were sequestrated. The other partners of the company were Benjamin Scott and John Melvil M'Arthur, both resident abroad,—the former in Newfoundland, and the latter in the island of St Vincent. Owing to the foreign domicile of these partners the sequestration was not extended to them as individuals. Duncan M'Arthur, senior, the brother of John Melvil M'Arthur, and also resident in St Vincent, was ranked in the sequestration for a debt of £3061. 2. 6., constituted by three promissory-notes for £530, £531. 2. 6., and £2000, granted to him by Macfarlane and Company on the 14th October 1816, and payable—the first on the 31st December 1816, the second three months after date, and the third on the 1st July 1822. After certain dividends had been paid from the sequestrated estate, an arrangement was entered into in 1828, by which Robert Macfarlane, on a payment of a certain sum to the creditors for his behoof, obtained his discharge, both as an individual and as a partner of the company.

Duncan M'Arthur, senior, died in 1835, leaving a deed of settlement in favour of his natural son, Duncan M'Arthur, junior, and Jacob Kladen, of the island of St Vincent. From the want of proper dispositive words this deed was ineffectual to carry heritage in Scotland, and consequently, a small property which had belonged to him at Dunoon remained in his *hereditas jacens*—the person entitled to succeed to it being John Melvil M'Arthur, his heir-at-law. In 1836, Duncan M'Arthur, junior, as sole surviving executor of his father, brought an action for payment of the balance of the debts ranked in the sequestration of Robert Macfarlane and Company. This action was directed against the company, and against Robert Macfarlane and John (Melvil) Mac-

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Arthur, the only surviving partners, as individuals,—the summons of constitution setting forth with regard to the latter, who was still abroad, that he had succeeded to heritable property in Scotland (meaning the above property at Dunoon), and was subject to the jurisdiction of the Court of Session, as the proprietor of such heritable property. Macfarlane, founding upon his discharge, intimated that he would lodge defences, unless the conclusions against him as an individual were withdrawn; and a minute withdrawing these conclusions having been lodged, decree in absence was pronounced in January 1837 against Macfarlane and Company, and against John Melvil M'Arthur as an individual.

Duncan M'Arthur, junior, in whose favour this decree was pronounced, died at St Vincent in July thereafter, and Colin M'Arthur and Thomas Gemmill, his trustees and executors, in virtue of the decree, arrested certain funds of John Melvil M'Arthur in the hands of the Renfrewshire Banking Company and others, and thereafter brought an action of forthcoming. John Melvil M'Arthur, on the other hand, brought a reduction of the decree—*pleading, inter alia*, that “he ought to be reponed against it *in integrum*, because the decree was obtained against him in absence of his procurator, and when he was not only quite unaware of the proceedings which had been instituted against him, but had been afforded no opportunity whatever of becoming acquainted either with their institution or progress; because, while the said decree proceeds against him as being furth of Scotland, no arrestment was used *jurisdictionis fundandæ causa*; and although it is assumed in the summons under which the decree was pronounced, that he was proprietor of an heritable estate in Scotland, it is not true that he was so, in the sense at least, and to the effect of subjecting him to the jurisdiction of the courts of this country. He was not then, and is not yet, vested in any heritable property whatever in Scotland; although he admits that he has a claim to certain heritable subjects of no great value, which he may perhaps deem it expedient to assert and clothe with a title. In the meantime, these heritable subjects form part of the *hereditas jacens* of the pursuer's brother, Duncan M'Arthur, senior, and may or may not, according to circumstances, be taken up by the pursuer.”

The processes of forthcoming and reduction having been conjoined, the Lord Ordinary pronounced the following interlocutor disposing of the above preliminary defence:

“6th July 1841.—The Lord Ordinary having heard counsel on the record in these conjoined actions of forthcoming and reduction, and thereafter considered the processes and productions, Finds that it is proper that the objections urged by the alleged debtor, John Melvil M'Arthur, to the decree of constitution in absence obtained against him in this Court in July 1837, at the instance of Duncan M'Arthur, junior, then of St Vincents, now deceased, should, in so far as preliminary, be now disposed of, before considering the other pleas of the parties on the merits either in the reduction or forthcoming: Therefore, in the first place, with respect to the *jurisdiction* of this Court to pronounce the said decree of constitution, Finds that it was set forth in the summons which preceded that decree, that the whole debts sued for were contracted in 1815 and 1816, by a company, of which the said John M'Arthur was a partner, then carrying on business in *Greenock* and so were repayable there; that the said company had been *sequestered* in Scotland, and

the sums pursued for ranked therein: Finds farther, that it was alleged in the summons of constitution that the debtor had right to a landed property in Scotland, which property, it is averred in the present record, belonged to his deceased brother, and has for five years and upwards been claimable solely by the said John M'Arthur, as the late proprietor's apparent heir, and has not, in point of fact, been claimed by any other heir: Finds that the preceding facts being now established, either by the public records or by explicit averments on the record of this cause, admitted or not denied, it follows in point of law, that this Court had sufficient jurisdiction to entertain the said action of constitution, and to pronounce decree therein, if not obviated by other objections either to the form or merits of the process, of which the Court fell to take cognisance in common form; and so far repels the third reason of reduction, and decerns. In the second place, with reference to the *title* of the pursuer of the action of constitution, Finds, that as the claims pursued for belonged to Duncan M'Arthur, senior, of Dunoon, they fell to be liquidated by Duncan M'Arthur, junior, of St Vincents, pursuer of the action of constitution, as the only surviving executor of the original creditor, and therefore, that the said Duncan M'Arthur, junior, and his mandatories, had an undoubted title to raise that action: Farther, repels the other objections, in point of form, to the regularity of the decree of constitution: But in respect the alleged debtor objects to the *balance* claimed on the *merits*, and farther urges claims of *compensation* against the original creditor, while he farther urges pleas not only against the *title* of the pursuers of the forthcoming, but against the diligence of the creditor, on the ground that the funds in the hands of the arrestees were entirely derived from parties who expressly *excluded* such diligence, at the instance of the creditors of John M'Arthur, which allegation is not admitted,—Before farther answer on these and on the other points of the cause, remits the process, with the whole productions therein, to Mr William Moncreiff, accountant in Edinburgh, to examine the whole accounts and vouchers of the parties, and to call for such additional documents as he may think necessary, and to report,—1st, Whether the balance claimed and decreed for under the decree of constitution be sufficiently vouched, and still unpaid, in whole or in part, by the defender John M'Arthur, and to what extent, if any, the same has been *compensated* by vouched counter claims on the part of the original debtor; 2d, Whether the whole of the special legacies and burdens left by the will of Duncan M'Arthur, senior, of Dunoon, have been paid, and whether the sums pursued for, if due, belong to the *residuary* estate of that party; 3d, From what source the funds now in the hands of the arrestees were remitted to them, and on what title or terms they hold the same, so as to enable the Court to ascertain how far the creditors of John M'Arthur are entitled to attach the same; and generally, to report on any other points that can be ascertained from the accounts and documents produced or recoverable, which either party may suggest as material to any pleas on record, not now disposed of, on which they mean still to insist: Farther, grants diligence against havers for recovery of such writs as the accountant may require for the elucidation of the points now at issue; and grants commission to the said William Moncreiff to take the depositions of the havers, to be reported on or before the day of

next: Reserving in the meantime all questions of expenses.

“*Note*.—Since this case was before the Court in the summer session of 1840, on a reclaiming note as to the preliminary pleas (which was remitted to the Outer-House for farther discussion), a record has been made up on the whole cause, including both the preliminary and peremptory pleas; and after a very full and able argument from both parties, the preceding judgment has been pronounced, disposing of the objection to the jurisdiction, and to the form of the decree of constitution, but superseding consideration of the other pleas on the *merits* of the claim, and on the pursuers' title to insist in the forthcoming, till certain investigations are made by an impartial person skilled in figures and accounts, which has been directed in the close of the interlocutor.

“On the question of *jurisdiction*, the debtor's case was argued as if the creditor held him to be amenable to the Scots Court solely, *ratione originis*; and if so, the decision of the House of

Lords, in the case of Grant and Pedie (1 Wils. and Sh. p. 716), would be decisive against the jurisdiction. But the Lord Ordinary holds the nativity of the debtor to be the least material element in the present case. The admitted facts of his being a member of a Scots copartnership which contracted the debt in Scotland, and of course became bound to repay it here—and of that company being sequestrated and still undischarged, are all specialties which, independent of the defender's origin, go far to show that the Scots Court was the proper forum for the constitution of the claim contained in the decree now under challenge.

“The House of Lords reversed the decision of this Court in Grant's case, merely because it proceeded on the *forum originis* alone;—according to which *ratio*, all parties who have left Scotland *animo remanendi*, including natives, who, like the first Lord Mansfield and Admiral Greig, have never indicated any intention to return, and may not have set a foot in Scotland for sixty years, would still be held amenable to our Courts for all their transactions, wherever concluded. That was viewed as a very startling and unreasonable doctrine, not founded in modern law and custom, and therefore was rejected in Grant's case as sufficient *per se* to found jurisdiction. But the Lord Chancellor (Eldon), on remitting Grant's case to this Court for farther discussion, carefully reserved consideration of a creditor's right to sue a party who had left the *forum contractus* before paying his debt;—and Mr Ivory, in his edition of Erskine, has an excellent note on this subject (Vol. I. p. 36–38), which tends strongly to support the competency of the jurisdiction *ex contractu*, more especially when combined with birth and other specialties, to which it is sufficient to refer.

“The chief and overruling peculiarity, however, in the present case, is to be found in the fact set forward on the face of the summons of constitution,—that the debtor has *heritable property* in Scotland, which of itself would be sufficient to found jurisdiction, even if the debt had been contracted abroad. This is a fact in the case which has been satisfactorily elucidated since the preliminary pleas were argued in the Inner-House. It is now established that there is a property at Dunoon, to which the debtor has right as *apparent heir* of his brother. The fact of there being such a property is *admitted*. The fact of his *apparency* is also admitted; but the debtor adds, that he has never yet taken up, or entered into *possession* of that property.—See revised condescendence, art. 33, and answer thereto.

“Now, the Lord Ordinary conceives these admissions to be decisive of the question of jurisdiction. By a well-known ancient Statute (1621, cap. 27), every creditor of an apparent heir is entitled to attach the property of a defunct for the heir's debt; and the decree of constitution here was absolutely necessary, as a step, *inter alia*, to entitle the creditor to charge the heir, and attach that estate for his debt, in terms of the Statute.

“As to the plea of the debtor, that he has not yet taken *corporal possession* of the estate, it is sufficient to answer, that he cannot renounce it or remain out of possession to the prejudice of his creditor. The latter has right by Statute to attach it, as the estate of the heir; and it must be competent to the creditor to take a decree of constitution, as a necessary preliminary to a special charge and decree of adjudication. The creditors, accordingly, since obtaining the decree of constitution, have executed a *special charge* (condescendence, art. 33,) against John M'Arthur, as a step to adjudication; they required no general charge to entitle them to constitute their debt, as they sued the apparent heir for his *own* debt, and not for that of his ancestor. Had the action related to a claim against the defunct proprietor, the heir would have been entitled to a general charge before the constitution, because, till such a charge was given, the creditor could cite no living party as liable for the debt; and the general charge is necessary to ascertain the representation of the deceased debtor. In that case also, the heir charged is entitled to *renounce* the representation, and thereafter the creditor can only obtain decree *cognitionis causa*. But no such course is necessary, or indeed competent, when the creditor is suing for the debt of the apparent heir himself. The latter cannot defeat or delay his creditor's attachment, by repudiating a property to which the law enables both him and his creditor, by a simple and appropriate course of proceedings, to expedite a complete feudal title.

“It was contended farther, on the part of the debtor, that the jurisdiction of this Court, if sustained to the effect of enabling the creditor to attach the heritable estate claimable by the heir, ought not to go beyond it, so as to validate a decree of constitution to any amount. But it does not appear that such an objection is agreeable to our practice in any analogous cases. If a creditor can find any moveable sum, however trifling, belonging to a foreign party, in the hands of a Scots custodian, to warrant an arrestment *ad fundandam jurisdictionem*, the existence of such a lien has been invariably held sufficient to validate a decree of constitution before our courts to any amount,—nay, as exemplified in the case of Douglas, 30th June 1831, the Court will not inquire nicely into the amount or value of the fund arrested, to support critical objections to the jurisdiction. On the same principle, and *a fortiori*, must there be available jurisdiction in our courts, when there is a *real* estate within the territory of Scotland (which, for aught that appears, may be worth a very considerable sum), to enable the creditor to enforce the decree of constitution when pronounced.

“The same principle is sufficient to support the jurisdiction of the Court in both cases. Although the Court has no jurisdiction, in many instances, against parties domiciled abroad, these may be cited edictally when a pursuer can show that the citation is not asked capriciously and without cause, but to enforce an attachment of property, or funds heritable or moveable, within the *forum* of the Court. Moveable goods or funds require an arrestment to fix them: but obviously a landed estate requires no such *nexus*. The power of the Court to enforce the decree to an available effect being ascertained, the competency of the jurisdiction to take cognisance of the debt becomes indisputable. The Court is not limited by the amount of the fund attached, as the decree cannot be *pro parte* good and *pro parte* bad. The Judge is entitled, and bound to take cognisance of the whole debt, to see how far diligence, to any extent, should proceed on it. This, however, imposes no hardship on the debtor. If he has notice of the proceedings, he can, of course, show how far the claim is unjust; and if decree passes for the time in *absence*, it is open to him afterwards to object to it in whole, or to such extent as he can prove it to be unjust or unwarranted. But he cannot maintain that the constitution of a debt taken out before a tribunal which has jurisdiction at least over a part of the debtor's property, is to all effects null and void.

“On the other objections, in point of form, to the decree of constitution under reduction, there was little debate at present before the Lord Ordinary. The parties relied generally on the argument delivered when the preliminary defences were debated, and it is sufficient for the Lord Ordinary to refer to the interlocutor and note which he then issued, if the objections in question should be repeated.

“The other pleas of the parties, it is thought, cannot be satisfactorily determined till the real state of the facts is ascertained on matters as to which the parties are much at variance. The remit made by the Lord Ordinary will probably so elucidate the case, as to supersede several of the questions on which the parties are at present at issue.”

John Melvil M'Arthur reclaimed. At advising,

Lord Fullerton.—The points raised and insisted in between these parties, which may properly be considered as preliminary, are—1st, Whether there was jurisdiction in this Court to sustain the action of constitution in 1836, and the forthcoming now in dependence? and, 2dly, Whether, supposing these questions to be determined in the affirmative, the pursuers of the forthcoming have a sufficient title to maintain the action?

The Lord Ordinary appears to have reserved this latter point; and in the argument which we have heard, the parties have acquiesced in that reservation, and have confined themselves to the question of jurisdiction.

The objection to it is founded on the circumstance, that John M'Arthur, the defender both in the constitution 1836, and the forthcoming, though a Scotsman by birth, had left Scotland for several years, at the date even of the first of these actions,—had permanently established himself in the island of St Vincent,—and never returned to this country.

On the other hand, it was contended that the defender, though in St Vincent at the date of the constitution and since, was a partner of a Scotch company which was sequestrated,—that that sequestration, *quoad* the defender, was then in dependence,—and that the debts pursued for in that action of constitution were debts due by the company and the individual partners, of which Scotland was the *locus contractus* as well as the *locus solutionis*,—and that, besides, the defender had heritable property in Scotland, inasmuch as he had succeeded to such estate though he had not completed a title to it.

In regard to the place of birth, it is now fixed by the judgment in the case of *Grant v. Pedie*, that that is not sufficient to found jurisdiction. No doubt, in that case, the Lord Ordinary had, in sustaining the jurisdiction, combined that circumstance with another, viz., that "the contract, or obligation on which the contract proceeds, took place in Scotland." But the Court went entirely and solely on the *ratio originis*; and the House of Lords, reversing that judgment, remitted the case, with directions to the Court of Session to consider whether jurisdiction could be sustained on the grounds mentioned in the interlocutors of the Lord Ordinary, or on any other grounds appearing in the pleadings, "other than those founded on the *domicilium originis*."

Now, it farther appears to me that this judgment went substantially to exclude the mere *domicilium originis* from the circumstances on which the jurisdiction could be founded. It reversed expressly the interlocutor of the Court sustaining the *domicilium originis*. The remit applied only to the grounds mentioned in the Lord Ordinary's interlocutor, or stated in the pleadings, *other than the domicilium originis*,—not combined with the *domicilium originis*, which would have been the terms of the remit, if it had not been intended to discard that point altogether from the elements of the case. Certainly that judgment leaves the question open, whether the *locus contractus* and *locus solutionis* may not found jurisdiction by the law of this country? Only, in regard to the latter, it must be kept in view, that in this case it is not express: it is only inferred from the *locus contractus*. It was expressly admitted by the counsel for the pursuer, that the action of constitution was laid, not on the bills, but on the debt due by the company and the defender, the individual member of the company. There is no question here, then, as to the *locus solutionis*, except as inferred from the *locus contractus*. For it is undoubted that Scotland was the place where the debt was contracted.

Now, certainly, some of the older authorities support this ground of jurisdiction. But it is quite unnecessary now to examine those decisions; because, in this matter, any authority which they might otherwise be entitled to, is entirely destroyed by the last decision on the very point, pronounced on consultation of the whole Court,—I mean the decision in the case of *Wylie v. Laye*, 11th July 1834. That was a declarator of marriage, in which the facts supposed to constitute the alleged marriage had taken place in Scotland. The defender, an Englishman, objected to the jurisdiction; and it would seem, that of all supposable cases, marriage was that in which, from the peculiarity of the contract, the *locus contractus* would have the strongest effect in supporting jurisdiction. But the opinion of the consulted Judges, concurred in by the Judges of the Second Division, on this point, was,—“That the *locus contractus* does not lay a foundation for a jurisdiction over a foreigner, unless he has been cited in this country, or, in some cases, unless his funds have been arrested *jurisdictionis fundanda causa*.” It is true that there the defender was held not to be a Scotsman by birth. But looking at the terms of the judgment of the House of Lords in the case of *Grant v. Pedie*, I think that whatever may be the case in questions of *status*, in a question of mere pecuniary obligation, the circumstances of the place of birth and *locus contractus* combined, cannot have any stronger effect than when existing separately.

There is, however, one other circumstance in this case which may be noticed here, viz., the sequestration of the company of which the defender was a member. But that cannot raise any question, considering the facts which are averred and admitted in the record. It appears that the sequestration was not directed against the defender at all.—(See articles 14, 15 and 18 of condensation and answers). It was confined to the com-

pany, and Macfarlane as an individual; and, secondly, it appears that, long before the constitution was raised, the whole sequestrated funds had been divided among the creditors, Macfarlane as an individual discharged, and the sequestration substantially wound up. As, however, the company was not discharged, and the present defender, as an individual, was no party to the sequestration, he of course remained liable for the unpaid debts of the company. But still the sequestration, which neither called him as an individual, nor localized in Scotland any property in which he had either a direct or contingent interest, could have no effect in sustaining jurisdiction against him in his individual character.

I do not think that that jurisdiction could be sustained against the defender on any of the grounds hitherto alluded to. The only point remaining, is the effect of the heritable property belonging to him in Scotland.

The fact is admitted by the defender, that he had succeeded to a small property at Dunoon by the death of his uncle,—that he had right to it as heir-apparent; but it is said that he has never made up a title to it, nor possessed it; and the question is, whether this failure to exercise the rights of heir (for he has never positively renounced them), has taken off the effect in sustaining jurisdiction, which would otherwise be the consequence of holding heritable property in Scotland?

The question is, in so far as I know, new; but upon looking at the points which are held fixed in this branch of our practice, and the principles necessarily involved in them, I think the question ought to be decided in the negative, and that the jurisdiction put on this ground ought to be sustained.

In the first place, I understand it to be fixed, that absolute possession, or completed vested right to an heritable estate in this country, does found jurisdiction, and that not limited merely to actions regarding the property itself, but generally in regard to all actions of a merely pecuniary nature. I do not understand it to be disputed, that if the defender had made up titles, and possessed this small property, the action of constitution, for however large a sum, could not have been questioned on the score of jurisdiction. The same rule applies in the case of arrestments *jurisdictionis fundanda causa*. The jurisdiction so founded is not limited to the subject or funds arrested: it too is general, and will sustain pecuniary actions to any amount.

These considerations, of themselves, afford an answer to the arguments *ad absurdum* so strongly pressed on the part of the defender. For the very same consequences will be found to follow in those cases which were represented as fatal to the pretensions of the pursuer here. If the vested right to a small heritable property supports jurisdiction, not merely in relation to the property itself, but generally, the smallness of the property here may be considered as entirely irrelevant. And when it is urged, that in this way a man, by succeeding to some trifling property in Scotland, may, in entire ignorance, be subjected to the jurisdiction of the courts of, to him, a foreign country, does not the same inconvenience or incongruity hold, and still more strongly, in the case of arrestment *jurisdictionis fundanda causa*? A party is much less likely to be constantly aware of the motions of all his debtors, than that one has succeeded to an heritable property. Yet if one of his debtors removes to Scotland, an arrestment *jurisdictionis causa* will unquestionably subject him to the jurisdiction of our Courts, whether he may have been aware of the circumstance or not. And it will be at once seen, that the supposed inconvenience is rather apparent than real. For, first, it is always a question for the courts of his own domicile, how far they will give effect to any judgment pronounced against him by the courts of another country. And, secondly, even in Scotland where the judgment is pronounced, and where alone it decrees effect, it is not conclusive: it is but a decret in absence, against which the party may, when any attempt is made to put it in force, raise, in the form of a reduction, all the objections which he could have urged as defences if he had originally appeared. Accordingly, that is done here by the defender; and the only question is, not whether the decret of constitution shall be held conclusive of the amount and subsistence of the debt, but whether it shall be held absolutely null, as pronounced without jurisdiction. I think this point is not at all touched by the supposed inconveniences of possible

ignorance, and similar contingencies. It must be tried as if the present defender had appeared and pleaded to the jurisdiction in the original action.

Now, in considering the effect of the speciality here—I mean the defender's omission or failure to exercise his rights as heir,—we must look at the principle on which jurisdiction is sustained in the cases already alluded to. It does not, and cannot rest on the more limited principle of jurisdiction, *ratione rei sitæ*. For, by our law, it is in such cases not confined to the property or funds, which are naturally, or by force of arrestment, fixed within the territory. If a man has a small estate here, or has a trifling debt owing him by a Scotch debtor, that will support jurisdiction in general against him. The only principle which I am aware of, then, is, that there being a subject of any value, however small, within the jurisdiction, and admitting of being made available to a pursuer through the means of a judgment of the courts of this country, these courts have, *eo ipso*, jurisdiction to pronounce such judgment. The circumstance which supports the jurisdiction, is the existence of property or effects, not merely which the action does directly claim, but which it may be made to affect. On any other ground, I cannot see why the possession of heritable property should support jurisdiction,—why, for instance, the circumstance of a party being infest in a house at Dunoon, or anywhere else in Scotland, should warrant the courts of this country to give decret against him for a debt of £20,000. The only conceivable ground of sustaining jurisdiction in such cases is, not that the *rei sitæ* is at issue in the action, but that the *rei sitæ* may be made available through the means of a judgment pronounced in the action, and that, therefore, the jurisdiction of the Court in pronouncing it, may, to a certain extent, be carried into effect. The same principle is clearly involved in the jurisdiction founded on arrestment,—confessedly not limited to the subjects covered by the arrestment.

Now, if the principle of our law on this point be, not the absolute and direct application of the conclusions of the action to the subject situate within the territory, but the mere fact of there being within the territory property which the judgment in the action may be the instrument for reaching, it is clear that this principle applies as forcibly to heritable subjects held on apparençy, as to those vested by a completed title. For, in the first place, a constitution of a debt against the apparent heir is a judgment which does admit of being made effectual to attach such estate,—as effectual, indeed, as if the heir had entered. The only difference is, that in the latter case, the estate may be directly adjudged; while, in the former, the adjudication must be preceded by a special charge to enter. Still the constitution involves, in both cases, the very same ground of jurisdiction, viz., the existence of property within the territory which the constitution affords the means of attaching. Secondly, The constitution is the indispensable step for so attaching it. The creditor cannot get at the property but through the means of the constitution; and if there is no jurisdiction in such a case to support an action of constitution, I do not see how an estate, held in apparençy by a party not within this country, could be reached for payment of a debt due by him. A general charge to enter heir is, in the supposed case, out of the question. That is the instrument for reaching the estate of the ancestor, at the instance of a creditor of the ancestor. There the general charge fixes the liability for the ancestor's debt; and if the heir renounces, judgment of constitution is taken, not against the heir, but against the *hereditas jacens* of the ancestor. But when the heir himself, as here, is the debtor, there are no *termini habiles* for a general charge to enter, or a renunciation. The object is to constitute the debt, not against the *hereditas jacens* of the ancestor, but against the heir himself, which clearly neither requires nor admits of a general charge, as no such measure is necessary to render a man liable for his own debts, however necessary it may be to sustain action against him for the debts of his predecessor. The only charge required in such a case, is a special charge to enter to the lands. But such special charge can only proceed on constitution: See Stair, t. 5, 23. It "must proceed on production of a decret, not *cognitionis causa*, but for performance." But it seems to be maintained that the constitution ought, in some way or other, to have been limited to the

property in Scotland, and that the defender might have renounced. I am not aware of any authority for such a practice,—nor do I see how such a constitution could have been brought. In all actions against parties for their own debts, the conclusion is personal for the establishment of the debt and payment. And where could there be room for any renunciation in such a case as this? It must be at once seen, that if there were room for renunciation in such a case, no constitution could by possibility be obtained. The foundation of the jurisdiction being the heritable estate, if that estate could be renounced, there could be no jurisdiction to support any constitution; and if constitution could not be obtained, the estate could never be made available to the creditor. It is absolutely necessary to guard against confounding such a case with that of a constitution of a debt due by the ancestor. There, if the heir renounces on a general charge, decret of constitution goes out against the *hereditas jacens* of the proper creditor. But in cases like the present, if the heir could competently renounce, in a constitution sought against himself for his own debt, he would, *eo ipso*, exclude the only ground on which jurisdiction could be sustained against him, and the result would be, that to reach an estate held in apparençy in this country, it would be necessary to constitute the debt by a judgment in the courts of the country in which the apparent heir resided. Besides, the inconsistency of holding the circumstance of apparençy to form an essential ground of distinction, appears from another consideration. It was long doubted in what situation the rents of an heritable estate, to which no title had been made up by the apparent heir, stood, after the death of such heir: Whether they were in *bonis* of the heir, or still formed, as accessories, part of the *hereditas jacens* of the predecessor. But this point was finally determined in favour of the former view. It was fixed by the judgments of the Court in the case of Lord Banff, July 24, 1766, and the reversal by the House of Lords in 1767, of an adverse judgment pronounced in the previous case of Hamilton v. Hamilton. It may thus be considered as fixed there, that the heir, though not making up a complete title, or actually possessing, is, by the mere force of his title to possess, the true creditor in the rents not uplifted; and it must follow from this, that an arrestment of these rents *jurisdictionis fundandæ causa*, would effectually found jurisdiction against him, whether he chose to possess or not. But if the title to possess is sufficient to create in him a right of credit in the rents, capable of being the ground of arrestments, is not the same title to possess the lands, sufficient of itself to found jurisdiction, seeing that the lands to which that title applies, require no arrestment to fix them within the territory? It would be a strange anomaly indeed, if the right to possess the lands themselves did not found jurisdiction, when the single circumstance of the heir's right to possess them, so vested him with the rents as to render them capable of being arrested by his creditors, and made them the ground of creating jurisdiction. With regard to the case of Cameron v. Chapman (16 Shaw, 907), referred to on the part of the defender as affording an analogy fatal to the jurisdiction here, it appears to me not to touch the present question, and to rest on a peculiarity which does not here exist.

It appears from the opinion of the consulted Judges in that case, adhered to by the Second Division of the Court, that the main ground there taken was, that after the death of the foreigner, the original defender, there could be no transference against the executor, also a foreigner, without a new arrestment *jurisdictionis fundandæ causa* to support it. The distinction is taken in express terms between a real estate in this country, and a moveable fund fixed only by the operation of arrestment *jurisdictionis fundandæ causa*. It is expressly laid down in that opinion, 1st, that even if the executor had been confirmed, there must still have been arrestment *jurisdictionis fundandæ causa* to support the transference; and, 2dly, that so long as the executor remained unconfirmed, there was, according to the former decision of Houston, no means of competently arresting for that purpose. What may be the proper course to take in such a case as that, it is unnecessary here to inquire. It is sufficient to state, that the case was decided on the special ground, that the arrestment *jurisdictionis fundandæ causa* against the original creditor fell by his death, and did not operate against the executor, and that as the only right belonging to the defunct

was moveable, a new arrestment was necessary to warrant the transference; and that ground will not apply here, where the right required no arrestment to fix it within the territory. And, accordingly, in practice, I believe nothing is more common than to transfer action against the heir of Scotch property who succeeds during a dependence, whether he happens to be domiciled in this country or not.

But, besides, the analogy is far from being complete between an executor unconfirmed, in relation to the moveable property of the defunct, and the heir, though unentered in his real estate. The executorship is an office which requires the sanction of the proper court to give it effect. It is not necessarily confined to one person or set of persons: it may be conferred on a party explicitly named,—on a general legatee,—even on a creditor. Without confirmation, there is, properly speaking, no title even to possess. So that an executor or representative in moveables has no definite character in regard to the succession of the defunct, till he vests it by confirmation.

The situation of the heir, though unentered, is in every important particular quite different. He possesses in himself the character with which no one can interfere; that character alone gives him a title, and the sole title to possess,—a title so complete, that the produce—the rents of the lands—vests in him at once, without any process whatever, so as to be attachable by his creditors. He has thus, independently of any process or actual interference with the lands, a title which connects him with them, at least to the extent of enabling a creditor to call him into a Scotch Court.

I think, then, that the case alluded to does not apply; it was decided on grounds peculiar to itself, and leaves untouched the general principle, that real property in Scotland does found jurisdiction, and validates, in so far as jurisdiction is concerned, any decree of constitution taken against the apparent heir for his own debt.

I think, then, that upon this ground, the jurisdiction ought to be sustained, and the Lord Ordinary's interlocutor adhered to.

Lord Mackenzie.—I agree with the opinion now delivered in every point, and I think it unnecessary to do more than simply observe, that this is a debt of the ancestor's heir. Had it been a debt of the ancestor, there might have been some difficulty in constituting it. There would also have been more difficulty if the succession had been only to a moveable estate. As to that supposed case, I do not wish to give any opinion. Certainly not the opinion that the heir, by refusing to make up a title, would leave his creditors without a remedy.

Lord Gillies.—I have some difficulty; but, on the whole, I concur in Lord Fullerton's opinion.

Lord President.—I also concur in Lord Fullerton's opinion. I leave entirely out of consideration the effect of the combined circumstances of the *forum originis*, the *locus contractus*, and *locus solutionis*. I found entirely on the fact stated in the summons of constitution, that John Melvil M'Arthur had succeeded to heritage in Scotland. He had not made up his titles, but he was heir-apparent, and has been so for five years; and he now pleads that that succession was not sufficient to give the Court jurisdiction. He admits he is the true heir; and he takes good care not to say he has abandoned his right; but he simply says he has not entered to possession, or made up any title, and that, therefore, he is not amenable to our jurisdiction. There is no doubt he has a right to the rents, and that, under the old election law, he might have come from the West Indies, and been entitled, solely on the ground of his having succeeded to this property, to walk in to a meeting of the freeholders of the county for the election of a member of Parliament, and give his vote, or, perhaps (for such things have happened) be his own elector. This juggle, with regard to his not having entered to possession, and therefore not being subject to our jurisdiction, appears to me contrary to legal principle; and I have looked in vain for any authority to support it.

The Court pronounced the following interlocutor:

"In respect that at the date of the citation in the action, and of the decree of constitution pronounced against him, the said J. M. M'Arthur had right, as heir-apparent, to an heritable estate in Scotland—Adhere to the interlocutor of the

Lord Ordinary reclaimed against, repelling the objection to the jurisdiction of the Court and to the decree of constitution, and remitting to the accountant to report on the points specified in the said interlocutor, and refuse the desire of the reclaiming note: Remit to the Lord Ordinary to proceed further as shall be just, and reserve, for his further consideration and decision, all questions of expenses."

Lord Ordinary, Cuninghame.—*For Pursuer (J. M. M'Arthur),* Solicitor-General (M'Neill), Patterson; John Patten, W.S., *Agent.*—*For Defenders,* Macfarlane; Charles Fisher, S.S.C., *Agent.*—B. Clerk.—[H.B.]

14th January 1842.

FIRST DIVISION.—(H. B.)

No. 72.—ROBERT HENDERSON and OTHERS, *Pursuers,*
v. *The SOCIETY of SOLICITORS before the SUPREME*
COURTS, Defenders.

Exclusive Privilege—Corporation—Powers—The charter incorporating the Solicitors to the Supreme Courts proceeds on the narrative, that the society had collected a sum of money for a library and for the relief of poor members, widows and children, and gives full power to make bye-laws, and do other proper and necessary acts for conducting the affairs and administering the funds of the incorporation, provided always that these were not contrary to the laws of the country, and were reviewable by the Court of Session on the summary application of any party having interest—Held that the society were not entitled, under their powers, to vote away a sum from their accumulated funds, and a proportion of the annual contributions of members, and money paid by new entrants, to a widows' scheme, the benefits of which were restricted to the widows of those members who chose to become annual contributors.

In 1784, the agents and solicitors who had been admitted to practise before the Supreme Courts agreeably to the Acts of Sederunt, 10th August 1754, and 10th March 1772, on the narrative that they were desirous to promote, as far as in their power, "the salutary ends and purposes of the said Acts of Sederunt," voluntarily constituted themselves, "with the intention of perpetual succession and permanency, into a society or body collective, under the title and denomination of the Society of Solicitors of the Court of Session and other Supreme Courts of Scotland;" and as they considered a common fund to be "essentially necessary in order to the accomplishment of the objects of the association," they assessed themselves in the sum of £5. 5s. each as the beginning of the fund, and resolved that in future the whole members then existing, or that afterwards might be admitted, with the exception of such as might have outlived their business, or been reduced to indigence or inability by sickness, accident, or the infirmities of old age, should make payment to the treasurer of £1. 1s. Sterling of annual contribution. The 10th regulation fixed the sum to be paid by new entrants; and the 14th, the sum to be paid by the members for each apprentice. The 25th regulation provided, that the whole funds shall be "the absolute property, and at the disposal of the members;" but the 28th declared that it should

"not be lawful or allowable to dispose of, or order to be paid away, for any end or purpose whatever, otherwise than for interest or annual profit, any part of the principal sums whether funded or unfunded, or to sell or dispose of any subject belonging to this society (excepting what shall be deposited in the hands of the treasurer for contingencies and expenses), without the concurring votes of three-fourths in number, or more, of the qualified members present at a general meeting, specially convened for that express purpose, in time of session, by the order

and appointment of a previous meeting, also held in time of session, fourteen days at least prior to the date of the meeting at which the votes are to be taken, with regard to the disposal of any part of the said principal sums or subjects aforesaid."

The 30th regulation was in the following terms:

"Three-fifths of the interest, rents, and annual profits, due for the time, accruing from the whole principal sums, and other subjects belonging to this society, after deduction of the salaries and necessary expenses then due, shall be at the disposal of a majority of the qualified members, in general meetings duly assembled, for the relief of indigent members, widows, and children, and for such other purposes as shall appear proper, until the funds of the society shall be deemed sufficient to yield such stated or fixed annuities as shall be hereafter provided for by this society: but it shall not be lawful to fewer than two-thirds in number of the qualified members, in general meetings duly convened, to order to be paid away, or disposed of, any more, or greater sum of the said interest, on any account whatever."

The 31st regulation explained the mode in which the regulations embodied in the deed of agreement, and any other regulations, standing ordinances or bye-laws of the society, should be repealed, or new ones enacted; and in the 32d, the members engaged to obey and conform themselves,

"not only to all and every one of the regulations herein contained, but also to all such other regulations, bye-laws, orders, and resolutions, of this society, as are, or shall be made, passed, agreed to, and signed, as herein after directed, according to the true intent, meaning, and construction of the same, in all points."

In 1797, the society obtained a charter of incorporation from the Crown. The charter repeats the narrative of the regulations of 1784, stating that the members had formed themselves into a society, and collected a sum of money

"*tanquam principium pecuniæ depositæ pro bibliotheca librorum utilium et necessariorum comparanda, proque subsidio sociorum defectorum, et viduarum liberorumque sociorum in rebus egenis morientium.*"

The object of applying for the charter is stated to be,

"*pro his propositis consequendis, et pro dictæ societatis meliori tutamine, atque administratione pecuniarum depositarum aliarumque rerum cum securitate promovere, et negotia reipublicæ, in quantum ad eorum praxin occupationemque in dictis curiis refert, in modo proprio et regulari perficere.*"

The charter gives full power to the society, or a majority of the members,

"*dirigendi, ordinandi et constituendi, in omnibus rebus et negotiis, ad dictam societatem ejusque gubernationem et administrationem ejus facultatum, pecuniarumque depositarum spectant, et pertinent;*" and it also gives, "*plenam potestatem et auctoritatem ad eorum generales conventos ordinatos de tempore in tempus congregatos, constituendi, ordinandi, et faciendi tales et tot leges privatas, constitutiones, consuetudines et edicta, quæ illi vel major pars illorum pro tempore congregatorum, pro meliore administratione et ordine rerum et pecuniarum depositarum dictæ societatis attentionumque patrimonialium gubernatione propria et necessariis judicabunt, dictasque leges privatas, constitutiones, consuetudines et edicta, ullasve earum, mutandi aut abrogandi, ut dictæ societati vel majori parti illorum tunc præsentium necessarium esse videbitur; omnes quas leges privatas, constitutiones, consuetudines et edicta uti prædicitur faciendi, debite observanda et tenenda volumus: Providen. semper, quod eadem legibus regni non adversa vel contraria erunt, talibusque legibus privatis et ordinationibus ad Judicium Caricæ Sessionis recognitionem summam, ad applicationem ullius personæ interesse habent. semper subjectis.*"

In 1817, at a general meeting of the society called

by requisition, for the purpose of deliberating on the subject, it was moved, and unanimously agreed to, "that the establishment of a scheme for providing annuities to the widows of the members of this society is a proper and expedient measure," and a committee was appointed to report such measures as they might think advisable for carrying the scheme into effect. The report being made, the society, in terms of it, resolved that all those of its existing members who, by the 1st of May 1817, should declare their willingness to contribute £5. 5s. annually, and if married, pay a certain sum as marriage-tax, should constitute "the Society of Contributors to the Widows' Scheme of the Solicitors of the Supreme Courts of Scotland;" and that those existing members who might thereafter declare their accession to the scheme before Whitsunday 1819, should be received as contributors, "on a petition to the society of contributors, but on such terms as a majority of the society shall agree to receive them." With regard to those existing members who did not so declare their accession, the contract bore, that they should be excluded from the benefit of the scheme

"for ever, unless they shall be admitted by two-thirds of the contributors to the scheme present at a general meeting, held in time of session, upon their application, and making payment of £10 Sterling, over and above the rates and whole other contributions that would have been due by them if they had become contributors under this contract previous to the term of Martinmas 1817, with interest thereon until paid."

Future members were to have the benefit of the scheme on paying the annual contribution of £5. 5s.,—those who were married paying the marriage-tax according to the scale fixed in the case of the original members, with an additional payment of £15 if above forty, and not above fifty years of age, or of £30 if above fifty. On the 2d June 1817, at a general meeting of the society, it was resolved, in terms of a motion tabled at a previous meeting, "that £750 Sterling of the society's funds be applied to the proposed widows' scheme, with interest from Whitsunday 1817." It was also resolved, that "the half of all entry-moneys to be received from future entrants with the society, and the half of the yearly contributions by members shall be applied to the use of the said widows' scheme." In 1833, it was moved at a special general meeting of the society, "that the payment to the widows' fund of one-third of the annual subsidy levied from the members shall be suspended until the debt due by the society shall be paid, and it shall appear that the income of the society is adequate to the expenditure." This motion, after having been repeatedly under consideration, was rejected in December 1834, by a majority of thirteen to eleven—the society approving of the report of a committee, who, *inter alia*, reported it as their opinion,

"that it would be illegal, and certainly most inexpedient to withdraw from the widows' fund any branch of the original sources of income, or to alter any of the previous resolutions of the society on which the scheme was originally commenced and followed up the deliberate and solemn contract. Your committee may further notice, that the accountant made his calculations of the value of the annuities to be paid to widows upon the unquestionable understanding and calculation that the half of the annual contribution payable by the members of the society formed a branch of that fund, and as the scheme has now gone on for seventeen years upon that footing, your committee are inclined to think that the widows of deceased members, as well

as the wives of existing members, have obtained a vested interest, which cannot in justice or fairness be now disturbed."

At a special general meeting, held 1st July 1839, a motion was considered for "rescinding the resolution of the society in the year 1817, which provided that 10s. 6d. of the annual subsidy paid by members should be appropriated to the widows' fund." Mr Robert Henderson moved as an amendment,—

"In respect that the resolution of 1817, appropriating or gifting away to the private widows' scheme or fund established by a few members of the society (and with which the society as a body had no interest or concern whatever), one-half of the annual subsidy exacted from the whole members of the society for the purposes of the incorporation, as well as one-half of the entry-money exacted from the members of the society upon their admission, was *ultra vires* of the incorporation, and consequently illegal; therefore, the said resolution should be rescinded, and declared null and void *ab initio*, reserving to the society as a body, or any of the individual members thereof, all right and title to insist for repetition of all sums exacted from members, and so misapplied under said resolution."

This amendment was rejected as incompetent, on the ground that in consequence of going beyond the motion, it could only be considered as a notice of motion to be considered at the next stated general meeting in December. Another member then moved as an amendment, that the resolution of 1817, in so far as it provided for the appropriation of one-half of the £1. 1s. payable annually by members, should be recalled and rescinded as at Whitsunday last, and in all time thereafter, but that the arrears payable at and prior to that time should be appropriated to the widows' scheme as heretofore. This amendment was adopted unanimously, with the exception of two members, Messrs Robert Henderson and James Moore, who dissented from it in so far as it sanctioned the appropriation of any part of the arrears to the widows' scheme. Thereafter Mr Henderson presented a note of suspension and interdict against the Society of Solicitors, in which he prayed the Court

"to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents from appropriating and paying over to the private widows' fund, established by some members of the said society for their own behoof and benefit, and with which the incorporated society, as a body, have no interest or concern, or to any person or persons for behoof of the said private widows' fund, (1.) Any part of the entry-moneys exacted from entrants with the society, as members of the incorporation; and (2.) Any part of the yearly subsidies or contributions exacted from members of the incorporation to the funds of the society; reserving to the complainant all right and title to insist and sue for repetition, for behoof and benefit of the incorporated society as a body, of the sums exacted from him and all other members, and illegally appropriated to the said private widows' fund."

When this note was presented, the number of the members of the society was 115, but of these only 42 were connected with the widows' fund.

Interim interdict was granted, but the following interlocutor was afterwards pronounced by Lord Fullerton in the Bill-Chamber:

"The Lord Ordinary having considered the note, answers, and productions, and having heard the agents of the parties, passes the note for the purpose of trying the question of law there raised; but in respect that the appropriation of funds complained of is authorised by a resolution of the incorporation, formally and regularly passed at the general meeting of 1817, and standing unchallenged ever since, during sixteen years of

which period, viz., from the year 1823, the complainant has himself been a member of the society, recalls the interdict."

After this interlocutor was pronounced, the Society of Solicitors, at a meeting in November 1839, resolved, in terms of a motion which had been submitted, "that as the object of the suspension and interdict at the instance of Mr Henderson against the society and its office-bearers is for the benefit of the incorporation as a body, the society ought not to oppose the same."

Mr Robert Henderson and four other members executed a summons of reduction and declarator against the society, in which, *inter alia*, they concluded to have it found and declared, that all the proceedings of the society, in instituting the widows' scheme, and making payments to it from the funds of the society, were reduced and declared to have been from the beginning null and void,—because, *primo*, (formal).

"*Secundo*, It was *ultra vires* and illegal for the said incorporated society to make any bye-law, minute, or resolution appropriating the funds then existing, or funds to be levied from either the then, present, or future members of the incorporation for any other purposes than such as are warranted and authorised by their foresaid charter. *Tertio*, It was *ultra vires* and illegal in the said incorporation or society to appropriate the funds, present or prospective, of the incorporation to or for behoof of the foresaid private association formed by certain members only of the incorporation for a fund to their widows, such not being one of the objects or purposes for which the society was incorporated. *Quarto*, It was illegal and incompetent for the said incorporated society to levy or exact, either from entrants or members of the incorporation, any sums of money, in name either of entry-money or annual subsidy to or for behoof of the foresaid private association formed by certain members only of the incorporation for a fund for their widows, and which private association, or widows' scheme, the members of the incorporation, as a body, had neither any control over, nor any interest whatever therein. *Quinto*, The said pretended bye-laws, and others, by which the general funds of the incorporated society have been misapplied, were not only contrary to, but subversive of the purposes for which the society was originally formed, and afterwards incorporated, and have caused great damage and prejudice to the interests thereof,—as well as for other reasons to be proposed at discussing hereof: And the said pretended bye-laws, minutes, and resolutions being so declared, reduced, and set aside, and other conclusions hereof disposed of, the said defenders, conjunctly and severally, ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of £100 Sterling, or such other sum, less or more, as our said Lords shall be pleased to modify, as the expense of this process, over and above the expense of extracting the decree to follow hereupon, reserving to the incorporated society, as a body, or the pursuers, or other individual members of the said society, all right and title to insist for repetition of all sums exacted from, or paid by the pursuers, or other members, and misapplied as aforesaid, as accords."

The Society of Solicitors, instead of entering appearance as defenders, adopted the following resolution:

"That as the society had not only, upon the 4th November last, resolved not to oppose the suspension and interdict at the instance of Mr Henderson against the society and its office-bearers, as it was for the benefit of the incorporation as a body, but also upon the 2d December last, by a majority of the members present, actually rescinded and declared the resolution of 1817 null and void *ab initio*, as being *ultra vires* of the incorporation, and consequently illegal; and as the action of reduction and declarator now brought by Mr Henderson and others is for the purpose of supporting the suspension and interdict, and having the resolution of 1817 legally and effectually set aside against the members of the widows' scheme, for the benefit of the incorporation as a body—Therefore the society ought not in any way to defend the action, it being understood that in that event Mr

Henderson and the other pursuers shall not insist for expenses against this society and its office-bearers."

Certification *contra non producta* and decree in absence were pronounced against the society; but appearance having been entered by the Society of Contributors to the Scheme as defenders, and by the widows interested in the fund as compeers, the processes of suspension and interdict and of reduction and declarator were conjoined, and a record made up, in which it was

Pleaded by the pursuers—1. The resolutions and proceedings under reduction are illegal and *ultra vires*, in respect that the intention and effect of them is to appropriate certain funds belonging to the incorporated Society of Solicitors to purposes not contemplated in the charter of incorporation, and in which the incorporation, as such, has no interest. 2. The resolutions and proceedings under reduction being in themselves null and void, and the resolution of date 2d December 1839, rescinding and making void the resolutions and proceedings under reduction, being a valid and binding resolution of the incorporated society, the pursuers are entitled to decree of declarator and reduction, in terms of the conclusions of their summons. 3. The pursuer and suspender Mr Henderson, as a member of the incorporated society, has good title and interest to apply for and obtain the interdict craved, to prevent the misapplication of the common funds of the incorporation. 4. The Association or Society of Contributors to the Widows' Scheme, defenders, having in law no connection with, or claim upon, the incorporated society, are not entitled to demand or receive any aid or support from the incorporation's funds. 5. The pursuers have done no act, either jointly or severally, by which the right of any of them, as members of the incorporation, to challenge the illegal proceedings under reduction, can be held to have been waived, abandoned or lost.

Pleaded by the defenders—1. The pursuers are now barred, *personali exceptione*, from challenging the resolutions complained of on any of the grounds urged in the present suspension and reduction. 2. The resolution of June 1817 is now binding and effectual, as a stipulation or regulation of the society, upon the principle of usage, as explaining or even altering the terms of the original contract of the society. 3. The resolutions complained of are now valid and effectual *quoad* the defenders and compeers, and cannot be questioned by any member of the incorporation, in respect these resolutions form matter of contract between the incorporation and the widows' scheme, implemented and relied upon by both parties, and in respect the continuance of implement is requisite for the stability and existence of the widows' scheme, which was substantially instituted by the incorporation.

The Lord Ordinary ordered cases, and thereafter made avizandum with them, and the whole process, to the Court. His Lordship issued the following note:

"This is a case of importance in the law of society and incorporation. It is also a question of great interest to the widows at present drawing annuities from the fund, and to females having a near prospect of being placed on it, as the best part of their means of subsistence may probably depend on the issue. It is fit, therefore, that the question should be brought under consideration of the Court with the least possible delay.

"The object of the conjoined actions is to have certain resolutions of the Incorporated Society of Solicitors before the

Supreme Courts, passed so far back as 1817, rescinded. By these resolutions the society agreed to contribute a considerable sum (£750) from their general funds to the establishment of a widows' fund, for the provision exclusively of the widows of members; they also agreed to appropriate to the same purpose one-half of the entrance-money of new members, and a certain share of the small subsidy or subscription-fund paid annually by the members. It was to be optional to members to connect themselves with this subsidiary scheme or not as they chose; but if they joined it, they were bound to make a considerable additional annual contribution not leviable from other members. On that footing the widows' scheme was established in 1817, and these grants by the society were passed *unanimously*. The portions of the annual subsidy fixed in 1817 were contributed by the whole members for a series of years without objection, and they are still leviable, and paid annually into the fund. There are now forty-two members who contribute to the widows' fund, and eleven widows who draw the annual allowance (it is believed £30) claimable by persons in that class.

"The suspender and pursuer, Mr Henderson, and a few other members of the society who have been admitted since 1817, now object to the resolutions by which the capital sum of £750, and the annual portions of the entry-money and subsidy were granted to the widows' fund, and they have brought them under *suspension and reduction* in the processes now reported to the Court. It is the duty of the Lord Ordinary to state, as shortly as possible, the views which have occurred to him on a consideration of these cases:—

"1. The leading plea of Mr Henderson, pursuer and suspender, is, that any appropriation whatever of the funds of the society to a widows' fund in 1817, was *ultra vires* of the society, and that it may be rescinded *quandocunque*, as a null and incompetent alienation, by the Supreme Court, if brought under review at the instance of any party having interest in the funds. The Lord Ordinary, however, is not satisfied, upon any considerations or authorities yet urged by the pursuer, that this would be a maintainable doctrine, even if the resolutions had been complained of *de recenti*, and before third parties had acted on them, or acquired an interest in the fund, and still less after they have been acquiesced in for the best part of the existing generation, and when widows and families have acquired an interest, perhaps to the extent of their means of subsistence, in defending the scheme.

"There can be no doubt that it is competent for this Court (more especially when applied to *debito tempore*) to stop, at the instance of any party interested, all resolutions for the alienation of the property and funds of corporations which are manifestly illegal and incompetent, even though agreed to by a preponderating majority of these societies. On that point the cases of the Trades' House of Glasgow, and of the Weavers of Lanark in 1793, quoted in the papers, are of themselves decisive precedents in point—and the later case of Paisley, in which the magistrates and town-council of a burgh of regality, which possessed considerable property, were interdicted from selling certain superiorities belonging to the burgh for political purposes, may be quoted as a decision to the same effect.—*Fac. Coll.*, 22d January 1822.

"The right of all interested to complain in the present instance is still more clear, from the special clause in the charter incorporating this society, which provides, that the administration by the society of their property and funds should be at all times subject '*ad iudicium Curie Sessionis*, recognitionem summam ad applicationem ullius personae interesse habent.'

"While the jurisdiction of the Court however is incontestable, the next and more important inquiry is, if the resolutions would have been rescinded as *ultra vires* of the society, even if they had been complained of at their date, and before the parties had relied and acted on them? The powers of the corporation, in the administration of their affairs, were thus defined in their charter: His Majesty granted '*plenum potestatem et auctoritatem, ad eorum generales conventos ordinandos, de tempore in tempus congregatos, constituendi ordinandi, et faciendi tales et tot leges privatas, constitutiones, consuetudines, et edicta quae illi vel major pars illorum pro tempore congregatorum, pro meliore administratione et ordine rerum et pecuniarum deposi-*

tarum dictæ societatis attentionumque patrimonialium gubernatione, propria et necessaria iudicabunt, dictasque leges privatas, constitutiones, consuetudines et edicta ullasve earum *mutandi*, aut abrogandi ut dictæ societati vel majori parti illorum tunc presentium necessarium esse videbitur; omnes quas leges privatas constitutiones consuetudines et edicta uti predictur facienda debiti observanda et tenenda volumus providen. Semper quod eadem, legibus regni, non adversa vel contraria erunt.'

"Under these extensive powers the society had right not only to apply the common funds to the promotion of the objects more particularly specified in the charter, but to *alter* these articles of their constitution, and to make new bye-laws respecting their funds and their affairs generally, providing only that such laws '*legibus regni non adversa vel contraria erunt*.' Hence if the resolutions now complained of had been brought under review by any one interested at the time they were passed, the objection would have raised this question,—Whether the appropriation of the funds to a widows' scheme was contrary to the purposes of the association, or to the common law of the kingdom? As at present advised, the Lord Ordinary does not conceive that such a plea would have been maintainable. Looking to long-established *usage* in trades and professional corporations as the best interpreter of the purposes of these associations, and of their understood powers of administration over their common funds, it seems to have been the practice from time immemorial for such incorporations to apply a part of their funds to the support and maintenance of *widows*. Indeed, although this is notorious to all conversant with the management of our incorporated trades, the fact is established in the most authentic manner by the report presented to Parliament in 1835 by the commissioners appointed to inquire into the state of the *municipal corporations* in Scotland, in which it was shown that there is hardly an incorporation of any trade or profession in this country in which a part of the funds are not applied in giving annuities and allowances, greater or less, to the widows of deceased members. In particular, reference may be made to the reports on the affairs of the cities of Edinburgh and Glasgow, which have schedules attached showing the allowance to widows in the different corporations of these large towns, in every one of which it appears that annuities are given to widows varying from £60 to 20s. per annum. These, too, appear to be either *optional* or *fixed*, according to the property and funds, or views of the several corporations.

"The greater part of these subordinate funds have been created, not by Act of Parliament, as hinted at by the pursuer, but upon the understood powers of the corporations at common law. It is often expedient to have a special Statute to enable the trustees of widows' funds on a great scale to lend or borrow money without extra expense, and to exclude creditors from attaching the widows' annuities for any thing but *alimentary* debts, and for various other useful purposes which may easily be figured. In the great bulk of corporations, however, a scheme for widows may be, and has very generally been, carried into effect without any extraordinary powers from Parliament.

"Thus standing the general usage of corporate bodies in Scotland with regard to provisions for widows, it is not easy to see how this Court would have interfered, in 1817, with an *unanimous* resolution of the Society of Solicitors to appropriate £750, and one-half of the admission-money of entrants, to the establishment of a permanent fund for widows. The universal usage shows that this must be viewed as one of the purposes to which the funds of corporations may be applied by the common law and practice of Scotland. But there is a separate consideration peculiar to the present case. The charter of the Society of Solicitors expressly bears, that they had collected a fund for the establishment of a library, '*proque subsidio sociorum defectorum et viduarum liberorumque sociorum in rebus egenis morientium*;' and the contract, which was the bond of association among the members for thirteen years prior to the charter, distinctly provides that the common fund 'shall be at the disposal of a majority of the qualified members, in general meetings assembled, for the relief of indigent members, *widows*, and children, and for such other purposes as shall appear proper, until the funds of the society shall be deemed sufficient to yield such *stated* or *fixed* annuities as shall be hereafter provided by the society.' These clauses warrant the inference that the

provision of *fixed annuities* for the widows of solicitors was contemplated, from the earliest period that this society was incorporated, as one of the chief objects which the members had in view in the collection and accumulation of a common fund. When the corporation therefore agreed unanimously in 1817 that the time was then come to devote £750, and one-half of the fees of entrants, for that purpose, it is supposed that the Court would have required some very strong objection to induce them to interfere with the appropriation. But no such objection, founded on the state of the funds as in 1817, is even now set forth on this record by the pursuer.

"It is maintained, no doubt, by the members now objecting, that the widows' scheme established in 1817 was not a plan for the provision of the widows of *decayed* and *indigent* members, but of the widows of all members, rich and poor, indiscriminately. But the Lord Ordinary is not prepared to find that a general provision for the widows of all members is not the best and most delicate mode of providing for the widows of decayed members. It obviously tends to diminish their number, if not to prevent any such class from arising; as the scheme, if framed on right principles, may induce the most necessitous members, by a small annual payment, to provide in that way for their widows. Such a regulation as to widows was found not to be revocable by an incorporation, and enforced in the case of the *Flethers of Glasgow* against Scotland, (*Shaw's Rep.*, 21st January 1826); a case distinguishable from an opposite decision in the case of *Paterson*, (10th February 1803, *Mor. App.*, *voce Aliment*, No. 6,) where the allowances to widows were unfixed and *discretionary*. There was some discussion also in the case of *Howden* against the Incorporation of Goldsmiths (2d June 1840), as to the legality of a bye-law, by which that body established a fund for paying a certain *annuity* to all their members upwards of fifty-five years of age. The decision of that case ultimately turned on a different point, but the regulation was not declared by any of the Court to be incompetent, and it is still carried into effect.

"It is objected, however, to the appropriation under review, that it was *partial* and unnecessary, in so far as it was not given to all the members or their widows indiscriminately, but was set aside for the widows of the *contributors* only, who it is said were thus *auctores in res suas*. This plea, however, appears to be sufficiently met by the consideration that *all* the members had a right, and were invited to enrol themselves in the scheme; and if the effect of the institution was to reduce or put an end to the class of necessitous widows, it is impossible to deny that the whole society had more or less an interest in its maintenance. It was certainly not viewed as a partial or selfish appropriation in 1817, when the society *unanimously* concurred in the vote by which it was passed.

"II. But, in the next place, even if the resolution under reduction had been such as the Court, on due cause shown, might have corrected in 1817, it is a different question whether it can be set aside years after it has been *carried into effect* by consent of all interested,—when matters are *no longer entire*,—and when numerous third parties and their families have acquired an onerous, and to themselves an all-important interest in the continuance of the scheme. On this point of the case, it is conceived to be manifest, that when the contributors to this scheme have gone on for twenty years and upwards to pay rates for insuring an annuity to their widows,—and when perhaps many have joined the society, and paid their entrance-money as the purchase-money of that very provision, it would be subjecting their widows and families to unprecedented injustice, to allow the society to demand back the fund, without regard to the subsisting interests.

"It has been alleged, indeed, that the £750 voted by the society to the widows' scheme is still *extant*, and that it may yet be recovered or attached in the hands of the trustees of the widows' fund. By that statement it is presumed the pursuer only means to allege that a sum equal to £750 is still in the trustees' hands, which may be recovered by decree of this Court, if the pursuer succeeds in this action. But the answer to such a claim is obvious; the fund has been onerously and irrevocably alienated; in fact, it has been *paid away* for behoof of third parties, who trusted to the good faith of the society in purchasing the benefit of the scheme, and their rights and interests over the sum in question far outweigh those of the corporation.

The members who transferred and paid away the corporate funds may possibly be liable in accounting to the other corporators (if there be any entitled to complain); but money paid and applied years ago under a specific contract, in which many third parties have now acquired an interest, cannot be reclaimed on any ground set forth on this record.

"At the same time, it is by no means clear that even the members of the corporation who passed the resolution of 1817 would be personally liable, *post longum intervallum*, for any mistake in the administration of the funds. It must occur to any one acquainted with the past history and proceedings of corporations, that there are many acts which might possibly be interdicted by the Court if complained of *debito tempore*, which cannot be sustained as grounds of personal challenge against the members, when they have been assented to, or long acquiesced in by all interested in the corporation at the time. Thus it is a matter of notoriety in the history of Glasgow, that during the American war, six of the incorporated trades of that city paid £500 each from their respective common funds for raising what was called the Glasgow Regiment. It is possible that these patriotic gifts might have been successfully interdicted if they had been complained of at the time; and if the same strictly legal views as to the powers of corporators, on which the Court proceeded a few years afterwards in the case of the Weavers of Lanark (when that corporation was prevented from giving away the corporate funds in subscriptions to promote burgh reform), had been earlier recognised, it is probable that the alienations by the trades of their funds for military purposes might have been checked. But when no objection was stated at the time, it would be too much to hold that the heirs and successors of the corporators could be called to account in a succeeding age, by *new members* attempting to challenge applications of the funds which all interested enthusiastically concurred in when they were passed. On the same principle, it may well be questioned if parties in the situation of the pursuers, and those who concur with them, be entitled to complain of the disposal of personal funds agreed to years before they had any concern with the corporation.

"III. Upon the preceding views, the Lord Ordinary is of opinion that the present action cannot be maintained on the grounds laid in the summons, and more fully detailed in the record now closed. It may be proper to add, that other pleas were indicated at the debate which are not now pressed. In particular, it was at first alleged vaguely, that the widows' scheme was ruinous and disadvantageous to the parties contributing,—that a better return for the sums paid could be got from any ordinary insurance office,—and that the society and contributors could not be bound to proceed with what was called a losing concern,—at least if they made due provision for the existing and vested interests of all who had a preferable claim over the present fund. Of course there can be no doubt that this Court, in the exercise of its powers as a court of equity, has jurisdiction to dissolve or relieve parties from a joint concern or a society which is disadvantageous and ruinous to all; but there are no *termini habiles* to raise that question here. The members of the widows' scheme, the chief parties having a title to urge it, do not complain of the rates as extravagant or inadequate. Again, if the other members of the corporation really intended to insist in such a plea, both the summons and record should have contained specific allegations as to the funds of the scheme, and the returns given by other institutions to widows, so as to show on what grounds and to what extent they maintained their right, under present circumstances, to put an end to the scheme as a losing and inexpedient concern. Farther, if a majority of the society wished to put an end to the scheme, under a due reservation and provision for all the *existing interests* in the scheme, they should have set forth distinctly, in what manner they meant to secure and provide for such interests. The Court could thereupon have directed such further inquiry and discussion as might be necessary on these points. But it is supposed, that neither the pursuer nor the majority of the society have any sincere intention at present to insist for a termination of the widows' scheme on these grounds."

The cause being advised,

Lord President.—It is not necessary to call on the pur-

suers' counsel. The Court feel an insurmountable difficulty in adopting the view of the Lord Ordinary. His Lordship, indeed, has not given judgment, but he has explained his opinion very fully in a note. The case is one of great importance, not only to the parties, but to the general law of incorporations. There are some specialties in the case, but in determining it, we must apply the common principles of law which relate to questions of this nature. Now, I must confess that from the time I became capable of forming a legal opinion, I have understood that no incorporation was entitled, without special authority, to do acts such as those now under reduction. In the first place, it must be admitted that there is no great distinction between the charter of incorporation and the original resolutions of 1784. The charter must be regarded as a ratification of the resolutions, and these again lead us back to the Acts of Sederunt. The object of these Acts was to provide a respectable body of practitioners, and for this purpose, the parties to the resolutions agree to assess themselves in order to create a fund which, as the charter explains, might enable them to acquire a library, and provide a fund not only for widows, but for decayed members and children. These were the leading objects of the association, and I cannot see anything in the resolutions to justify the conclusion which the Society of Solicitors appear to have drawn from them. Indeed, with regard to the lump sum which was voted away, I cannot see any clause which authorised them to trench upon the capital. The 25th section, which seems to intimate that there was a full power of disposal, I rather think refers merely to the disposal of the interest of money, and other annual profits. And to what purposes were these to be applied? To the providing of annuities for indigent members, widows, and children. It is true there is a reference to some ulterior annuities, and the solicitors argue, that these were to be of the nature of those provided by this widows' scheme. I cannot see that. The classes of persons are very different. Those to whom the annuities of the widows' scheme are paid, may be persons for whom the original resolutions meant to provide, but they may be different altogether; while they expressly leave out of view two of the classes for whom provision was expressly contemplated. We every day see melancholy instances of individuals who have failed in their profession, and make application to us for relief. Can it be said to have been inexpedient for the society to contemplate cases of that description, and make a provision for them by granting such annuities to decayed members? Assuredly not; and this, I apprehend, was the leading object which they did contemplate. But then, in 1817, they resolved, wisely or unwisely, to adopt a different measure altogether. Looking probably to what had recently taken place in the Church of Scotland, and other public bodies, they resolved to have a widows' scheme. This scheme was not only confined entirely to widows, but was still farther restricted; because the benefits were not given universally to the widows of all who had been members. A condition of certain annual payments were annexed, and those members who failed to make them, were excluded from all interest in the fund. The question, then, which has been raised, and which we are now called upon to decide, is, was it competent for the solicitors to vote away these funds to such an institution? I am clear, that if they were resolved to do so, only two courses were open to them. They ought either to have gone to the Legislature, where all having interest would have been able to appear, or they ought to have applied to the Crown and obtained a charter sanctioning an appropriation of these funds, different from that now sanctioned by the existing charter. They took neither of these courses; but after considering a motion for the institution of a widows' scheme, and receiving the report of a committee, resolved at once to carry it into effect, and at once, *de plano*, voted away to it £750 of these funds. I do not know what the amount of the funds may be, but I suspect that the sum thus voted formed a large proportion of them. In addition to this vote, it was further resolved that one-half of the annual contribution of members, and one-half of the money paid by new entrants, should go to the same scheme. Again, those members who became contributors, on falling into arrears, forfeited all their bygone payments, and those who were unable, or declined to contribute, had nothing more to do with the fund than perfect strangers. The fact is, that the contributors to the widows' scheme were

a limited body; and it accordingly turns out that their number bears a small proportion to that of the whole society. And yet the whole society are compelled to make payment of annual contributions and entry-money to this smaller one. Is this competent, legal, and in terms of the charter? I agree with the pursuers, that the society were not entitled to lay down this code of regulations in favour of certain contributors. The effect of the scheme is, to provide only for their widows, whether poor or not; and therefore, it is emphatically not a scheme for decayed persons at all, whether members, or widows, or children. Now, a reduction has been brought of this scheme, and it is met by the plea of homologation. I cannot see how that plea can shut us out from considering the legality of the scheme. Many members who have entered recently cannot be affected by that plea; and those actually pursuing the reduction seem competent to do so. Was this scheme then legal in 1817? I am not able to say that it was, or to resist the conclusion for reducing it. No doubt there is a question behind of a different nature, viz., what interest the existing widows have in the fund? We are not called to decide that question now; but I must own my impression to be, that if the scheme was invalid in 1817, the fact that the society have committed themselves to it, is no answer to the question, whether the pursuers are entitled to reduce it. This, however, is a point on which we may afterwards get more light; but if called upon to decide it at present, I must say, that however hard it may bear on individuals, the length of time during which the scheme has existed, is no legitimate answer to the question, was it legal; aye or no? If once we permit deviations from the objects sanctioned by the charter, it is impossible to say where they are to stop. I am clear that judgment must be given in favour of the pursuers.

Lord Gillies.—I concur as to the merits of the reduction, but I have a difficulty in following it out to the consequences indicated. In the suspension, the parties desired to insist and sue for repetition. Say a widow has drawn her annuity for twenty years, with the unanimous concurrence of the society, is she to be called upon to repay all she has drawn? The question is not properly before us, but I think it should have been before us, and that we ought to know the extent to which this claim is to be maintained. Is it meant that the widows are to be called upon to repeat?

The counsel for the pursuers here explained that this was not meant, and that they were willing to lodge a minute foregoing all claim of repetition against the widows.

Lord Mackenzie.—I concur with your Lordships as to the merits of the reduction. I am clear that the scheme is illegal. It is not sustained by the charter. On the contrary, it both differs from, and is inconsistent with, the objects contemplated by it. The only things mentioned in the charter are a library, and a provision for decayed members, widows and children. Your Lordship has justly observed, these objects are totally different from the scheme to which the grant has been made from the society's funds. That scheme is not intended for widows in poverty at all,—not for members at all,—not for children at all, but for a class of persons totally distinct from the general body of the society. No doubt all those belonging to it are members of the society, but those of them only belong to it who are able to contribute; and their widows get the benefit of it, whether they are poor or not. So much is this the case, that it has become usual in marriage-contracts to take notice of the widows' interest in this scheme. It is impossible, therefore, to say that this is a charitable fund in favour of the classes of persons referred to in the charter. It is true there are general words in the charter, and I do not think we are compelled to limit the expenditure of the funds to the objects expressly specified in it; but if the expenditure goes beyond these, we are certainly entitled to see that the objects are such as are agreeable to equity and the laws of the country. No doubt the society have a power of making bye-laws, but this power is limited, by its very nature, to the making of such arrangements as are fairly in accordance with the interests of all the members, and it is the business of the Court to decide whether they are so or not. Viewing matters in this way, I think it is impossible to sustain this widows' scheme. The proper object of the charter was, to maintain a respectable body of practitioners; and it gives

power, with this view, to levy certain contributions. The power to tax is given for this purpose, but not surely to tax generally for any objects totally unconnected with that expressly specified. Even had the charter said nothing on the subject, I might have thought the society entitled to levy certain assessments from the members. This might only have been regarded as an ordinary act of administration, adopted for the purpose of securing the respectability of the body. That cannot be affirmed of this scheme. In the most favourable view which can be taken of it, it is just a *bonus* to these married members who have money, and are able to pay insurance for their widows, and it is a *bonus* granted at the expense of those members who have no money, or not enough to pay such insurance. Have the public any interest in such a scheme as that? I cannot conceive it. For my own part, I think it would just be as reasonable to give a bounty to bachelors. In fact, it would be more reasonable, because those members who abstain from marrying, leave a larger sum to be divided among the widows and children of those who do marry. The Lord Ordinary seems to think the tendency of the scheme is to diminish the number of poor widows. I rather think not. The tendency, I should think, must be the other way. It appears to me it would just have been as much within the scope of the charter to have voted away the money in providing country quarters for some of the members, or for any other purpose in which the public had no interest whatever, and the general body of the members no interest that was fair and equitable.

Lord Fullerton.—I agree entirely on the merits. Here, as in other associations, though it is left to the members to administer the funds, it is under the qualification that they must administer them for the proper objects of the association. This would hold under any contract; and though the 25th regulation gives extensive powers, it must be read under the qualification that these powers must be exercised for the common interest. In the present instance, the matter is rendered more clear by the fact that the charter was obtained long after the regulations were adopted. Something might have been said in favour of the grant under reduction, so long as the regulations formed the only law; for it might have been argued, that the society might have dissolved itself, and disposed of the funds at pleasure; but after the charter was obtained, matters stood on a different footing; for it was granted on the ground that the funds were to be employed for particular purposes, and an obligation was thus laid on the society to administer accordingly. The only question of importance then is, did this payment in 1817 fall truly within the appropriate objects of the charter? I think it impossible to hold that it did. It is no doubt true that the expenditure cannot be strictly limited to the purposes mentioned in the preamble of the charter; but still, though some latitude must be allowed, it cannot be extended to purposes evidently beyond the charter. But that is evidently the case here; for it is impossible to maintain, on any good ground, that the sum granted to this scheme was a sum devoted to charitable purposes. For such purposes the grant might have been defensible, both at common law and under the charter; but charity has nothing to do with this widows' scheme, which was instituted for the purpose of providing annuities to the widows of such members as chose to contribute to it, whatever the circumstances of these widows might prove to be. It is no doubt true, that by an annual payment every member might secure an interest in the scheme, but there were many members not in circumstances to make the payment, or derive any advantage from it, and yet to this scheme, thus restricted to particular contributors, the slump sum of £750 of the society's funds, with a certain proportion of the annual contributions, and the money paid by entrants, was voted away. Suppose the society, instead of instituting a scheme of their own, had gone to an insurance office and entered into an arrangement, by which they agreed to pay to the office a large proportion of their funds, on the condition that those of their members who chose to insure annuities to their widows should be entitled to do so on more favourable terms than the public generally, would this have been legal? Clearly not; and simply on the ground that while such an arrangement was not for the general objects of the society, the whole benefit of it was, from its very nature, confined to a limited proportion of the members. The scheme in

question is very much of the same nature; and I am clear that its legality cannot be sustained. As to the form of the action, I think it rather unfortunate that the whole claim for repayment is not properly before us. I have no doubt as to the latter of the declaratory conclusions. Indeed, there is no question between the individual pursuers and the general body of solicitors who have declined to appear, and have allowed certification in absence to pass against them. So far, therefore, as the society is concerned, the whole proceedings complained of are rescinded. The contributors to the scheme as defenders, and the widows receiving annuities as comparers, are now the only parties against whom the conclusions are directed, and their situation is in many respects different from that of the society.

The pursuers having lodged a minute abandoning all claim of repetition against the widows, the Court pronounced the following interlocutor:

“Reduce, decern and declare, in terms of the conclusions of the libel, and suspend the proceedings complained of, and grant interdict as craved; reserving to the pursuers and suspenders, under the qualification specified in the said minute, all right competent to them to insist for further redress in the premises, and to the defenders their defences as accords; find the defenders and respondents liable in expenses, and remit the account,” &c.

Lord Ordinary, Cuninghame.—Act. Rutherford, Inglis; Thomas Landale, S.S.C., Agent.—Alt. Solicitor-General (McNeill), G. Bell; Joseph Liddle, S.S.C., Agent.—[H.B.]

14th January 1842.

FIRST DIVISION.—(H. B.)

No. 73.—THE RIGHT HON. VISCOUNT MELVILLE and OTHERS (Sir R. Preston's Trustees), Pursuers, v. CAPTAIN JAMES ERSKINE WEMYSS and OTHERS (Sir William Erskine's Trustees), Defenders.

Relief.—Warrandice.—Sale.—Held that a purchaser, against whom the Crown was proceeding with a suit in Exchequer for bygone teind-duties, was not obliged to wait the issue of that process, but was entitled to proceed with an action of relief for the purpose of determining the seller's liability under the clause of warrandice, in the event of the Crown's claim being sustained.

The Crown brought a suit in Exchequer against Sir Robert Preston's trustees, for a large amount of arrears of teinds payable under the *reddendo* in the original Crown-charter of certain lands which Sir Robert Preston had purchased in 1819 from Sir William Erskine's trustees. In the disposition to Sir Robert, the *reddendo* stated for the teinds was one penny Scots, if demanded; and the same *reddendo* was the only one mentioned in the titles as far back as 1796, when Sir William Erskine had obtained a Crown-charter of resignation and confirmation. Sir Robert Preston's trustees, founding on the clause of warrandice in his disposition, brought an action of relief against Sir William Erskine's Trustees, who, without consenting to become parties to the Exchequer suit, or admitting their liability under the clause of warrandice, moved the Lord Ordinary, in the action of relief, to sist procedure *in hoc statu*. His Lordship having pronounced an interlocutor in terms of the motion, Sir Robert Preston's trustees reclaimed, and *pleaded*, that though they could not be entitled to obtain decree unless the Crown succeeded in the suit, yet, since liability under the clause of warrandice was not admitted, they were entitled to proceed with the preparation of the cause, so as not to be exposed to the risk of a tedious and expensive liti-

gation after the Crown should have compelled them, by a *writ of extent*, to make instant payment.

Sir William Erskine's trustees *pleaded* the inconvenience which would result from carrying on expensive processes of relief, which might eventually prove to have been altogether unnecessary.

Lord President.—I don't know that Sir William Erskine's trustees are liable under the particular clause of warrandice; but by superseding procedure, as the Lord Ordinary has done, we shall place Sir Robert Preston's trustees in this situation. The suit in Exchequer will proceed; and if the Crown obtain decree, not a single day's delay will take place. Implement will be compelled forthwith by means of a writ of extent. I don't think the defenders are entitled to subject them to this possible hardship.

Lord Gillies.—This is just an ordinary action of relief, founded on a clause of warrandice. In every such action there are two questions: The first is, whether there is any good ground for the attempted eviction from the purchaser? and the second, whether, supposing there is good ground for the eviction, the seller has rendered himself liable by the nature of his warrandice? Now, the defenders in this action of relief answer both these questions in the negative. They maintain that the suit of the Crown is vexatious and ill founded; and they also maintain, that if it were well founded, they are not liable. In these circumstances, I don't see how we can prevent the pursuers from proceeding to the effect of trying the question of liability. Of course they cannot be entitled to decree before the actual eviction. Had the Lord Ordinary said that the suit at the instance of the Crown was obviously foolish and groundless, we might have felt justified in sisting procedure, but this does not appear, and therefore we must recal the interlocutor.

Lord Mackenzie.—I am of the same opinion. The common course, where eviction is threatened, is to rest satisfied with intimation of the action to the party liable in warrandice; and the effect of this is, that if that party refuse to appear, he shall be held bound by what is done. This is the usual way; but there is another, viz., an action of relief; and if the purchaser does not think intimation to be sufficient, there is nothing to prevent him from bringing such an action. If, after the action of relief is raised, the defender in it admits the warrandice, there may be good ground to delay; but there is no such admission here. On the contrary, the liability is denied, and therefore the pursuers cannot be prevented from going on to get judgment, finding that the clause of warrandice is applicable. They are not bound to wait the issue of the Crown suit.

Lord Fullerton.—The present is very much a question of convenience. Were the liability in warrandice expressly denied, I would at once hold that the pursuers cannot be compelled to sist procedure; but the defences, in so far as relates to the liability, are not very explicit. I rather think one of them amounts to an acknowledgment of liability.

The Court recalled the interlocutor.

Lord Ordinary, Cockburn.—Act. G. Bell; Thomson Paul, W.S., Agent.—Alt. Anderson; Dickson and Stewart, W.S., Agents.—B. Clerk.—[H.B.]

15th January 1842.

FIRST DIVISION.—(H. B.)

No. 74.—JOHN LOVE and OTHERS, Pursuers, v. THOMAS BROWN, Defender.

Process.—Remit, Judicial, to a person of skill.—A tradesman appointed by the Sheriff, in a process before him, to inspect a building, made the inspection in the absence of the parties, and dictated his report, which was taken down in writing by a writer who was the ordinary agent of the pursuer, though not his agent in that particular process. The report was objected to, and a remit was again made (the defender objecting) to the same tradesman, who gave in a second report, free from the previous irregularities, but the same in substance as the first. On the motion of the defender the tradesman was put upon oath, and deposed to the verity of his reports. Judgment having been given

for the pursuer, the defender advocated, and, without impugning the integrity of the tradesman, contended that a new inspector ought to be appointed—Held that the second report was final, and could not be opened up.—Observed, That where the Court, on a general motion by the parties for a remit, appoints a particular individual who is not expressly objected to, the appointment must be held to have been made with consent.

John Love and others, his creditors, by summons, dated 12th May 1838, sued Thomas Brown, smith at Stewarton, before the Sheriff of Ayr, for the sum of £16. 13. 5., with interest from Whitsunday 1827, being the balance of an account said to be due for mason-work executed for him by Love in 1826. Brown, in his defences, stated, that in 1826 Love had engaged to build a house for him in Stewarton, in a tradesmanlike manner, for £125. 16s., and that Love, in proceeding with the work, made a sub-contract "with a person of the name of James Gillies, and between them they built the house, and received the whole contract price except £16. 13. 5., which was retained until the sufficiency of the building was ascertained. It soon became evident that the building was not executed in a tradesmanlike manner; on the contrary, that it was very insufficient, the walls admitting water and damp to a very uncommon and injurious extent, and nothing will remove this radical insufficiency, which accordingly remains to this day. Love seeing the state of matters, and being sensible that the balance in the defender's hands would not compensate the deficiency in the building, he abandoned any claim to it, and thus the transaction has stood for above fifteen years." On these grounds Brown pleaded, 1. Prescription; and 2. Not only denies resting-owing, but avers, that on an inspection and report on the sufficiency of the building, it will be found that the defender is a creditor, and not a debtor of John Love's, the latter having already received more than the insufficiency of the work entitled him to. The Sheriff-substitute, on 23d October 1838, pronounced an interlocutor decerning in terms of the libel, "in respect of the time which has elapsed,"—the house having been built in the spring of 1827, and possessed by the defender ever since, "without making any judicial complaint as to its insufficiency, and to have the same inspected." An appeal was taken to the Sheriff, and on 20th November 1838, the Sheriff-substitute, as advised by him, found,

"*Primo*, That the plea of prescription is not well founded, the defence implying the non-payment of the balance of account sued for. *Secundo*, That the pursuer, Love, was the party with whom the defender contracted, and his present defence of non-sufficiency of work is pleadable against the pursuer. *Tertio*, That the presumption of the defender's acquiescence in the goodness of the work, arising from the delay since it was finished, is removed by the circumstance of an unsettled balance being allowed to remain in his hands: and also by the circumstance of the pursuer having lately agreed to a reference to arbitration as to the condition of the house: Therefore alters the interlocutor complained of, and remits to the Sheriff-substitute to appoint a person of skill to inspect the house and to report, as clearly as he can, on the state of its sufficiency as originally finished, distinguishing, if possible, between original insufficiency and decay from ordinary tear and wear, and specifying the amount of damage arising from such original insufficiency, if such did exist; and to the said Sheriff-substitute to do further as he shall think just." (Signed) "WILL. EATON."

"*Note*.—There is no doubt of the necessity of timeous complaint as to the sufficiency of any article received in the ordinary case. But in many articles (among which a house is one) it takes some time to discover concealed faults; and nothing is

more common than for the purchaser of a house to retain part of the price to answer such blemishes. No doubt it would have been more accurate in the defender to have called for an inspection sooner, and have got all matters settled; but the sum retained might seem to him a security. His delay will however operate unfavourably for him, in the difficulty of now distinguishing between any original deficiency and the effects of tear and wear. The inspector named will of course receive power to examine the parties, and make all other due investigations."

The Sheriff thereafter pronounced the following interlocutor:

"The Sheriff-substitute having heard parties' procurators, names and appoints John Brown, builder in Kilmarnock, to inspect the house in question, and to report as clearly as he can on the state of its sufficiency, as originally finished; distinguishing, if possible, between original insufficiency and decay from ordinary tear and wear, and specifying the amount of damage arising from such original insufficiency, if such did exist."

John Brown, the inspector, reported as follows:

"In terms of a remit from the Sheriff of Ayrshire, dated the 4th of December last, in the process at the instance of John Love and others against Thomas Brown, to inspect the sufficiency of the mason-work of a house in Stewarton belonging to the said Thomas Brown, and built by the said John Love, I John Brown, builder in Kilmarnock, certify, that I this day proceeded to the said house, and inspected the same carefully, and found that the house was built originally in the same style of workmanship as similar houses in the town of Stewarton, and in a sufficient manner. The reporter, therefore, considers the contractor entitled to payment of his account claimed."

(Signed) "JOHN BROWN."

"Fees of inspection and report, one guinea, paid me by J. A. Snodgrass." (Signed) "JOHN BROWN."

The defender lodged the following objections to the report:

"1. The inspection was made by the reporter, accompanied by the pursuer's country procurator and agent, Mr Snodgrass, writer in Stewarton, and the report is holograph of Mr Snodgrass—all done in absence of the defender, and without any intimation or communication to or with the defender or his procurator. Proceedings so utterly irregular—so perfectly unjust—cannot and will not be received by your Lordship. 2. The reporter not only so proceeded under the guidance and direction and along with the pursuer's agent, carefully concealing all the proceedings from the defender, but he neither called for the plan or specification, and consequently he could not know whether the building was in terms of the plan or specification, or not. No doubt the reporter says the house was built originally in the same style of workmanship as similar houses in the town of Stewarton. This sort of general description, unmeaning and indefinite as it clearly is, would have been quite unnecessary if the reporter had called for the plan and specification, and examined and compared the building with them, and heard the defender thereon, as he was bound to have done. 3. The defender will be prepared to show and to establish to the entire satisfaction of any inspector who will give the defender an opportunity of being present at the inspection, that the building has from the beginning admitted, and down to the present day admits, water and damp to an extent altogether inconsistent with original sufficiency of building, and clearly demonstrating the original insufficiency of the building. On these grounds, the defender submits that the report produced ought to be ordered to be withdrawn from process; and as, from the way and manner in which Mr Brown has permitted himself to be misled by the pursuer's agent, he has disqualified himself from making an impartial report in the case, the defender would humbly suggest that your Lordship appoint a respectable and experienced builder and mason in Ayr, to inspect and report, on regular previous notice of at least eight days, to both parties, and hearing them on the subject of dispute, directing him to take the plan and specification as the basis of his report, and that these may be recovered for that purpose."

The Sheriff-substitute, by an interlocutor, repelled the objections to the report, but in the circumstances found no interest due. On considering reclaiming petitions for the parties, he afterwards recalled this interlocutor, and of new remitted to Mr Brown

"to visit and inspect the house in question, in terms of the interlocutor of Court, in presence of the parties,—hear them fully upon the objections and answers to his report,—call for the plan and specifications,—and to give a new report agreeable to the interlocutor of Court."

The Sheriff, on an appeal, adhered to this interlocutor, adding the following note:

"From the Sheriff's personal knowledge of Mr Brown the inspector's character, he was satisfied that he was influenced by no improper motives; but he must say that the inspection was conducted with great looseness and irregularity—1st, In not giving both parties due notice; 2dly, In communicating with the pursuer's agent alone; 3dly, In employing the last individual to draw up his report; and 4thly, In giving in a report, loose, general, and specifying no particulars. The Sheriff trusts, that in again inspecting the subjects, he will proceed with the utmost care and caution, and make up his report himself, after he has returned home; taking such full notes and memorandums on the spot as may enable him to do so in a complete and satisfactory manner."

The following is Mr Brown's second report:

"*Kilmarnock, 18th February 1840.*

"In terms of a remit from the Sheriff of Ayrshire, dated the 17th of December last, in process at instance of John Love and others against Thomas Brown, all in Stewarton, to inspect and report on the house in question agreeable to the interlocutor of Court, &c.

"Having sent previous notice to the parties, I this day met them at the house in question, viz., Thomas Brown, John Love, James Montgomerie, and James Gillies, also James Stirling, the inspector appointed by Thomas Brown to superintend the building while it was going on, read over my former report, with a number of the papers both for and against said report, when both parties professed to know little about them. Gillies said he and his partner made a good job of the part of the work they executed, Mr Brown having given him a set of mason-irons to do so. Montgomerie said, so well pleased was Brown with the work after it was done, that he gave him a present of equal value to what he had given Gillies his partner. Heard both parties at full length, carefully examined the house, as compared with the plan and specification, and found them to agree in every material point, and done in a tradesmanlike manner. Brown mentioned some trifling deviations, which were not of the smallest importance. However, as Mr Stirling, the proprietor's inspector, was present, I put the question to him, if the contractors, while doing the work, wrought to his directions, and in reference to the plan and specification? He said they did, and showed every wish, while doing the work, to please both him and the proprietor. I then put the question, Was it by your advice that the proprietor retained the balance in dispute? He said it was not. After hearing all they had to say, I am of opinion that the house was built in a tradesmanlike manner, and agreeable to the plan and specification."

(Signed) "JOHN BROWN."

"In reference to my former report, and on looking it over again, I do not think I would alter it, were I to report again, taking into view the remit of the 4th December 1838, which was to report as to its sufficiency as originally finished, distinguishing, if possible, between original insufficiency and decay from ordinary tear and wear, and specifying the amount of damage arising therefrom, if any such original insufficiency did exist. Taking the remit, and all the pleadings previous to my report, they only went the length of alleging the workmanship was not done in a tradesmanlike manner. Now I think that my report bears that the house was built in a tradesmanlike manner; and as I saw no original deficiency, of course I had nothing to report on that head. His Lordship says the inspection was conducted with great looseness and irregularity. So far from that

being the case, I never was at more pains in my life to come at a true report. 'Tis true I had none of the parties present; neither did I want them. The record being closed, and I had read all the papers, I certainly concluded I had before me all that was meant to be said on either side. Having business at Stewarton on the day the inspection took place with Mr Miller and Mr Snodgrass, after it was done I inquired at Mr Snodgrass where the house was situated I was to inspect; he said he would show it to me. He inquired if I did not want the parties present. I said I did not, as I had read all the papers carefully over, and that I understood from them on what I was to report. Having pointed out the house, he immediately left me, when I made as careful an inspection as was in my power. Mr Smith and I had then to go to Dunlop and Beith to inspect properties in both places. When we came back to Stewarton, we had to call on Mr Snodgrass, to inform us anent some properties we could not then find out; which when done, I asked Mr Snodgrass if he would write my report, as I had made up my mind on what I should report, which he agreed to do, and wrote as I directed; and I must observe, that it is a very common practice here, if any of the parties' procurators are at hand, to cause them write their report.

"It appears to me his Lordship has paid more attention to Mr Morton's false and calumnious assertions with regard to my inspection and report, as being done under the management and direction of Mr Snodgrass, than he ought to have done; for his statements, with regard to that inspection, is false from beginning to end. Mr Snodgrass neither interfered nor attempted to interfere with either my inspection or report, more than did Mr Morton, except that he wrote the report as I directed him.

"His Lordship will observe, that, agreeable to his remit of December last, I am instructed to hear parties, &c., &c.

"In again reading over the process and specification, I find the following document at the end of the specification."

"*Stewarton, 16th September 1826.*

"Having this evening taken in offers for the above specification, and as John Love, James Montgomerie, and James Gillies is the lowest offers, I do hereby accept of the said offers; and James Stirling is to inspect the said work, and settle all dispute."

(Signed)

"THOMAS BROWN.

"JOHN LOVE.

"JAMES MONTGOMERIE.

"JAMES GILLIES."

"The above parties all acknowledge the signatures to be true, and this is my reason for having more parties at the inspection than is allowed in the defender's defences. In doing so, I acted to the best of my judgment; and if wrong, his Lordship, I hope, will put me right."

(Signed)

"JOHN BROWN."

The defender lodged objections to this report, but these were repelled by the Sheriff-substitute, who sustained the report and decerned for the pursuer. This judgment was affirmed on 16th June 1840 by the Sheriff, who observed in a note:

"Although the present report of the inspector is not written with technical accuracy or detail on the proper professional subject of inspection, and contains a great deal of extraneous matter which would have been better omitted, yet still it includes the material points required both in form and substance. Due notice was given; all the parties interested were present, and were heard on their several allegations; the reporter examined the subjects on his own professional knowledge, and made up his report by himself, at a distance from all parties. No doubt the defender says (as unsuccessful parties usually say) that the reporter did not investigate sufficiently: but the Sheriff, who is unprofessional himself, must repose some confidence in a professional man of character, that he will take such means as he thinks sufficient to enable him to form an opinion on the matters remitted to him; more especially when the inspector was acquiesced in by both parties. The inspector declares that he took those means, and he formed a clear opinion on the result at both inspections."

The defender then moved that the reporter, Mr Brown, should be required "to verify his report on

oath." The Sheriff-substitute granted the motion, and Mr Brown deponed, *inter alia*, "that the reports produced by the deponent are just and true reports, to the best of the deponent's knowledge." The Sheriff-substitute, "in respect of the oath of John Brown to his report," adhered to his former interlocutors; and this judgment was affirmed by the Sheriff, who added the following note:

"The Sheriff has great doubts of the competency of the whole procedure in this case, since his interlocutor of 16th June 1840. It adhered to that of the Sheriff-substitute of 31st March, finding the defender liable for the account libelled, agreeably to a former interlocutor of 23d October 1838. The case was thus final in this Court. After it was so final, a motion was made by the defender that the inspector should verify his report on oath. This is usually allowed, when made *tempestive* (that is before the case is final); and in extraordinary cases, a full examination of the inspector is permitted, where there seems reason for a minute expiscation of particulars. But all this was out of place after the case was final; and neither Sheriff nor Sheriff-substitute could alter the judgment pronounced. The Sheriff therefore thinks, that the motion for the inspector's oath should have been refused, as out of time. But still less was it proper to allow so minute and searching an examination as the oath, No. 34, urged for the obvious purpose of overthrowing the report already finally decided on. And to complete these irregularities, the case is brought before the Sheriff by the defender, by what is called a minute of appeal (No. 36), but which is in a form quite contrary to the Act of Sederunt, and is truly a reclaiming petition against the judgments of 16th June and 31st March, praying the Court to alter them, in respect that the oath of the inspector does away the import of his report.

"Had the Sheriff even been satisfied that this last was the case upon the merits, he could not have altered his final judgment; but his views still remain the same as expressed in the note to his last interlocutor. Though the report is not accurately or articulately drawn up, the Sheriff believes that it is substantially just, and founded on adequate means of inquiry."

The defender advocated, and put in the following additional pleas:—1. The pursuer, Love, acquiesced in the retention by the defender of the balance pursued for on account of the insufficiency of the work performed by the pursuer, having made no claim for the same during a period of fifteen years; and the present pursuers are barred by his acquiescence from now insisting for payment of the said balance. 2. The Sheriff having sustained the relevancy of the defence founded on the alleged insufficiency of the work performed by the pursuer Love, was bound to take competent and proper means of ascertaining whether the defence was well founded in point of fact. 3. As the reports by the inspector, John Brown, were made up without any inquiry into the truth of the allegations by the defender, and as they contain no sufficient information on the subject of the remit to Brown, and show from their contents that he was unfit to act under a judicial remit, they do not afford sufficient means for determining whether the defence above mentioned be well founded in point of fact. 4. The final interlocutors complained of were irregularly and incompetently pronounced.

The following additional pleas were put in by the pursuers:—1. A judicial remit having been made to the inspector, and his nomination consented to by both parties, and a report being made, it is incompetent to obtain a new remit to a different person to report on the same facts; and if objections on any ground be taken to his report, the only competent relief is by a remit to the inspector to reconsider his report. 2. The

judicial inspector having in the present case reconsidered his report, and adhered to it, the same is binding and conclusive, more especially as the advocator subsequently requested him to depone to the verity thereof, which he did. 3. The defence of the advocator having been laid in the closed record solely on alleged insufficiency in the walls admitting water and damp, from the work not having been executed in a tradesmanlike manner; and parties having gone to issue on this defence, and the inspector having in his report negatived the allegation, the advocator is concluded, and it is incompetent now to allege variance between the work done and the specification. 4. *Separatim*. An inspector chosen by the advocator, and named in the original specification, having overlooked the progress and completion of the work, the advocator is precluded from denying its sufficiency and conformity to the specification, not having objected in any way when taken off the hands of the workmen. 5. The reports made under the judicial remit exhaust the matter in dispute between the parties, and afford sufficient grounds for a judicial determination of the point at issue, and the interlocutors complained of are in so far well founded. 6. The advocator having been found liable for the full amount of the claim pursued for, with expenses, the pursuer, in the circumstances, is entitled to interest on said claim, agreeable to the conclusions of the summons,—at all events to bank interest.

The Lord Ordinary pronounced the following interlocutor:

"9th December 1841.—The Lord Ordinary having heard parties, and considered the process, advocates the cause, recalls the interlocutors complained of, finds that the advocator is not foreclosed by the reports of the inspector John Brown, but that he (as well as the respondent) is entitled to be allowed to prove his averments otherwise, and appoints the cause to be enrolled, in order that it may be settled how the parties propose to proceed, and reserves all questions of expenses.

"*Note*.—The case has been conducted so very irregularly in the Inferior Court that it is not easy to clear it. But the Lord Ordinary thinks,—1st, That as the first remit was not made of consent of parties, but *ex proprio motu* of the Sheriff, it could not be held to have been acquiesced in by the advocator, merely by his not petitioning against it; 2d, That even though it had been expressly consented to, the very objectionable manner in which the inspector did the business, would have justified the advocator in resisting, not only that report but any other remit to that person; 3d, That when the Sheriff renewed the remit to him, the advocator did object to this step on clearly good grounds; 4th, That when the Sheriff decided the cause on the second report, whether the interlocutor became final in law or not, he (the Sheriff) did not hold it to have become final, because he allowed farther proceedings; 5th, That the advocator's obtaining the oath of the inspector on the second report, does not bar him from objecting both to the report and to the remit.

"This last is the point on which the advocacy turns. The respondent holds, that making an inspector verify his report on oath, excludes the party who does so from challenging the remit. The Lord Ordinary thinks this not a necessary conclusion. There is no inconsistency in protesting against the propriety of a remit, and yet, since a Sheriff will persist in making it, moving that the inspector be required to verify it. This is done under an implied reservation of previous objections. Such remits, when fairly conducted, ought to receive great support from our Courts; but there is no judicial comfort in adhering to them, when they are tainted by irregularities on the part of the inspector."

The pursuers reclaimed. At advising,

Lord President.—When I first read the papers, I had great

doubts of the soundness of the Lord Ordinary's interlocutor, and these doubts have since been confirmed. There is something irregular in the whole course of the litigation, which is apt to prejudice one's mind; but laying aside these irregularities as not affecting the substance of the procedure, the only question for consideration now is, whether there is any necessity for farther investigation by a fresh inspector. I put no stress on what is called the reporter's egregious departure from propriety in employing the agent of one of the parties as his amanuensis in writing out the report. Snodgrass, whom he so employed, was not the agent in the actual process before the Sheriff; and though it is admitted that the reporter first asked him to point out the premises, and afterwards employed him to take down the report at the reporter's own dictation, as it is not averred that Snodgrass was present during the inspection, or made any correction on the report, I cannot think these circumstances sufficient to disqualify the reporter, whose strict integrity there is no reason to doubt. As to the other objection, that the pursuer had told the reporter of the process, and that the reporter had taken the trouble to read the pleadings, I don't think it of any importance. He wished to make himself master of the whole matter, and it does not appear that his report was unduly influenced by it. Then comes the more serious objection, that he made his inspection in the absence of the parties. This was certainly irregular, but the irregularity did not rest so much with the inspector as with the Sheriff-substitute, who simply remitted to him to inspect and report, without saying any thing about the presence of the parties. This irregularity was corrected by the second report; for I think the Sheriff, who knew that the reporter was a most respectable individual, did right in not superseding him, and remitting to another. Indeed the defender admits, that though he objected to a new inspection by Mr Brown, it was with no intention to impugn his character. In this second report he adheres to the decided opinion he had given in his first, with a notandum, which is said to display an *animus* that disqualified him from being inspector. I don't wonder at his observations. Having made his report in good faith, he must have been more stolid than the wall he was employed to inspect, if he had been insensible to the reflections which had been made. He thinks an imputation had been cast upon his honesty, and he says, in language not disrespectful, what an honest man might be supposed to feel in the circumstances. The Sheriff properly repels the objection to the second report, and then the defender comes forward and moves that the reporter be ordained to verify it on oath. The Sheriff agrees to this (irregularly I think), and then after the defender has subjected him to this ordeal—to this species of legal torture—he now tells us we are not to look either at the report or the deposition. I cannot enter into this. He has done his utmost to shake the accuracy of the report, and having failed, he would now get quit of it altogether. On this point, nothing can be more strong than the case of *Dickson v. The Monkland Canal Company*, (House of Lords, 29th June 1825). A remit had been made, with the acquiescence of the parties, to an engineer, who gave in a report. Mr Dickson contended that the report was inaccurate, and endeavoured to get quit of it. The Court here repelled the objections, and the House of Lords, on appeal, founding on Dickson's acquiescence in the remit, affirmed the judgment in so far as it repelled these. Lord Gifford, in delivering the judgment, thus expressed himself: "In Scotland, as in England, I apprehend that where parties consent that a thing shall be done on the judgment of a particular individual, they must be bound by that consent, and therefore, it appears to me that Mr Dickson must be bound by the judgment of Mr Telford." There are many other decisions to the same effect; and it would evidently be a departure from the principles of these decisions to sustain the objections of the defender.

Lord Gillies.—I concur in every one word that your Lordship has said, and it is therefore unnecessary for me to go over the proceedings. Indeed, I am unable to see any good objection to the first report. By the terms of the remit, if there was no original insufficiency, it was impossible for the reporter to do more than say there was none. It is true he was asked to distinguish between original insufficiency and ordinary tear and wear. This could only mean he was to distinguish, provided

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there was insufficiency. Plainly, if there was none, it was an utter impossibility to make a distinction. Then it is said, that he ought to have called parties before him. Perhaps he ought, but power to do so should have been expressly given him. He could not go beyond the terms of the remit, and therefore, the absence of parties, if an irregularity, is an irregularity for which he is not to blame. It is said that the report was vague—that it ought to have stated the various particulars. What particulars? Was he to have specified all the doors and windows, and made remarks on each? The report would, in that case, have been as long as the pleadings. He tells what is sufficient; and had we had nothing before us but the first report, I would have been clear for sustaining it. By declining to sustain such reports as these, we should just be putting an end to the very useful and necessary practice of ordering remits.

Lord Mackenzie.—I concur. If the remit had been made by the authority of the Court alone, without the consent of the parties, I might have had some difficulty. The Lord Ordinary supposes this to have been the case, but erroneously; for the remit was made on the motion of the defender. He did not ask that the inspector should be appointed by himself, and when Mr Brown was appointed by the Court, he did not reclaim. In these circumstances, I hold the appointment equivalent to a remit with consent. Now, though such a remit is not a judicial reference in the ordinary sense, binding parties as in an arbitration, it is so far of the nature of it, that after the remit has been made, parties are not entitled either to go into a proof at large, or have a new remit, unless there is some gross failure on the part of the individual appointed. There can be no doubt that this is the rule. I recollect many instances of it in the Outer-House. I always took care, in ordering remits, to state in the interlocutor that it was done with consent; and this was never objected to. Here the party moved for a remit, and I think the Sheriff would have been entitled, in remitting to Brown, to say that it was done with consent. If I had any objection to the procedure, it would be of a different kind. I am doubtful if there should have been any remit at all, for it would rather appear that the pursuer was not answerable for the particular parts of the work in which the deficiency was alleged, as it had been done by separate contract. The Sheriff, however, has not gone on that, and we cannot now take it up. Was there then any fault committed by the reporter so gross as to call for a new reporter, or a proof at large? I don't think there was. It would be highly unsafe to open the matter up. As to the first report, I think there was good ground for exception. Whether the fault was owing to the reporter or the Sheriff, the inspection ought undoubtedly to have taken place at the sight of parties. It is not customary, I believe, to give an express order for this, but it must always be understood. No doubt a mason may judge as accurately in the absence of parties as in their presence, but it may be otherwise; for they may be able to call his attention to objects which he might be apt to overlook. But then he makes a second report when the parties are present, and adheres to his former judgment. There the case ought to have ended. No party had a right to go farther. I concur in your Lordship's observations on the additional remarks made by the reporter. Perhaps he had been a little too much blamed, and he felt it. As to the employment of Snodgrass, the agent of one of the parties, to write the report, it is not a practice to be recommended. It was right in the defender to notice it, but it did not amount to corruption. I have no idea at all that there was any thing in the reporter but the most perfect honesty. As to the oath, I think the report would have been as good without it. As it is, it cannot make the matter worse; and, at all events, it bars us from putting it. Without further observation, I think we must alter the interlocutor.

Lord Fullerton.—I agree entirely with the views now expressed by Lord Mackenzie.

The Court altered the interlocutor, and remitted *simpliciter* to the Sheriff.

Lord Ordinary, Cockburn, for Jeffrey.—*Act. Anderson, Handyside; William Patrick, W.S., Agent.—Alt. Mairland, Cook; Menzies and Monteath, W.S., Agents.—B. Clerk.*—[H.B.]

15th January 1842.

SECOND DIVISION.—(J. W.)

No. 75.—MAGISTRATES and TOWN COUNCIL of JEDBURGH, *Pursuers*, v. JOHN MADDER and OTHERS, *Defenders*.

Process.—Proof.—Commission and Diligence.

In an action of declarator of a right of thirlage and for abstracted multures, two separate issues were prepared to try these questions. At this stage the Lord Ordinary granted a diligence for the recovery not only of writings tending to instruct the right of thirlage, but also of all books, accounts, and other documents of the defenders, instructive of the multures abstracted. The defenders reclaimed, and craved to have the diligence restricted to the recovery of writings tending to instruct the right of thirlage. On the suggestion of the Court, the pursuers agreed to postpone the trying of the second issue until the first should be determined. And in respect of this consent, the Court remitted to the Lord Ordinary to restrict the diligence *hoc statu*.

Lord Ordinary, Cuninghame.—*Act*. Rutherford, Marshall; Bells and Rutherford, W.S., *Agents*.—*Alt*. Dean of Faculty (Wood), Pyper; John Richardson, W.S., *Agent*.—*F. Clerk*.—[J. W.]

15th January 1842.

SECOND DIVISION.—(J. W.)

No. 76.—ELIZABETH WILSON, *Pursuer*, v. ARCHIBALD BROWN, *Defender*.

Parent and Child—Paternity—Illegitimate Child—Oath in Supplement.—*Circumstances held not sufficient to amount to a semiplena probatio, so as to have entitled a party to her oath in supplement.*

Parent and Child—Judicial Declaration—Question, *Whether the declaration of a defender at the outset of a cause, before proof, and before a suspicion has been established against him, is consistent with the principles applicable to the relation between pursuer and defender?*

Proof.—Witness.—Disqualification.—*A witness, the mother of the pursuer, deposed in initialibus, that the child for whose aliment the action was raised, was in part supported by the earnings of the deponent,—that she had expressed her approval of the instituting of the action,—and that she had asked the other witnesses what they had said.—Held that she was disqualified, on the ground of interest and interference in the cause.*

This was an action for the aliment of a child brought forth by the pursuer on the 12th April 1840, and alleged to have been begotten on her in fornication by the defender, a Glasgow warper, on the 15th July 1839. It was proved that the pursuer, a weaver's daughter, was on intimate terms with the defender's family; that she met with him on the night in question, in the presence of his sister and a girl called Amelia Dawson; that they all went together into a public-house and had some drink; that thereafter they went to the defender's father's house, where they remained for a while. The pursuer, the defender, and Dawson then left, and went into another public-house, where they had some whisky. Thereafter the three went to the pursuer's mother's house, but the mother being the worse of liquor, would not allow her daughter to enter, and beat Dawson down stairs. Thereupon the three went to Dawson's house, which the pursuer and defender left together about twelve o'clock. According to the judicial declaration of the defender, he then went home with the pursuer, and remained about an hour at the

foot of the stair leading up to the pursuer's house, or at the close mouth, which, he added, was occasioned by the pursuer not getting into her mother's house. In the course of the proof led by the pursuer, her mother was produced; and being interrogated *in initialibus*, deposed,

"That she has had some conversation with the pursuer as to this case; and being interrogated, if she gave the pursuer any advice to prosecute the defender? Depones, That her daughter, the pursuer, said she was going to do so, and the deponent said it was very right, as they were not able to keep it: That the child lives in the house with the deponent, and is kept by the earnings of the deponent and the pursuer. Interrogated, Whether her daughter told her what any of the witnesses said when examined for the pursuer, and if so, what they said? Depones, That her daughter was not present, but some of the witnesses told deponent something of what had been said, and she asked some of them what they said, and they accordingly told her something what they said."

An objection having been taken to the admissibility of the witness, upon which the defender craved the opinion of the Court, the Sheriff-substitute pronounced the following interlocutor:

"Glasgow, 9th November 1840.—Having considered the objections and answers to the admissibility of the pursuer's proposed witness, Margaret Wilson, for the reasons stated in the annexed note, alters the deliverance of the commissioner; sustains the objections to the admissibility of said witness, and ordains the sealed packet, No. 15, containing her deposition taken, to lie *in retentis*, to be withdrawn from process."

(Signed) "HENRY GLASSFORD BELL."

"*Note*.—The proposed witness is the mother of the pursuer. This, of course, since the passing of the Act 3d and 4th Victoria, cap. 59, is no sufficient objection; but in her initial examination, the mother has admitted circumstances clearly sufficient to exclude her, on the ground both of interest and partial counsel. She depones, 'That she has had some conversation with the pursuer as to this case,' &c., as quoted above. Now, though the late Act provides that it shall not be imperative to reject a witness, who, without any culpable negligence or criminal intent, has been present in Court during the proceedings, there is, in the present instance, a very different *species facti* admitted than the accidental overhearing the depositions of other witnesses. There is not only the conversation with the pursuer as to the case, and not only the being told by other witnesses out of Court what they had said, but the actual asking these witnesses to tell, and receiving the information in consequence. It would be extremely dangerous to hold that the recent Act countenances the admissibility of witnesses who, by their own act, and from their anxiety as to the issue of the cause, have made themselves acquainted with the evidence given previous to their own examination. It is settled by numerous decisions, that the mere circumstance of being present at a consultation disqualifies a witness, even although nothing passed at the consultation regarding the point as to which the witness is adduced, and surely, *multo magis*, disqualification must ensue, if a party has gone about and obtained from preceding witnesses the substance of their depositions. On the ground of interest, the objection is no less fatal. From the time of Lord Stair downwards, the rule has been preserved inviolate, that a direct pecuniary interest disqualifies, that is, when the witness can either gain or lose by the judgment to be pronounced. 'It may be observed,' says Mr Tait, 'that where the interest of the witness is direct, the rule of disqualification is universal, and applies to every case, however inconsiderable the pecuniary interest may be, or however high the character and fortune of the proposed witness may raise him above suspicion.' Now, the mother of the pursuer admits that the child is partly supported by her exertions, and is a burden on her. The interest, therefore, in the issue of the action is such as, according to all the decisions and authorities, must exclude her."

This judgment was affirmed on appeal to the Sheriff, and on the 16th December 1840, the Sheriff-substitute

found that the pursuer had failed to establish a *semiplena probatio* against the defender, and assoilzied him from the conclusions of the summons. On appeal, the Sheriff altered this interlocutor, and allowed the pursuer her oath in supplement, adding the following note:

"The grounds on which the Sheriff conceives that a *semiplena probatio* has been made out here, according to the recent decision of the Supreme Court, are these:—The child is proved to have been born at its full time on the 12th of April 1840; now, on the Monday after the Glasgow Fair of 1839, which was about the 8th of July, or just nine months and six days before the pursuer and defender are proved to have been together in a public house at the Broomielaw, when 'she used a great many freedoms with his person,' after which they went out together and alone. It is proved, moreover, that on one occasion, in December 1839, the defender was seen coming out early in the morning from the pursuer's house, and a man's voice was heard there the night before, so as to have impressed on a neighbouring woman the belief that he was there all night; and farther, it is proved that the pursuer had long been on intimate terms with the defender, and had lived in his house, in so much so that many of the neighbours looked upon them as lad and lass. These circumstances taken together, and especially the first, are much stronger than those that occurred in the case of *Lennox v. Agnew*, decided by Lord Jeffrey in 1839, where the Court allowed the oath in supplement to be taken."

The defender having advocated the cause, the Lord Ordinary pronounced the following interlocutor:

"25th November 1841.—The Lord Ordinary having heard the advocator, and considered the process, repels the reasons of advocacy, and remits to the Sheriff *simpliciter*: Finds the advocator liable in expenses; appoints an account thereof to be given in, and when lodged, remits the same to the auditor to tax and to report."

"Note.—Independently of various other circumstances, the *semiplena probatio* is established by the single fact in the advocator's own declaration, viz.,—he and the respondent were an hour or so together, and by themselves, in a stair about midnight. He argued that this was 'only opportunity;' what else is being in bed?"

"It was not the pursuer's business to call the defender's father at first, because the fact of minority only transpired in the course of the proceedings, and after, his citation on incident diligence was sufficient, if his citation at all was necessary in such a case."

"The Lord Ordinary having decided for the respondent, has had no occasion to give any judgment on the objection to the admissibility of her mother; but his opinion is, that she was legally rejected."

The advocator reclaimed, and *pleaded*—

That this was not only a clear case, but also an honest one. The defender is decerned against entirely on an admission contained in his declaration which could not have been proved otherwise. The ground of the judgment is, that there was opportunity; if this be sufficient, then the law is in a most dangerous state. There must not only be opportunity, but facts denoting that there was an intent in the parties to avail themselves of it. The occasion of meeting was not sought after by the defender; and if the pursuer were the *puella intacta* she represents herself to have been, she is not likely to have surrendered her virtue for the first time in such a situation. The point as to the inadmissibility of the pursuer's mother as a witness, is not raised in the additional pleas; and this is not a question of *status*, where the Court *ex proprio motu* might suggest a new plea.

Replied—

That the plea is raised on the record, and the whole case comes up by advocacy, so that the Court may review every interlocutor pronounced in the cause.

Lord Justice-Clerk.—You had a plea, but waived it. Your only plea in the advocacy is, that you have proved the defen-

der to be the father of the child in question by competent and sufficient evidence, but you did not ask the judgment of the Lord Ordinary on the rejection of the witness.

Lord Moncreiff.—If we were all clear as to adhering, this state of matters might be very well; but if we are not, a very little additional evidence might turn the scale, particularly where there is such difference of opinion.

Anderson.—The Lord Ordinary gives no judgment upon the point, and the Court may either dispose of it now, or remit to the Lord Ordinary. The additional pleas are merely supplementary to those stated in the Inferior Court.

Lord Moncreiff.—The Lord Ordinary indicates his opinion, that the witness was legally rejected, and if you can now satisfy us that she was not, then we can remit.

Anderson resumed.—In order to disqualify a witness on the ground of interest, it must be direct, and not collateral. The mere fact of the child living in the witness' house is not sufficient, for there was no legal obligation on her to maintain the child. As to the ground of partial counsel, a witness will be rejected if it appears that the party has been tampering with him; where the witness is brought to a consultation by the party, this also disqualifies; but if the witness be brought by a third party, or is present by accident, the objection does not hold; for a party is not to suffer because the witness has done what is not regular and proper.

Lord Medwyn.—I have no difficulty in thinking that the witness was properly rejected. The grounds of interest and partial counsel are distinct in themselves; but here they are combined. If the witness had an interest, this might move her to make the inquiries which she did. No doubt there was no legal obligation on her to maintain the child, but she admits the fact that she was maintaining it, and that the object of the action was to get quit of this burden. This makes her the more anxious to know what the witnesses were saying, and thus she was enabled to fashion her own testimony.

Lord Moncreiff.—I am of the same opinion, and that the grounds of the objection cannot be taken separately. If the ground of interest stood alone, it might not be sufficient; but *de facto* she was maintaining the child; and knowing that she was to be examined as a witness, she not only accidentally learns what the others had said, but she goes and asks them. She did this with a view to regulate her own testimony; and in the circumstances, I think she was disqualified.

Lord Justice-Clerk.—I concur entirely. Whether there was a legal interest or not, or whether that interest was direct or consequential, is of no moment, in considering its effect upon the objection on the ground of interference. It is clear the witness did not go to the others to ask unimportant questions. If she did, the pursuer should have pushed the examination, and seen what it was that was stated to her in answer. The Statute rendering her a competent witness, ought to have made her the more cautious in keeping herself pure. The objection is not so much one of partial counsel, as an interference in the cause with the view of preparing herself to give evidence.

On the merits:

Lord Medwyn.—The case may be a narrow one, but looking to the whole circumstances, I am for adhering to the interlocutor of the Lord Ordinary.

Lord Moncreiff.—At first I was of the opinion of Lord Medwyn, but I have great doubt of it now. The parties were intimate, and if they were regarded as lad and lass, it was undoubtedly in carrying on an honourable courtship. They had been in many situations more favourable to intercourse, and nothing came of it. They met accidentally on the night of the 15th July 1839, and there is no concealment in the matter. There was also, as is proved by Dawson, a real difficulty in the pursuer getting into her mother's house. They then went to Dawson's, and after remaining some time, the pursuer and defender again went to try and get in to her own house. It just comes to this, they remained an hour together at the foot of the stair, when there was a real object, viz., to get admission, which had been refused. I have great difficulty in holding that this amounts to more than suspicion, and I think it would be hazardous to find that it was more.

Lord Justice-Clerk.—I concur in the difficulties which have

been expressed. In cases of this description, we are too apt to lose sight of the principles applicable to the relation between a pursuer and defender. I never can see the principle upon which a man's judicial declaration is to be taken before the proof, or a case of suspicion has been made out against him; and where this is done, I will always give a defender the fullest benefit of his declaration in his own favour, where that declaration is candid. Here it is candid; and we must take his reasons for meeting with the pursuer on the night alleged. I don't put much upon their drinking together, considering the rank of life to which they belong. They then go home to his father's house, and this is favourable to both parties. He afterwards goes home with the pursuer, with the intention of leaving her there, and then going home with Dawson. The mother is the worse of drink, and not only refuses the pursuer admittance, but beats Dawson down stairs. They then go to Dawson's, and afterwards the lad takes charge of her to see her home. She was the companion of his sister, and was intimate in his own family. His conduct, therefore, was most natural; and he acted both kindly and properly. For a considerable time the pursuer can't get into her mother's house, and they remain together. Now, what does this woman ask me to believe,—that she, a respectable person, intimate in the defender's family, allows herself to be overcome for the first time in a common stair; a situation likely enough for prostitution, but not for the seduction of a virtuous girl. If any thing suspicious had been seen or heard, that would have been different; because facts overcome presumption. In all the cases, there was some suspicious fact accompanying the opportunity; here we have nothing suspicious. They remained an hour together, but the defender says it was because the pursuer was shut out. This might have been contradicted by the mother, but she goes and disqualifies herself; and it is not the fault of the defender that he could not show that her intoxication continued, and that she did not hear them asking admittance. Justice to the defender requires that his declaration be taken with its qualification. The circumstances are only suspicious, and do not create a reasonable belief in my mind.

Lord Medwyn.—I entirely dissent from the observations made by your Lordship against the practice of taking judicial declarations. The declarations of both parties are often the best way of getting at the truth, and saving a proof altogether. It is the general practice, and I should be sorry to see it departed from. If the defender wants the judicial declaration of the pursuer, it is always in his power to get it.

Lord Justice-Clerk.—I have no objection to declarations, but to their being taken at the outset of the cause.

Lord Meadowbank absent.

The Court advocated, recalled and assoilzied.

Lord Ordinary, Cockburn.—*Act.* Anderson, C. Robertson; Thomas Dunn, S.S.C., *Agent.*—*Alt.* G. G. Bell, Pattison; John Rogers, S.S.C., *Agent.*—*T. Clerk.*—[J.W.]

18th January 1842.

FIRST DIVISION.—(H. B.)

No. 77.—ALEXANDER MOREEN, *Petitioner.*

Poors' Roll—Certificate under A. S., 16th June 1819—1. *Circumstances in which a certificate was sustained, though signed by the minister and elders on different papers.* 2. *The certificate does not require to be given in kirk-session.*

Alexander Moreen, a parishioner of Marnoch, with the view of being admitted to the poors' roll, applied to the minister and elders for the usual certificate. The minister, intimated a meeting of the kirk-session for that purpose from the pulpit; but none of the elders having attended, he signed the certificate, and accompanied it with a statement that the elders had "declined to act in this matter." This declinature was brought under the notice of the Court by the applicant's counsel, and warrant was granted to cite them

before the Court "should they still continue to decline to act in this matter."

The cause being again called,

Rutherford, for the elders, stated—

That they had first become acquainted with their alleged declinature from the notice which had been taken of it in the newspapers. The state of matters in Marnoch was well known. Mr Edwards had been inducted in consequence of legal proceedings in this Court, but the great body of the parishioners did not acknowledge him as their minister; and the elders, from the same feeling, refused either to attend his church, or to meet with him in kirk-session. In this way the intimation from the pulpit had never been communicated to them; and Mr Edwards, knowing the circumstances, was not warranted in certifying, as he had done, that the elders declined to act in the matter. The certificate required by the Act of Sederunt might be given without any meeting of the kirk-session, and therefore an intimation of a meeting of kirk-session was not the kind of intimation which the elders were entitled to receive. Their absence from such a meeting might have warranted Mr Edwards to certify that they refused to act with him as a kirk-session, but gave no warrant whatever for certifying that they declined to act in the matter of giving a certificate to an applicant for the poors' roll. After the interlocutor of the Court was served upon them, with notice of a diet to be held for the purpose of granting the certificate, the elders appeared to act; and though they refused to sign a paper with the minister, bearing, "that we, the undersigned minister and elders," &c., they signed another in exactly the same terms, except that it commenced with the words, "we, the undersigned elders," &c. They tendered this certificate to the applicant, but, strange to say, he declined to receive it, and took a protest that they should be held liable to him in all the consequences of refusing to grant a certificate. One would have thought that if his only object was to get on the poors' roll, he would have been glad to have received the certificate in any form which he could make available; but he now appears to argue against the sufficiency of his own certificate, and subject the elders in expenses on the ground of its insufficiency. The question thus raised, therefore, is, Whether the Act of Sederunt requires that the minister and elders must meet in kirk-session to grant this certificate? Now, the Act of Sederunt says nothing of a kirk-session at all. It simply requires a certificate signed by the minister and two elders. Here the certificate is in all respects in terms of the Act of Sederunt, except that it is contained on two separate papers,—the signature of the minister being on the one, and those of the elders on the other. Is it necessary to construe the Act of Sederunt so strictly? Because it uses the word "certificate," must those elders who, from any cause, decline to sign with the minister, while they offer to sign separately, be held guilty of a contempt of Court? Many causes may be imagined which might justify elders in refusing to act with the minister; but whatever these causes may be—should they amount to nothing more than certain scruples—there is nothing in the Act of Sederunt compelling them to forego them, if they prefer signing separately. It is evident from the language which the elders have used in their written statement, that they entertain all proper deference for the Court. There is no desire on their part, still less on that of their counsel, to question the authority of the Act of Sederunt, which is most expedient and beneficial. But, undoubtedly, if the matter were to be carried farther, and a rigid construction of the Act to be determined on, there would be room for grave consideration as to the competency of issuing such an Act of Sederunt, and issuing it under the penalty of subjecting in expenses, or something more serious, those not observing it to the very letter. That, however, is a question which the elders have no interest and no wish to raise. The first person deserving blame is Mr Edwards, who misled the Court by a false statement; and the next party to blame is the applicant himself. What right had he to say,—I won't take a separate certificate from you: I have got one from the minister; and if you refuse to sign it, it is at your peril? It looks as if there were other matters here than the obtaining of a certificate.

Ross, for the applicant, stated—

That he had no wish, and no interest to object to the separate certificates, if the Court should be pleased to sustain their sufficiency; but the Act of Sederunt speaks only of a certificate; and the applicant had certainly an interest in seeing that what the elders offered him was such as the Act of Sederunt required. With regard to the declinature to act, it was well known, that whether the signing of the certificate were a sessional act or not, the usual mode of intimating a diet for doing it, was by notice from the pulpit. Mr Edwards had adopted this usual mode; and presuming, from the non-appearance of the elders, that they declined to act, he was entitled to certify the fact. One thing is certain, that these elders, by continuing to hold office while they declined to discharge its duties, instead of resigning their office, and allowing their place to be supplied by others who would discharge them, had subjected the applicant to great delay, trouble and expense; and for these he would submit that he was clearly entitled to reparation.

Lord President.—I am bound to state, that from the terms in which Mr Edwards has couched his statement, I was led to believe that his elders had declined to act in this particular matter. I did not understand him to mean that he had got no elders who would act with him in any matter. It was under the impression of a distinct refusal in the particular matter that I suggested the interlocutor which the Court pronounced. Now, however, the circumstances are fully before us, and the case bears a very different complexion. With regard to the Act of Sederunt, I think that, on a fair construction of its terms, it is impossible to hold that what it requires is an act of the kirk-session. Had that been the thing required, the Act would have mentioned the kirk-session, and been satisfied, as in all sessional acts, with the signature of the minister as moderator. Instead of that, it mentions only the minister and two elders. Now, it appears that we have a certificate by the minister and by the elders, but on separate papers; and the question is, ought such a certificate to be sustained? I am inclined to sustain it as a *bona fide* compliance with the Act of Sederunt. It is quite evident that these elders meant no disrespect to the Court, and that there is no reality in the statement, that they personally declined to act in the matter. This is clear, both from their own written statement, and the statement now made by their counsel; and I therefore move the Court to sustain the certificate. We have nothing to do here with the state of matters in the kirk-session.

Lord Gillies concurred.

Lord Mackenzie.—When this matter was formerly before us, my impression was the same as your Lordship's. I am clear that the Act of Sederunt does not contemplate a proceeding by the kirk-session. If it did so, it would of course require that the certificate should be granted, at least, by a majority of the kirk-session. On the contrary, the number of elders may be a dozen; and though ten of them may be against granting the certificate, yet if two of them, with the minister, concur in granting it, it is sufficient. The only question is, whether we can sustain this certificate, where the minister and elders sign on separate documents? I cannot comprehend their scruples to sign with the minister. It seems to me they might just as well refuse to read the same newspaper with him; but that is their matter; and I think the circumstance of their signing separately is too insignificant to call for a rejection of the certificate. With regard to the power of the Court to enforce the Act of Sederunt, I at one time thought, that in the case of a refusal, all that the Court could do was to bring up the recusants, and make them give evidence as witnesses. I have changed that opinion. I think that, as the proper object of the Act is to save the expenses of process, the Court are entitled, under the Statute authorising them to make acts for that purpose, to enforce this Act.

Lord Fullerton.—I concur entirely.

The Court sustained the certificate.

Act. Ross.—*Alt. Rutherford.*—[H.B.]

18th January 1842.

FIRST DIVISION.—(H. B.)

No. 78.—NICOL ROBERTSON, Pursuer, v. ALEXANDER DAVIDSON and OTHERS, Defenders.

Friendly Society—Forfeiture—Acquiescence—Proof—Under a regulation of a friendly society saving from forfeiture those members who could prove to the satisfaction of the society that they had been "prevented from paying up, either by imprisonment in a foreign country, or some other urgent necessity"—Held competent for a member, eight years after his forfeiture had been declared, to prove that he had been so prevented.

In 1803, a society was formed in Stromness under the name of the "Friendly Society of the Village of Stromness for the relief of Widows, Orphans, and Disabled Men." It was provided that the society should consist of two classes—the one containing those who, on becoming members, were not above thirty years of age, paid £2 of entry-money, and contributed 2s. 6d. quarterly, or 10s. 6d. annually; and the other class containing those who paid only £1 as entry-money, and 1s. 3d. quarterly, or 5s. annually. The 15th article of the society is as follows:

"If any member shall not, before the last Wednesday of November, have paid, or at least shall then pay, the quarterly payments due from his class for the year preceding, then, and in that case, such members shall be liable to pay, as the penalty of such neglect, for the first time, the sum of one quarter's payment of his class; for the second neglect two quarters' payments; and for the third offence three quarters' payments of his class, and that in addition to, and along with the arrears of quarterly payments due by him; and if any member shall be deficient in paying up his quarterly payments for the space of four years successively, then his name shall be struck off from the list of subscribers, and his widow and children shall not be entitled to any benefit from the funds, unless he can prove, to the satisfaction of the society, that he has been prevented from paying up, either by imprisonment in a foreign country, or some other urgent necessity."

The 22d article provided:

"If any member of the society shall, by misfortune or accidents, be rendered unable to gain a subsistence for himself or his family, such member shall be entitled to such annuity as his widow or children would have received,—the members of the society, or the committee for the time, to be judges of his claim for inability, and to sustain or reject the same as they shall see cause."

The pursuer, Nicol Robertson, was an original member of the first class, and continued in the regular payment of his contributions till 1820. He also paid £1 to account of arrears in 1823. The 24th article of the society provides, that intimation of the time and place of the quarterly meetings should be intimated to the members; and, in accordance with that article, these quarterly meetings were intimated to Robertson till 1829, when he was declared to have forfeited his right, and his name was struck off from the list of members. It did not appear that this proceeding had been regularly communicated to him, but after it, the intimation of the quarterly meetings which he had previously received was discontinued. In 1834, the capital of the society, composed chiefly of contributions of the members, but partly also of donations from the Hudson's Bay Company, Sir William Forbes and others, amounted to above £700, but the affairs of the society were said to be by no means in a flourishing condition, as the number of members paying regularly their quarter pennies was only twenty, while the fund was burdened

with twenty-five widows and pensioners of the first class, and five of the second. The articles of the society did not contain any provision for its dissolution; but at a meeting in November 1835, a motion for dissolving the society was discussed, and an adjourned meeting was fixed for the last Wednesday of February 1836, for the purpose of finally disposing of the motion. This meeting was not intimated to the pursuer, who was living in Stromness, but was advertised in the newspapers of the district. The meeting in February unanimously agreed to the dissolution, which was said to have been afterwards consented to by the widows and pensioners. In January 1837, when a meeting of the committee was held, the following petition was given in by the pursuer:

"*Stromness, January 17th 1837.*—Unto the President, Vice-President, and Committee of the Friendly Society of Stromness, Nicol Robertson Humbly Showeth, That he is one of the first founders of that Society, and one of the first class, and paid into it I think for more than twenty years, and never left paying into it, until by severe rheumatisms and severe fever, rendered me next to miserable, by losing the strength nearly of one side, which has rendered me cripple for more than twenty years, which is well known to you all; and although I never pleaded poverty so long as I was able to make a small fend for myself, with the help of friends, in an honest way, I certainly was entitled to help from our Society, although I did not ask it from the day I left paying into it; and now when the funds of the Society is begun to be divided among able and stout men, I hope you will see it just, when you consider the above facts, that I am entitled to my right and lawful share along with you, and send it me accordingly, as you have done to others, without putting you or me to any further trouble.

"I am, Gentlemen, your most obedient servant,"

(Signed) "NICOL ROBERTSON, senior."

The petition was refused; but on making the final division of the funds, it was agreed to set apart about £100 for the paying twenty-five per cent. upon the respective contributions of those individuals "who had become defaulters through carelessness, inattention, or perhaps through poverty." The pursuer declined to accept of this provision, and brought the present action, in which he averred that his failure to pay his contributions was caused by an inability which would have entitled him to become a pensioner on the funds, and concluded that the defenders, Alexander Davidson and others, members of the society, should be compelled either to pay him the annuity of a first-class member, or the amount of the contributions which he had paid to the society, with interest.

The following are his pleas in law:—1. The pursuer's inability to pay his contributions since the year 1823, afforded sufficient excuse for non-payment thereof; and the alleged minute striking him off the list of members was irregular and illegal. 2. The pursuer, as a disabled member of the said friendly society, is entitled to such annuity from the funds of the said society as his widow or children would have received had he been dead. The pursuer being always ready and willing to pay up the arrears of his contributions, if it shall be found that he is bound so to do, the said annuity is payable, as concluded for in the libel. 3. For the purpose of ascertaining the amount of said annuity, the defenders are bound to produce the whole minutes, minute-books, accounts, books, vouchers, papers, securities, and other documents of and concerning the society,

with full and particular states of their annual income and other funds, and the application and distribution thereof, and of the various widows, orphans, and other annuitants thereon. 4. The defenders having taken upon them to declare the society dissolved, and divided the funds among themselves, are jointly and severally liable to make payment to the pursuer of the sum of £100, or such other sum as shall be ascertained to be the value of said annuity as at the 17th January 1837. 5. The minute of the defenders, bearing that they dissolved the society, was *ultra vires* of the defenders, and unauthorised by the rules of the society, and contrary to the objects and purposes of its formation, and wholly illegal. 6. In the event of the pursuer not being found entitled to said annuity as a disabled member of said society, the defenders are liable, conjunctly and severally, to make payment to the pursuer of the sum of £29. 7. 6., being the amount of the pursuer's contributions to the funds of said society, with interest, as concluded for in the libel.

The defenders *pleaded*—1. As the pursuer ceased in the year 1829 to be a member of the society, he has no title to pursue this action, or right to obtain, in any form, aid or benefit from the society's funds. 2. As the association was merely a private society, it was competent to dissolve it at any time by consent of its members; who, along with the other parties interested, were entitled to distribute the funds among themselves. 3. As the pursuer had forfeited and lost the right of membership in 1829, by being eight successive years in arrear of his quarterly contributions, he was validly and effectually struck off the list of members, and from thence ceased to have any right or interest in the society or its funds. 4. Even on the supposition that his statement in regard to his alleged state of health were true, his averment is not relevant to warrant either conclusion of the summons, for it was a quality and condition of a member's right to purge the irritancy incurred by his failure to make his contributions for four years, that he should prove to the satisfaction of the society, or committee of its members, that he was prevented from making such payment by imprisonment in a foreign country, or some other urgent necessity; but not only was no attempt of the kind made by the pursuer, but his failure to make it is admitted by the pursuer. 5. *Esto* the pursuer's claim had been competent during the existence of the society, it is altogether inadmissible now, after the society has been legally dissolved, and the funds distributed among those having right to them; and, even on the condition of tendering payment of his arrears, he has effectually excluded himself from a claim upon the funds under any conditions. 6. Farther, on the supposition that the pursuer's statements were relevant to warrant the conclusions of the summons, or either of them, the averments are groundless in fact. *Lastly*, The defenders are not bound to exhibit their books, papers, and states of their accounts to the pursuer; but they are, on the contrary, entitled to absolver from all the conclusions of the summons, with expenses.

The Lord Ordinary pronounced the following interlocutor:

"7th December 1841.—The Lord Ordinary having heard the counsel for the pursuer, and then, of consent, made *avizandum*, and considered the process, finds, that in the circum-

stances, the pursuer has no well-founded claim against the defenders: Sustain this defence, assoilzie the defenders, and decerns: Finds the pursuer liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and to report.

"*Note.*—The Lord Ordinary does not attach so much importance to the dissolution of the society as the defenders seem to do; because, if it be true that the pursuer continued a member, it could not be dissolved, in so far as his interests were concerned, without his consent: But he decides chiefly upon the long period of admitted arrear, and the still longer period of admitted acquiescence in the resolution striking him off. Even though this resolution had been liable to all the objections stated against it, the fact is not disputed, that after being struck off in February 1829, he made no complaint till January 1837, though he was living all the while in or near Stromness, the smallness of which excludes the possibility of his being ignorant of what had been done. This one fact implies a consciousness that he had been dealt with fairly, and is inconsistent with the whole of his present claim."

The pursuer reclaimed. At advising,

Lord President.—We are told, on the one hand, that the pursuer's situation is worse, from the fact that the society has been dissolved. But, on the other hand, it is admitted in the defences, that the claim was intimated before the dissolution; and it is therefore clear that the dissolution does not make the pursuer's situation either better or worse. The case has now been brought before us with the interlocutor and note of the Lord Ordinary; and I must fairly confess I am not able to concur in his Lordship's view, that the long delay amounted to acquiescence on the part of the pursuer; that is, to acquiescence in the resolution striking his name from the list of members. Had there been, as the Lord Ordinary supposes, an admitted acquiescence of eleven years' duration, there can be no doubt that this would have been a solid ground on which to found the plea; but then the fact seems to be very different from what is supposed. Is it not essentially necessary that the party against whom the plea of acquiescence is urged, should have known what he is said to have acquiesced in? Now, it appears that no intimation was given to the pursuer at the time when his name was struck off. It is said, indeed, that the meeting at which he was struck off was intimated to him, and that the resolution to do so was carried into effect in February 1829; but when the question was put to the defender's counsel, whether the fact of his having been so struck off was intimated, he was unable to answer in the affirmative. He merely says, that because the pursuer was living on the spot at the time, and because Stromness is a small place, it is to be presumed that the fact must have been known to him. Now, it is impossible to adopt this presumption. Before we can apply the principle of acquiescence, it is essentially necessary to be assured that there was a knowledge of the thing acquiesced in. This is not proved here, and therefore I cannot hold that the pursuer is barred by acquiescence from proving the facts which he offers to establish. Since, therefore, the Lord Ordinary has rested his judgment solely on the plea of acquiescence, I have the greatest possible difficulty in adhering to it. But, then, looking at the regulation (p. 5 of record), I cannot see how the members of the society can take the benefit of that regulation without giving the benefit of it. No doubt there was an express certification, that after the failure of payments for a certain period, the names were to be struck off; but this was under the qualification as to their being unable to pay, or out of the country. Now, when it is averred that the failure to pay was owing to bodily infirmity and poverty, the pursuer, on that supposition, is still entitled to his privilege. Now, his own statement is, according to his own homely phrase, that he had endeavoured to "fend" as he best could, but that his poverty was the sole ground of his not paying. I don't know what he may be able to prove; but when he avers this, I cannot see that we should shut him out from the proof. If a dissolution has taken place so as to preclude the society from acting on the regulation, whose fault is that? Let the matter be investigated thoroughly, and let the society say conscientiously that there is not sufficient evidence to establish his averments, and the case will be very different. But, in the face of the

regulation, it is impossible to debar him from the proof which he offers, that he was kept in ignorance of his being struck off, and of his other averments. If he establishes his averments, I should think him entitled, on paying his arrears, to a fair share of the fund. I must own that I am not affected by the defenders' argument, that this was a society for mutual assurance, and that the interests of members must be determined by a nice calculation. That might be a good argument if the sum claimed by him were to go to widows, and others entitled to provisions. But that is not the case; for they say it is expedient to put an end to the society; and having agreed to put an end to it, we cannot listen to that argument. The principle of decision in the cases founded on is sound, and I see little difference between them and the present. There it was pleaded that the party was unable to pay from poverty; and that is just what is pleaded here. There is the case of Steele in 1808. In the case of Boyes in 1834, the Court held that they could not qualify the Act of Parliament, and therefore that decision does not interfere with the case of Steele.

Lord Mackenzie.—I concur, but not without difficulty, and only from regard to the cases founded on. According to the ordinary condition of insurance on lives, failure in any year to pay the annual premium produces a forfeiture of all right in the insured,—a hard condition in cases of inability to pay, and scarcely consistent with our law against unequal conditions. Yet custom has sanctioned it. But in the present case, it was made an express condition in the regulations of the society, that a party failing to pay should forfeit his right, unless he were unable to do so from bodily infirmity, or the like. I admit, that if at the time this party had offered to prove his inability on such grounds, he would have been entitled to relief. But I do not think that the thing expressly stipulated was, that he was to get relief before he stated his claim to it. Yet in two cases it has been found that it is still open to the party who has been declared forfeited for non-payment of annual contributions, to prove at any time thereafter that he was in poverty, and that that was the reason of his not paying the annual sum, though he did not claim relief in these years. This he may do to the effect of rescinding the forfeiture. I should have doubted of this construction of the regulation, if it had not been adopted in these cases. I admit at once, that if the party had come forward in reasonable time, he would have been entitled to his proof; but I should have had great doubts of his being entitled to do so after such a lapse of time. It is said he was not bound to know of his name having been struck off; but by the very terms of the contract he was bound to know, that if he did not pay he would forfeit; and knowing this, he was bound to look after his interest, perhaps not instantly, but within a reasonable time. If he did not, then I should have thought that he was not entitled to prove his poverty, so as to be relieved from the forfeiture at all. But the Court has decided that there is to be no such limitation; and that if the failure to pay has been from necessity, this may be proved, and the forfeiture rescinded at any time. If the party here was bound to know of the forfeiture, he was entitled to know this interpretation adopted in the decisions of this Court settling the law. On the whole, I think him entitled to the proof which he offers; but I rest very much upon the decisions, which I do not consider myself entitled to go against.

Lord Fullerton.—I have the greatest difficulty in adopting the opinions just expressed. I rather think the interlocutor ought to be adhered to. The circumstance of the dissolution of the society may be entirely discarded. The only question is, Whether or not, at the time of that dissolution, the pursuer can be held to have been a member of it? Now, certainly, the cases referred to—I mean those of Steele in 1808, and Boyes in 1834—go far to modify, on equitable considerations, the strict rule of law mainly founded on by the defenders,—farther, perhaps, than I should have been disposed to go, if the question had been open. But it would be dangerous to go a step farther; and I think it would be going a great deal farther to sustain this claim in the circumstances of this case. It may be said to be fixed by those decisions, that where, by the rules of a society of this kind, a failure to pay the periodical contributions excludes from the society; while, by the same rules, a contributor, disabled by ill health or poverty from gaining a livelihood, is entitled to support from the society, the party

against whom the exclusion is enforced may relevantly aver and prove that his failure to pay was owing to that disability. But in both of those cases, the challenge of the exclusion took place within a moderately, or a comparatively short time after the penalty had been incurred. Certainly, in neither of the cases does it appear to have been pleaded, that the party excluded had given any ground for holding that he had acquiesced in the forfeiture of his rights. Now, here the exclusion took place in 1829. It might have taken place several years sooner, as he had for several years failed to pay; but it did not; and until that year the pursuer regularly received the notices to attend the meetings, according to the rules of the society. But in that year the exclusion took place, and from that time, in February 1829, it is admitted no notices to attend were sent. It is also admitted he continued to reside in, or in the neighbourhood of, Stromness; and yet from the year 1829 till the year 1837, he never made the slightest objection, or any attempt to question, or procure the recal of his exclusion. In these circumstances, it seems hardly to be denied, that if the resolution to exclude him had been intimated to him, this silence of his, for so long a period, must have been fatal to his claim. But it does not appear to me, that in such a case any intimation was necessary. He must be presumed to have known the rules of the society of which he was a member. He knew that he had not paid for several years. Even supposing that his ill health previously would, by the force of the exception in the 15th article, have afforded him an excuse for not paying, he knew that excuse had not been tendered; so that for more than the specified period he had neither tendered payment nor apology; and he knew that, from February 1829, the notices to him to attend the quarterly meetings, which all the members were, by the 24th regulation, entitled to receive, had been discontinued. It cannot be doubted, then, that he must have known,—1st, that he had incurred the penalty of exclusion; and, 2dly, that from February 1829, he was dealt with on the footing of that exclusion having taken place; and yet, for eight years he took no step for getting his excuse accepted, or himself replaced. I think that this does afford a most manifest and important distinction between the cases referred to and the present; and I see no reason, but on the contrary the greatest danger, in extending the principle of those decisions. I am disposed to adhere to the interlocutor of the Lord Ordinary.

Lord Gillies.—I concur in thinking that the interlocutor must be altered, but I think it unnecessary to enter at length into my reasons. The cases referred to are decisive; and I must confess, that if the question was still open, and these cases were now before us for the first time, I would be disposed to repeat them. I think them well founded. But it is said that there is an acquiescence in the present case, which did not exist in former cases. In those cases, length of time was certainly founded on, for it is expressly pleaded in one of them that four years had elapsed from the date of payment. That was debated, surely. But then it is said, that though length of time might have been pleaded, acquiescence was not pleaded. How then, is it pleaded here? The Lord Ordinary says that he proceeds chiefly on the long period of time which has elapsed; but how lapse of time can be construed into acquiescence, if the party did not know the fact in which he is said to have acquiesced, I cannot understand. The allegation of acquiescence is made not only without evidence, but against the admission of the defenders themselves. I cannot see how there can be acquiescence in a fact which never existed—I mean, a fact of which the man had no knowledge. But then, it is said, that by the regulations he must have known that if he intermitted payment for four years, his name would be struck off. This is somewhat odd. For it so happens, in point of fact, that not only four, but five, six, seven years elapse, and still his name continues on the list of members, although it is assumed that during all these years he must have known that he was no member. They took an arbitrary time for cutting him off, and he was no more bound to know that he was cut off at eight years, than at any of the preceding four, five, six, seven. I cannot, therefore, sustain the plea of acquiescence. With regard to the dissolution, I have some doubt how far the society were entitled to dissolve. It is said that they have funds to the

amount of £800, and the twenty existing members propose to divide it among themselves. Now, part of that sum appears to have been contributed, not by the members, but by charitable individuals for the benefit of the society, considered as a charitable institution. I see the names of Sir W. Forbes, and the Hudson Bay Company, mentioned as contributors. The money so contributed, be its amount what it may, the members were not entitled to share among themselves to the amount of one farthing. But the question of dissolution is not properly before us. As to the merits, I am clear that the interlocutor must be altered, as it proceeds on the understanding of an acquiescence which could not exist if the fact said to be acquiesced in was not known.

The Court altered, and allowed a proof.

Lord Ordinary, Cockburn.—*Act.* Anderson, Pattison; C. Spence, S.S.C., *Agent.*—*Alt.* Whigham, Paton; George Munro, S.S.C., *Agent.*—*B. Clerk.*—[H.B.]

20th January 1842.

FIRST DIVISION.—(H.B.)

No. 79.—ROBERT BALFOUR WARDLAW RAMSAY, *Pursuer, v. THE COMMERCIAL BANK OF SCOTLAND, Defenders.*

Landlord and Tenant—Lease—Assignment—Retrocession.
A lease, not assignable without the landlord's consent, was assigned, and the landlord consented by a writing to that effect indorsed on the assignation—Held that the assignee (a bank), though alleging that the assignation was only in security, was substituted for the original tenant, and could not retrocess him without a new consent from the landlord.

By a lease executed in 1834, Mr Robert Wardlaw Ramsay, the pursuer's father, let to George Wilson, his heirs and successors, for twenty-seven years from Martinmas 1832, a feu at Haugh Mill, in the parish of Markinch, with the houses, spinning-mill, and others built upon it, a garden and three acres of ground adjoining, as also the whole of the machinery, large and small, then used in the premises, with a right to use as much water as could be conducted from the Leven by a sluice of certain dimensions. The rent of the first year was £60, and of the subsequent years £176. 12s. 4d. The lease expressly excluded assignees and subtenants, "excepting such as shall be approved of by the landlord by a writing under his hand;" and it was "specially provided and declared, that if any assignation or subset shall be granted of the premises hereby let, or of these presents, by the said George Wilson or his aforesaid, he and they shall nevertheless continue responsible to the said Robert Wardlaw Ramsay and his aforesaid for payment of the rent and performance of the whole stipulations and provisions contained in these presents." The tenant was also taken bound to purchase the whole of the small machines, as specified in a schedule, at the price of £400, payable at Martinmas 1845. By a supplementary addition to the lease in 1835, the tenant became bound, in return for an expenditure by the landlord of £600 in erecting new buildings, to pay for five years an additional rent of £60, and thereafter of £40.

Wilson having become deeply indebted to the Commercial Bank through their agency at Kirkaldy in 1836, executed an assignation, which, after narrating the lease and supplementary addition *verbatim*, proceeds as follows:

"And farther, considering that John Reid, agent for the Commercial Bank of Scotland at Kirkaldy, for himself, and as agent

fore-said, has advanced various sums of money to me, amounting to £1990, of which I do hereby acknowledge the receipt, renouncing all exceptions to the contrary. Therefore, I the said George Wilson, with the special consent of the said Robert Wardlaw Ramsay, have made and constituted, as I do by these presents, make and constitute the said John Reid, for himself, and as agent fore-said, and his heirs and successors, my lawful cessioners and assignees, in and to the before-recited tack and supplementary minute, or addition thereto, during the whole years and terms thereof yet to run, from and after the term of Martinmas last, and to all the clauses, obligations, and stipulations therein contained, with the whole profits and emoluments of every description which may arise therefrom, and all action and execution competent to me and my fore-saids thereupon; and I do hereby assign, convey, and make over to the said John Reid, and his fore-saids, all right, title, and interest which I have or can claim, or pretend to the large and small machinery, specified and contained in the schedules annexed to the said tack; and, moreover, I the said George Wilson, without prejudice to the foregoing assignation, but in corroboration thereof, do hereby sell, assign, convey, and make over to the said John Reid, and his fore-said, the whole machinery, implements, and utensils belonging to me, and presently situated on the premises, contained in the said lease, and which are specially enumerated and contained in a list or schedule hereunto annexed, subscribed by me as relative hereto, with all right, title, and interest which I have or can claim, or pretend to the said machinery, implements, and utensils, or any part thereof, with power to the said John Reid, and his fore-saids, to occupy, possess, and enjoy the said spinning-mill, houses, ground, and others contained in the said tack, and the machinery, implements, and utensils hereby conveyed, and to let the said premises to tenants if they shall think proper, and to intromit with, uplift, and discharge the rents, profits, and duties thereof, during the remaining space of the said tack yet to run; and also to let the said machinery, implements, and utensils, along with the said spinning-mill and premises, or to sell and dispose of the said implements and utensils as he or they may think proper: surrogating hereby and substituting the said John Reid, and his fore-said, in my full right and place of the whole premises, with power to him and them to exercise every right and title concerning the premises, which I could have done before granting hereof: Providing always and declaring, that the said John Reid and his fore-saids, shall be bound and obliged, as by acceptance hereof, he binds and obliges himself and them, to make payment of the rent or tack-duty stipulated by the said tack and supplementary minute or addition thereto, at the terms therein specified; and also to perform, implement, and fulfil the whole other obligations and conditions incumbent on the tenant by the said tack and supplementary minute or addition thereto."

The landlord's consent to the assignation was expressed on the back of the deed in the following terms: "I consent to the preceding assignation, and hold it as duly intimated to me." (Signed) "R. WARDLAW RAMSAY." Of the same date the bank took an instrument of possession, and two days after granted a sublease to Wilson at the yearly rent of £1000. It appears that a back-bond was also executed in the following month (February), by which the bank became bound to retrocess Wilson as soon as the debt which he had incurred to them was paid. In October 1836, the bank through their agent, and with the landlord's consent, granted a sublease of the lands connected with the spinning-mill, to be used as a bleachfield. The half-year's rent falling due the first Whitsunday after the assignation, was paid to the landlord by Wilson. Another half-year's rent fell due at Martinmas 1836. The receipt for it by Mr Dewar, the landlord's factor, is as follows:

"Received, pro R. W. Ramsay, Esq. of Tillicoultry, from John Reid, Esq., Kirkcaldy, by Mr Geo. Wilson, £119.—11½. Sterling, being rent of Haugh Spinning Mill, from Whitsunday

1836 to Martinmas following, interest on store-room, &c., included, which are hereby discharged."

On the 27th April 1837, the bank applied to the Sheriff for sequestration against Wilson for the year's rent from Martinmas 1836 to Martinmas 1837, and obtained warrant of sale to the extent of £500, for the half-year's rent payable at Whitsunday. On this occasion the defenders' agent wrote to the landlord's agent as follows:

"I beg to mention to you, on behalf of Mr Reid, the Commercial Bank agent at Kirkcaldy, that he has found it necessary, as the principal tenant under the late Mr Wardlaw Ramsay, to sequester the effects at Haugh Mill, belonging to his subtenant Mr George Wilson, for the rent due by Mr Wilson to him, as agent for the Commercial Bank.

"The Commercial Bank agent will be ready to pay you the rent due to Mr Wardlaw Ramsay at Whitsunday first."

On the 8th May 1837, Wilson's estates were sequestrated under the Bankrupt Act. The rents of 1837 and 1838 were paid to Mr Ramsay by the bank, who took receipts as for rent due by them. One receipt is as follows:

"Edinburgh, 22d November 1838.—Received from the Commercial Bank of Scotland, £131 Sterling, being half a-year's rent due by said bank at Martinmas 1838, as tenants of the Haugh Spinning Mill, belonging to the representatives of the late Robert Wardlaw Ramsay, Esq. of Whitehill,—which half year's rent is hereby discharged by us their agents."

There are indorsements on these receipts by Mr Aytoun, the trustee on Wilson's sequestrated estate, bearing that he had paid the sums contained in them to the bank. In February 1838, Mr Aytoun brought an action of reduction and declarator against the bank, concluding for reduction of the assignation and instrument of possession in their favour, and of the sublease to Wilson, and to have it found and declared that the assignation had not conferred upon the bank any right in prejudice and to the exclusion of the other just and lawful creditors of Wilson. After an interlocutor had been pronounced remitting the cause to the jury roll with a view to the preparation of issues, a minute was given into process of the following tenor:

"Whigham, for the pursuer, stated, that the parties in this cause had come to an arrangement, whereby it became unnecessary to litigate farther, inasmuch as the defenders had consented to allow decree to be pronounced against them in terms of the libel, and he therefore craved his Lordship to recal his interlocutor remitting the cause to the Jury Court, and to decern in terms of the libel, but finding no expenses due to either party. To which statement, *Shank More*, for the defenders, answered, that the pursuer, with the approbation of Wilson's creditors, having agreed to pay to the defenders, the Commercial Bank, the sum of £650, out of the first and readiest of the funds, and to allow the said bank to rank along with the other creditors, for every debt due to the said bank, from the estate of the said George Wilson, and to draw the dividend effeiring thereto, the said defenders had agreed to allow decree to pass in terms of the libel, (but finding no expenses due to either party); and John Reid, late agent at Kirkcaldy for said bank, had agreed, with consent of said bank, to retrocess George Wilson in the lease mentioned in the action of reduction, in the same manner as if the said assignation sought to be reduced had never been granted; therefore he consented to decree being pronounced in the terms above mentioned."

Decree was accordingly pronounced in June 1839, and in July following a retrocession was executed in Wilson's favour. The deed of retrocession, after narrating the assignation, instrument of possession, sub-

lease, back bond, and stipulations of the above minute lodged in the process of reduction, proceeds on the part of John Reid the agent, with the consent of the bank, and also of Mr Aytoun the trustee, to retrocess Wilson, his heirs and successors, "to their own right and place of the premises before recited, tack and supplementary addition thereto, during the whole years and terms thereof yet to run." The first half-year's rent which fell due at Martinmas after this retrocession, was paid by the bank, as in the two previous years, on a receipt bearing to be for payment of "rent due by them" "for Haugh Spinning Mill;" but in June 1840, when a similar receipt was sent for payment of the Whitsunday's rent of that year, the bank declined payment, on the ground that they "had now no concern with the mill." Mr Aytoun also intimated that he was quite ready "to pay the half-year's rent due at Whitsunday last on Mr Wilson's account, whenever a discharge approved by him shall be granted for the Haugh Mill rent by his landlord;" and Wilson wrote a letter to the law-agent of the bank, stating, *inter alia*:

"If you think proper, I will consign the money in the meantime into the hands of Mr Aytoun, my late trustee, or his brother in Edinburgh, until Messrs Stevenson and Yule and you come to a proper understanding on the subject. The Court having found the bank's claim invalid, completely nullified the assignation, and my discharge having been legally procured, as well as being retrocessed into the property, I consider myself fairly the landlord's tenant, as if no assignation or bankruptcy had ever taken place."

The pursuer, who had succeeded to his father, the grantor of the lease, declined to acquiesce in this view, and brought the present action, concluding that the Commercial Bank ought to be decreed to make payment of the rent of each year, "during the currency of the said tack, for all the years thereof yet to run from and after the said term of Martinmas 1840, the terms of payment thereof being always first come and bygone;" "and to implement, pay, and perform the whole prestations and obligations incumbent on the said Commercial Bank as tenants and assignees foresaid, in virtue of the said lease, and supplementary minute or addition thereto, and assignation thereof."

In support of this action the pursuer *pleaded*—1. By the assignation and intimation thereof libelled, the defenders became tenants under the original lease, and are therefore bound to fulfil all the obligations imposed on the tenant by the said lease, during the whole period of its currency. 2. Under the circumstances, the assignation in question would have operated as an effectual transference of the lease to the defenders, even in a question with creditors. At all events, in a question with the present parties, the liability of the defenders, as assignees, cannot be affected by any such consideration. 3. A landlord who has once accepted of an assignee as his tenant under a lease excluding assignees, except such as he should approve of, is not bound to consent to a second assignation, even although the proposed assignee be the same person as the original tenant, and although the assignation should be executed in the form of a retrocession in his favour. 4. At least the landlord is not so bound, without reference to the circumstances of such party at the date of the proposed retrocession, or where, as in the present case, the landlord has reasonable grounds for his refusal.

Pleaded by the defenders—1. All right which the

defenders ever had, even in security, to the subjects of the lease held by George Wilson, having been brought to a close by the decrees of reduction, and the connection of the defenders with the lease having ceased, there is no legal ground upon which the conclusions of the action against them for payment of the rents, during the whole currency of the lease, can be maintained. 2. At all events, no change having taken place in the actual possession of the subjects, and there having been no absolute or effectual transference of the lease to the defenders, so as to operate a change in the tenancy, the defenders are not bound to implement the obligations of the lease, but are in this respect as free of responsibility as if the assignation in their favour had not been granted. 3. Even had their assignation to the lease not been reduced, and supposing it to have been open to no challenge, still, having been a right merely in security, and for repayment of their advances, and having been brought to a close by their settlement with the creditors of Wilson, no obligation can in the circumstances be inferred against the defenders, binding them to implement the prestations of the lease, as assignees thereto, and as tenants of the subjects; the more especially as, by the express terms of the lease, Wilson and his heirs remained bound to the landlord for the whole rents and other prestations under the lease, notwithstanding an assignation thereof. 4. The deed of retrocession, executed by the defenders in favour of Wilson, effectually divested them of all right in the premises, and terminated whatever liabilities might have been inferred against them prior to such retrocession; and all prior liabilities having been discharged, no claim exists on the part of the pursuer for any of the prestations or obligations of the lease, which can be legally enforced against the defenders.

The Lord Ordinary pronounced the following interlocutor:

"23d November 1841.—The Lord Ordinary having heard counsel on the closed record, and thereafter considered the documents produced, and whole process, Finds that the pursuer's father let the spinning-mill and machinery libelled on for twenty-seven years from Martinmas 1832, 'to George Wilson, and his heirs and successors, but expressly excluding assignees and sub-tenants, excepting such as should be approved of by the landlord by a writing under his hand:' Finds that Wilson having contracted a debt of £1990 to the Commercial Bank, he, on the 21st January 1836, assigned the said lease to Mr John Reid, as agent for the bank of Kirkcaldy; and the deceased Mr Ramsay, by a doquet on the back of the lease, consented thereto, and held the assignation as *intimated* to him: Finds that an instrument of possession was taken by the bank upon this assignation; and that, *unico contextu*, a sub-lease was prepared as from the bank to Wilson, *sub-letting* the whole premises to him: Finds that George Wilson became bankrupt, and that his estate was sequestrated on 8th May 1837, and his whole estates, real and personal, were judicially adjudged and assigned to Mr James Aytoun as trustee in his sequestration: Finds it not offered to be proved in this action that, prior to the sequestration, the bank had obtained any such *actual possession* of the premises let, as would have been available to them against the claim of the onerous creditors and judicial trustee, whose title and possession after the sequestration were incontestable: Finds in particular that, prior to the sequestration, the bank drew no rent from Wilson as sub-tenant, and that the principal rents due to the heritable proprietor continued to be paid to the landlord's factor by Wilson as the party in possession, notwithstanding the assignation: Finds, that soon after the sequestration, the trustee on the sequestrated estate raised a process of reduction of the said assignation, as being null, void, and ineffectual, from no possession hav-

ing followed thereon: Finds that during the dependence of that action, the bank advanced the rents to the proprietor as they fell due, which was necessary to save the lease from forfeiture: Finds that the bank were ultimately advised to enter into a compromise of the action of reduction on receiving payment of £650, and a right to rank for their debt on the estate of the bankrupt, to allow decree of reduction of the said assignation to pass; and that, accordingly, decree of reduction was pronounced at the instance of the said trustee on 28th June 1839: Finds that thereafter the agent for the bank, at desire and with consent of the trustee on the said estate, executed a *retrocession* of the lease in favour of the said George Wilson, the original tenant, who at the same time offered a composition to his whole creditors, and was *discharged* of all his debts contracted prior to the sequestration: Finds that Wilson still is in actual possession of the mill and machinery libelled on, and that he has offered to pay the whole rents claimable by the landlord, and consigned the same from time to time as they fell due: Finds, under these circumstances, that the pursuer has no claim on the defenders as assignees under their ineffectual and rescinded assignation, and therefore sustains the defences, and assuizes the defenders from this action: Finds the defenders entitled to expenses, as the same may be taxed by the auditor, and decerns.

"*Note.*—Under the circumstances of this case, as articulately detailed in the interlocutor, it is thought that the claim of the pursuer is not maintainable on any principle of law or practice applicable to the case.

"1. Although the general rule is now clearly fixed, that ordinary assignees of leases who have entered into *possession* on an assignation, are liable in all the obligations for past and future rents, as well as for the other prestations imposed on the original tenants, that obligation cannot be extended to the case where the assignation has been *reduced* at the instance of a competent and preferable party, and declared judicially to have been *null and void* from the beginning. It would indeed be a result most anomalous and unjust, if a party, after being deprived of all the benefit of an assignation, could nevertheless be subjected in its heaviest burdens. There is no example of any such claim being preferred, still less of its being sustained. Accordingly, although the present case is almost identical with the noted one of Brock and Cabbell, so long the subject of discussion both in this Court and the House of Lords, and although the assignation in that instance was finally held to be ineffectual, it does not appear that Mr Johnston of Alva ever attempted to claim the rent from the Glasgow Bank, after the reduction of their assignation.

"Indeed, it is apprehended that the principles of the strictest law, as well as of essential justice, are opposed to the claim. The liability of an assignee for the rent and prestations of a lease, arise from his having right to all the future benefit of the contract under a *complete title*; but if the title never has been completed by *possession*, and if it has been finally *reduced* by a court of law, there are no *termini habiles* for sustaining the obligation. When there is no *possession*, the landlord is bound to know, and has the same means as the rest of the public of seeing, that the assignee's right is incomplete.

"In the present instance, the pursuer does not allege that the decree reducing the bank's right was collusive, or that the defenders' right was, in point of fact, completed by *possession* at the date of the bankruptcy. The Lord Ordinary specially put it to the pursuer, if he was ready to undertake a proof to show that the bank ever had *actual possession*, and was answered in the negative. He urged, however, that it was the fault of the bank themselves that they did not get possession, and it was said that the pursuer should not suffer from that omission. But, with deference, the landlord did not stipulate that the assignees' right should be completed within a definite time; all that was asked from him, was his consent to the assignation, which he gave, leaving the assignees power to complete it or not as they chose; but if the assignees lost the benefit of the assignation, and never obtained possession, no obligation arose in the landlord's favour from that omission. The possession continued with the principal tenant, the party favoured and selected by the landlord; the bank never derived the great benefit which a complete assignation would have given them; and they justly stated at the debate, that if the landlord could have given and warranted possession to them,

they would most readily have undertaken all the responsibilities under the lease. But surely the landlord is not entitled to found any claim against a party who has thus sustained a great loss from the non-completion of a contemplated right, and when the possession was allowed to remain with the principal tenant to whom he himself granted the lease.

"If the proprietor had a claim against any party as assignee, it possibly might have been plausibly raised against the trustee and creditors who reduced the bank's assignation, and claimed possession for themselves; but as the landlord never gave any consent to their right, it seems very questionable whether he would have succeeded in establishing the character of assignees on the creditors at large in the present case.

"2. There is another ground upon which it is supposed that the defenders are entitled to resist the claim now under consideration. The lease here is in peculiar terms: it permits assignations with consent of the landlord, but under this special condition, that if any assignation or sublet should be granted 'of the premises thereby let, or of the said lease by the said George Wilson or his forebears, he and they should nevertheless continue responsible to the said Robert Wardlaw Ramsay and his forebears for payment of the rent and performance of the whole stipulations and provisions contained in the said tack.'

"The effect of this stipulation appears to be to retain Wilson as principal tenant, bound to the landlord for the rent conjunctly and severally with every assignee during the whole course of the lease. The original tenant is thus never entirely divested of his obligations and rights under this contract; and it must be competent for an assignee at any time to renounce his right, and grant a retrocession to the tenant so held bound. It is not in the landlord's mouth to object that this is an assignation to a *stranger* not consented to by him; his consent to the principal tenant was the foundation of the original contract; and a retrocession to that tenant falls within the permissive words of the lease, as given to a party 'approved of by the landlord by a writing under his hand.'

"It was objected to this view of the case, that Wilson's circumstances were now *altered and embarrassed*, and that the landlord was not bound to receive him now; but while the principal tenant continues bound for the rent, it is apprehended that the landlord cannot refuse to give him possession, and to receive him as tenant if he chooses to enter. The allegations as to his bankruptcy and *embarrassment* are totally irrelevant. As there was no clause of forfeiture in the lease, in case of *bankruptcy or insolvency* of the tenant, the landlord could never have put an end to the lease, or compelled the tenant to quit possession in consequence of any embarrassment in his affairs, so long as he paid the rent. As little could he object on that ground to the principal tenant resuming possession if he had ever quitted it, when he was still bound for the rent of the subjects.

"This plea, it is supposed, would have been competent, even if the bank had been for a short time in actual possession of these premises; but it is doubly available when the fact appears to be indisputable that the bank were never in possession."

The pursuer reclaimed. At advising,

Lord President.—The present case is one of importance in this department of law, but it cannot be at all assimilated to the cases of Yeaman or Brock and Cabbell. The circumstances are these:—George Wilson, in 1834, obtained from the late Mr Wardlaw Ramsay a lease of the mill and machinery, and mill-lands of Haugh Mill, with right of water from the river Leven, for the period of twenty-seven years from 1832, the date of his entry; and after a certain addition was made to his possession, a rent of about £160 became payable during the currency of the lease. The lease debarred the tenant from assigning, except with the consent of the landlord by a writing under his hand; and it also provided, that in the event of such an assignation, Wilson should still continue bound to Mr Ramsay for the stipulated rent. In 1836 an assignation of this lease was granted, setting forth its full terms, and also narrating on its face that £1990 had been advanced by John Reid, the agent for the Commercial Bank at Kirkcaldy, and accordingly assigning over to him, for himself and the said bank, as cessioner and

assignee, the full right of the lease during its currency, with all the stipulations and obligations contained in it, and expressly providing, that the assignee should be bound and obliged, "as by acceptance hereof he binds and obliges himself and them (the bank), to make payment of the rent or tack-duty stipulated by the said tack, and supplementary minute or addition thereto, at the terms therein specified; and also to perform, implement and fulfil the whole other obligations and conditions incumbent on the tenant by the said tack, and supplementary minute or addition thereto." And the instrument bears that a copy of the said tack and minute were delivered up to the said John Reid. Seven days after the execution of this deed of assignation, which bears to be with the consent of Mr Ramsay (though it was not subscribed by him), there were indorsed on the deed by Mr Ramsay these words: "Edinburgh, 10th January 1836. I consent to the preceding assignation, and hold it duly intimated to me." It appears that an instrument of possession was forthwith made out, and a ceremony of removing the tacksmen from the mill, and subsequently a sub-lease of the premises, was executed in favour of Wilson, stipulating a rent of £1000 a-year, over and above the rent due to Mr Ramsay. Wilson continued to possess and carry on the operations in the spinning-mill for some time. He soon after, however, became embarrassed, though it is said he had paid a half-year's rent to the agents of the landlord, who died soon after; and Mr Reid thereafter actually applied to the Sheriff for sequestration, from a doubt of his solvency, and an arrear of rent. Ultimately a warrant to sell to the extent of £500 was granted by the Sheriff, but, owing to subsequent events, never executed. Shortly after, Wilson was sequestrated by other creditors under the Bankrupt Act, and a trustee appointed. Several terms' rents which afterwards became due to Mr Ramsay were paid to his agents by the Commercial Bank, as expressed in the various receipts. In these circumstances, the trustee on Wilson's estate raised a reduction of the assignation in favour of the bank, and after a variety of procedure (the rent still continuing to be paid in terms of the above receipts), a remit was made to try the case by a jury. After this remit, Mr Reid and the bank (doubtful, it is said, if they would be able to defend their right against the creditors) entered into a compromise, agreeing that, in consequence of a sum of £650 having been paid down to the bank by the trustee, and the bank being allowed to rank for its debt on Wilson's estate, decree in the reduction should be allowed to pass. Decree was pronounced accordingly. Wilson was afterwards discharged on a composition. Mr Ramsay did not claim as a creditor, and was no party to the reduction of the assignation, which was never communicated either to him or his agents. After this Mr Reid, for himself and the bank, executed a formal deed, retrocessing Wilson in the full right of the lease. Mr Ramsay, the son of the granter of the lease, having again demanded the rent from the bank, was refused, on the ground that the bank had no longer any connection with the lease, and in consequence, the present action has been raised, which concludes that the bank shall be ordained to pay certain rents past due, and those of future years as they fall due, and in general, to pay and perform the whole prestations and obligations incumbent on them as tenants. From this action the Lord Ordinary has absolved the defenders; and the question is, whether that interlocutor should be adhered to. First of all, it admits of no doubt that Mr Reid, as acting with full powers from the Commercial Bank, did accept the assignation granted by Wilson, and to which Mr Ramsay gave a formal consent, and an acknowledgment of intimation. This acceptance is proved by the instrument of possession, the execution of the sub-lease, by a sequestration of the sub-tenant for rent, and a warrant of sale, as well as by the subsequent payments of rent by the bank. But if the acceptance of the assignation is thus irrevocably fixed upon the defenders, does it not irresistibly follow that the conditions of that acceptance, imposed upon them by the express terms of the instrument, were binding on them also? These were, that the assignee should be bound and obliged to pay the rent, and perform all the prestations of the lease. How can it be asserted that such a deed, which could not have been granted with effect without the landlord's consent, did not, after his consent was obtained, create an obligation in which the landlord was interested, or that what was done amounted

merely to an arrangement between Wilson and the bank, with which the landlord had little or no concern? I am compelled to draw from the nature of this transaction a very different conclusion. The assignation bearing on its face the fact that the bank had so recently after the date of the lease advanced to Wilson nearly £2000 (of which fact Mr Ramsay could not but be aware, though he could see nothing in the assignation indicating that it was granted merely in security, and there is no reason for holding that he did in fact know of it), was sufficient to inform the landlord that Wilson was not in a very flourishing condition. Having it in his power, however, to prevent his assigning his lease, Mr Ramsay was led to consider whether it would be beneficial for him to agree to the arrangement proposed; and looking to the security of the Commercial Bank, who agreed to take an unqualified assignation binding themselves as tenants, in addition to Wilson's own liability which was to continue, it was perfectly natural for Mr Ramsay to give his consent, on the understanding that he had the bank so bound to him as tenants during the whole duration of the lease, and that they could not again get free of their obligation without his full consent. An important relation was thus established between Mr Ramsay and the defenders; and from the manner in which the transaction was completed, and there being a direct personal contract between them, there arises a complete distinction, in so far as the interests of the landlord and the assignees are concerned, between the present case and those of Yeaman and of Brock and Cabbell, referred to. These related solely to questions between assignees and the creditors of the cedent, and raised no such questions as arise here. So far as the landlord could interfere, there was nothing done, or refrained from being done by him, to prevent the Commercial Bank, after receiving the assignation, from making it perfectly effectual against Wilson and all his creditors. It was open to them either to grant him a sub-lease out and out, or to remove him entirely from the subjects. But supposing the measures that were adopted by the bank to have been abortive for that purpose, it was their own fault, and not ascribable at all to Mr Ramsay. In point of fact, however, a sub-lease was granted, and this was followed by the important step of the bank sequestrating Wilson as the sub-tenant for rent due. This was a serious judicial step, and actually led to a warrant to sell to the extent of £500. There afterwards followed those payments of the rent directly by the bank to Mr Ramsay's agent, and receipts granted to them "as tenants at the Haugh Mill." Whatever indorsements these receipts bear as to the money having been handed over by Wilson's trustee, they cannot do away the terms in which the rents were discharged without challenge. And what can be said to evade the effect of the letter of the 27th April 1837, from Mr Campbell, the agent of the bank, to the agents of the landlord? I hold it impossible to put two meanings on this letter, as to the clear understanding of the parties at its date. It demonstrates that the bank did then clearly hold itself as principal tenant, and that Mr Ramsay stood in the relation of landlord, having the bank bound to him. Now, at this time, in consequence of the situation of Wilson's affairs, which soon after became so disastrous as to lead to his sequestration, the landlord had an undoubted right to hold the Commercial Bank as bound to implement their obligation under the deed to which he had fully consented; and he was, moreover, justly entitled to rely on nothing being done subsequently to his prejudice by the bank, and certainly on his not being thrown back entirely on Wilson as his tenant without his full consent. For a time thereafter, the rents were accordingly paid by the bank to the agents of the landlord; and after the reduction of the assignation had been raised by the trustee for Wilson's creditors against the bank, of which no intimation was given to those acting for Mr Ramsay, and preparation made by a remit for jury trial, the compromise and arrangement entered into, and decree of reduction granted in terms of it, were proceedings solely conducted by the Commercial Bank. To complete the whole matter, after receiving £650 as the price of the compromise, the deed of retrocession was granted by the bank in favour of Wilson, who had got rid of his debts by composition, and was discharged; and thus the bank imagined it had got rid of all obligation under the assignation. I cannot hold that, in these transactions, sufficient attention had been paid to

the rights of the landlord. The change in Wilson's status, after his bankruptcy, was very manifest, and the bank had no legal power to throw him back on the landlord as sole tenant. If the bank had really supposed it could get free of its obligation to Mr Ramsay by such a course of procedure, he ought to have been made a party to the reduction, and an opportunity afforded to him to resist it, when, at all events, he could have at once stated he would consent to no new assignation, either to Wilson or any one else. If this had been done, how could a reduction have had the effect of liberating the bank? Its assent to decree of reduction was purchased for a price; and Mr Ramsay is not to suffer by such a transaction, followed up as it was by the bank's being allowed to rank on Wilson's estate for their debt. Those proceedings, behind Mr Ramsay's back, cannot affect his interests. The conclusion of the action appears, therefore, to be well founded, and the bank still continues liable with Wilson to fulfil the conditions of the lease. If it is true, as the bank states, that Wilson is now quite solvent, sound in credit, and able to fulfil the obligations of the lease, so much the better for the bank; but after the completion of the transaction, the bank cannot shake itself free of it by such proceedings as those which it adopted.

Lord Gillies.—When I first read this case, I entertained doubts of the Lord Ordinary's interlocutor; and since then this adverse opinion has not been shaken, but confirmed. If any proposition be clear in law, it is this, that rights and obligations can be constituted only by deeds and transactions to which the person claiming or incurring them is a party,—not by those with which he has no concern. No doubt there is such a thing as a *jus quæsitum tertii* which may be acquired, in particular circumstances, by a person not actually a party to an agreement. But I can conceive no case in which rights can be destroyed, or obligations imposed, without the concurrence of the party, or by transactions *inter alios*. They may be by *delict*, but there is nothing of the kind here. By *res inter alios actæ* they cannot. Now, how stands the fact? A lease was granted by Wardlaw Ramsay to Wilson. This lease contained, 1st, a clause excluding assignees and sub-tenants, without the consent of the landlord by a writing under his hand; 2d, a clause declaring that if any assignation should be granted, the original tenant, as well as the assignee, should be liable for the rent. Well, an assignation is granted to the Commercial Bank. This, of course, could only be granted in terms of the lease. What, then, are the terms of the assignation? It states that the bank had advanced a sum of money of which receipt is acknowledged, and it then constitutes the bank Wilson's cessioners and assignees. Then there is the clause providing that John Reid, the agent of the bank, shall be bound to make payment of the rent, and perform all the obligations of the tenant under the lease. How do the defenders interpret this clause? As having no meaning at all. They say they were liable only while in possession of the farm. The clause then means nothing. The bank would be liable at any rate if they possessed the farm; but this clause makes them liable whether they possessed it or not; otherwise, it imposes no obligation, and is a mere nullity. This assignation was consented to by the landlord. It was not consent to an assignation in the abstract, but to this particular assignation, by which the bank were bound to pay the rent. How was Mr Ramsay to be deprived of his interest in this obligation? Has he said, or done, or acquiesced in any thing to affect it? Certainly not. Every thing done was *res inter alios*. He was no party to any of the subsequent transactions. The bank not only accepted the assignation, but acted as assignees. Can any thing be clearer than this? Can they shake themselves free of that character? I do not think their obligation such a nullity. Afterwards they sequestrate Wilson for rent. This was a most illegal, oppressive, and unjust proceeding, if they were not assignees. Then they paid rent as tenants. Lastly they granted a retrocession. This is the clearest proof of all. How could they grant a retrocession without being assignees? It is said the assignation was not real, but fictitious. The bank cannot plead this against the landlord. Then, what is called the decree of reduction was a mere compromise, and a compromise in which the bank availed themselves of their right, by receiving a price for the abandonment of it. It is said the landlord had shown a *delectus*

persona in the first tenant's favour, and may therefore be compelled to take him back. But people's opinions change. If a man divorce his wife, can he be compelled to take her back, on the plea that, by marrying her, he had shown a *delectus persona*?

Lord Mackenzie.—As your Lordship has already sufficiently stated the circumstances in which this question arises, it is unnecessary that I should repeat them. I have some observations, however, to make upon one or two points which have been pleaded before us:—1. The last point pleaded by the defender's counsel was a general and important one; and if he had been right with respect to it, he would have been successful in the cause. It is generally that the holder of an assignation, with the landlord's consent, to a lease not assignable without that consent, is entitled to re-assign the lease to the original tenant without the landlord's consent. If that be law, there can be no doubt that the defenders are free, as there was an assignation by them to the original tenant. But I do not conceive that to be the law. It is not supported either by reason or by authority. When a landlord grants a lease containing the condition that no assignation shall be made without his consent, and an assignation is granted with his consent, the lease passes to the assignee with all its conditions. But one of these is, that there shall be no assignation without the landlord's consent. There can, therefore, be no re-assignation, which is just an assignation, without his consent. It is true the landlord agreed to take this man as original tenant. But that does not infer, that when he has got another in place of him, he shall be willing to take him back again. And that reason applies *a fortiori*, if there have been a change in the circumstances of the original tenant, as, if he have become insolvent. But here, before the re-assignation, the tenant had become bankrupt, and in these circumstances, it would be plainly unjust to hold that the landlord was bound to take back the bad tenant, whom he had got quit of, and lose the good tenant he had acquired. Nor is there any authority for this doctrine of the defenders. I am not aware of any decision, or even *dictum*, which sanctions the rule, that a landlord may be compelled to take back the original tenant, or any of the previous assignees, when there had been several assignations; for it must be pushed that length. It is said that it is the general understanding of the country. My understanding is just the other way. I never understood that if a tenant went wrong, and with the landlord's consent got a good substitute in the lease, that substitute might hold it as long as it was profitable, but as soon as it became otherwise, might give it back to the original tenant and be free. 2. It is said, in the second place, that the landlord was a party to what he knew to be a mere assignation in security. Here, again, the plea is a good one, if it had been made out. If it had appeared in evidence that the landlord had been a party to a mere assignation in security, he must have been bound to consent to the re-assignation, on payment or satisfaction of the debt. But there is no such evidence; there is evidence to the contrary. The writings constituting the transaction with Mr Ramsay make no allusion to the assignation being one in security. No doubt there was a back-bond, which, so far as regards the original tenant and the assignee, showed the nature of the transaction to be in security. But with that the landlord had nothing to do. In relation to him there was no back-bond—no letter of the nature of a letter of regress. It is said that the very names of the parties were as good as a letter of regress. But I cannot adopt that. It may be true that one might guess that the bank did not enter into the lease by way of mere agricultural adventure or speculation. But what reason can be given why they might not take the lease in satisfaction of a debt which they could not otherwise receive, with the view of a profit by sub-setting? Unless such a profit was looked to, how could the lease afford any security? If good for security to the bank, it was good for satisfaction of what was due to them. We cannot hold, in contradiction of the instruments, that the landlord did that which he, being dead, cannot admit, and his representative denies he did, and which the instruments do not bear. 3. It is said, in the third place, that the bank are not liable for rent, because the assignation in their favour is void and null. Here, again, if the fact were so, there would be a great deal in the argument. If the assignation had turned out to be an absolute

nullity, on the ground of interdiction, or some other such ground, I doubt whether the bank would have been liable for rent without having acquired a right to the lease. But it is not true that the assignment was a nullity. No doubt there was a formal decree reducing it. But I pay no attention to that. The landlord was no party to that decree, and I hold that it must be entirely disregarded. Want of possession was pleaded as the reason of reduction of the assignment; I rather think there was possession. Lord Gillies has spoken to that. But there is this distinct ground on which the decree of reduction could never stand. The creditors had no title to pursue the action without the landlord's consent, which he was ready to refuse. They could not have taken the lease to themselves without his consent, and therefore the bank had only to get his declaration that he would not consent, in order to show that the creditors had no right to maintain the action. But it is plain that this was properly no decree—it was a mere transaction. A large sum was paid to the bank to obtain its consent, and *pro forma*. In short, it was nothing more than a bargain for a re-assignment. In my apprehension the bank are still the tenants. It is said they cannot get possession. I think they are in possession. The former tenant was, and is their sub-tenant. Even if they were not in possession, they could not be hindered from taking it. The creditors are barred from claiming the lease itself, by the clause requiring the landlord's consent to an assignment. This consent being refused, they cannot exclude the bank. The original tenant has assigned to the bank, and is bound to give them possession, if they have it not already. The landlord is bound, and most willing to put them in possession, if they are not in possession already. I think, therefore, the bank are unsuccessful on all points. They are the tenants, except for their own unavailing attempt to assign the lease, and therefore are liable for the rents to the landlord.

Lord Fullerton concurred.

The Court recalled the interlocutor, and decerned in terms of the libel.

Pursuer's Authorities.—*Brock v. Cabbell*, 29th November 1822, 5th March 1830; House of Lords, 13th May 1828, 3 Wilson and Shaw, and 23d September 1831, 5 Wilson and Shaw. Case of Grant, Hume's Decisions, p. 813. Bell's Principles, § 1212. *Skene v. Greenhill*, 20th May 1825.

Defenders' Authorities.—Bankton, Vol. II. p. 97. Woodfall on Law of Landlord and Tenant. *Brock v. Cabbell*.

Lord Ordinary, Cuninghame.—*Act. Anderson, Miller; John Yule, W.S., Agent.—Alt. More, Cowan; John Archibald Campbell, C.S., Agent.—B. Clerk.*—[H.B.]

9th February 1841.

HOUSE OF LORDS.—(W.H.D.)

NO. 80.—ANTHONY DIXON, JOSEPH DIXON, and OTHERS, *four of the nearest of kin of the late Jacob Dixon, senior, Merchant in Dumbarton, Appellants, v. MRS BROWN or DIXON, Relict, and JOSEPH DIXON and OTHERS, Children of the late Jacob Dixon, junior, and DANIEL BROWN, as Curator and Factor to the said Children, Respondents.*

Testament—Parent and Child—Provision to Children—Legacy—Lapsing—*Conditio si sine liberis*—Trust—*Where a father, in a family trust-settlement, left special legacies to his younger children and their heirs, and the residue of his means and estate to his eldest son, but without mentioning his heirs; although it was provided in his favour that his share of the succession should amount to a sum greater than the largest provision of any of the younger children; the eldest son having predeceased his father some hours, leaving children—Held (affirming the judgment of the Court of Session), that his share of his father's succession did not lapse, but went to his children, notwithstanding the distinction made in the terms of the settlement between him and the younger children of the testator, and that his children were alive at its date.*

Jacob Dixon, senior, succeeded in 1822, as sole surviving partner, to the whole property, works, and trade

of the Dumbarton Glass-Work Company, and thereupon formed a new copartnership with a stock of £98,400, divided into forty-one shares, of which he retained to himself twenty-one shares, giving ten shares to his nephew John Dixon, junior, of Leven Grove (who paid up £24,000, the price of his stock, besides allowing a sum to lie in the hands of the company), and the remaining ten shares to his eldest son Jacob Dixon, junior, who advanced no capital—his proportion being put to his debit in the company books. In November 1824, Jacob Dixon, senior, executed a family trust-settlement, in which he provided for his children in the following manner:

"In the second place, my said trustees shall pay the several provisions following, viz.:—To Anthony Dixon, my second lawful son in life, and the heirs of his body, the sum of £2800, which, with £1200 which I have already paid and advanced for my said son, for outfitting and putting him in business, makes up the sum of £4000 Sterling, which I intend to be the amount of his provision as one of my children, payable the said sum of £2800 to the said Anthony Dixon and his fore-saids, as follows,' &c.: 'To Joseph Dixon, my third lawful son now in life, and to the heirs of his body, the sum of £1500, which, with the sum of £2500 already advanced to him, or paid by me on his account, makes up the sum of £4000 Sterling, which I intend to be the amount of his provision as one of my children, payable the said sum of £1500 to the said Joseph Dixon and his fore-saids, as follows,' &c. 'To Elizabeth Dixon, my eldest lawful daughter, spouse of the Reverend William Jaffray, minister of the gospel at Dumbarton, and to the heirs of her body, the sum of £1500, which, with the sum of £1500 which I have already paid and advanced to my said daughter and her husband, makes up the sum of £3000 Sterling, which I intend to be the amount of her provision as one of my children, payable the said sum of £1500 to the said Elizabeth Dixon or Jaffray and her fore-saids, as follows,' &c. 'To Louisa Dixon, my second lawful daughter, the sum of £3000 Sterling, and to Catherine Ann Sophia Dixon, my youngest lawful daughter, the like sum of £3000 Sterling, payable the said sums to my said daughters at the expiry of one year after their respective majorities or marriages, whichever of these events shall first happen after my decease, or in the event of my surviving these periods, or either of them, then to be payable as follows,' &c. 'In the third place, I appoint my said trustees to make payment of the provisions, annuities, and others, and sustain delivery made by me of the effects specified, and contained in a separate or supplementary trust-deed executed by me in favour of the said trustees, of even date with these presents, to the persons thereinafter mentioned. Lastly, I appoint my said trustees to convey, deliver, and make over to Jacob Dixon, my eldest son, the residue of my said means and estate, after satisfying the provisions and others above mentioned, and that so soon after my death as my said trustees may have recovered and laid aside sums sufficient for satisfying the provisions, annuities and others provided by this deed, and the relative supplementary deed before mentioned; care being always taken that my said eldest lawful son shall not receive less out of my means and estate than the sum of £6000 Sterling, or the value thereof."

Jacob Dixon, junior, died on the 25th of September 1831, predeceasing his father, who died the day following, and leaving several children, who were alive at the date of the foresaid settlement. The other children of the testator survived their father. Mr Dixon, senior, left some heritable property, but it was burdened with debts and provisions to a greater amount than its value. His moveable property was very considerable. The pursuers, as the nearest of kin of Mr Jacob Dixon, senior, now brought the present action of declarator against the widow and children of Jacob Dixon, junior, *narrating* the assumption of Mr Dixon, junior, as a partner of the Dumbarton Glass Company,

without contribution of funds, whereby he had been made independent by his father,—that he had formed an illicit connexion with, and subsequently recognised a person of low rank as his wife, by whom he had a family, and the consequent displeasure of Mr Dixon, senior, who never intended to benefit that family; and *concluding*—That Jacob Dixon, junior, having predeceased his father, the testator, the legacy in his favour had lapsed and became void, and did not transmit or accrue to his children or representatives, nor was there ground for implying in their favour any conditional institution: That Jacob Dixon, senior, having, by the lapse of this legacy, died intestate, as to the residue of his estate, that residue, which, both in respect of the testator's directions to realise by sale the whole of his funds, and because the heritable property he left was exhausted by heritable debt, consisted entirely of moveable succession, belonged to the pursuers and others, the next of kin of Jacob Dixon, senior, and must be accounted for to them by his trustees: That the pursuers, though taking their specific provisions under the said deed, were not barred from maintaining that the said legacy had lapsed, or from claiming their share of their father's intestate succession.

The defenders *answered*—That the testator was on good terms with his eldest son's family at the date of the settlement, and *pleaded*, that the provisions made in the trust-deed and settlement of Mr Jacob Dixon, senior, in favour of his eldest son, Mr Jacob Dixon, junior, did not lapse by his predeceasing his father, but implied a conditional institution in favour of his children; and, consequently, that the defenders were entitled to claim the said provisions: That the pursuers were, by the trust-deed, expressly debarred from making any other claim against the estate and effects of Mr Jacob Dickson, senior, except for the special provisions bequeathed to them.

" 24th February 1836.—The Lord Ordinary having resumed consideration of the debate, with the closed record and whole process, In respect that the question relates to the construction and effect of a general family settlement by a father upon his children, by which it is manifest that he intended his whole succession to be regulated, and to leave no part of his property to the distribution of the law: And farther, in respect, that by the said settlement, the eldest son is evidently the *persona predilecta*, and that his share is not, like that of the other children, a definite sum or portion, in full satisfaction of all legal claims, but the whole residue of the estate, after paying the portions of the other children, and even guaranteed, at the expense of those portions, to the extent of a *minimum*, greatly exceeding the *maximum* of what is thus provided to each of the other children: Finds that the provision so made in favour of Jacob Dixon, the younger, the testator's said eldest son, did not lapse or fall to the heirs *ab intestato* of the father, by the said eldest son having predeceased his said father by a few hours; but that the principle of the implied condition *si sine liberis decesserit*, carries the whole right and benefit of the said provision to the defenders in this action, the surviving children of the said Jacob Dixon, the younger, as conditional institutes in the same; and therefore sustains the defences, assolizies the said defenders from the whole conclusions of the action, and decerns: Finds them entitled to expenses; allows an account thereof to be given in, and remits the same when lodged, to the auditor for his taxation and report.

" *Note*.—Holding the *conditio si sine liberis* to depend on the *presumpta voluntas* of the testator, there probably have been few cases, where, on the whole matter, there were so strong reasons for applying it as the present. The only circumstances which could give a colour to the claim of the pursuers, are, 1st,

That the father was aware, when he made his settlement, that his eldest son had children; and, 2d, That in providing for such of his other children as had issue, he has expressly cilled the heirs of their bodies as conditional institutes, but left his provision to the eldest son individually, and without any such addition. In an ordinary case, these circumstances might be of moment, and it is with a view to obviate their effect that the Lord Ordinary has brought into notice the other circumstances which are stated in the body of his judgment; and taking them altogether as elements in the complex question as to the real or presumed will of the testator, he thinks it cannot be reasonably doubted how that question should be decided.

" The existence of children at the date of the settlement is not of much weight *per se*, and has often been disregarded in cases of this kind. The variance of style in the provisions for the other married children, and for the eldest son, is no doubt much more material, and in some cases has been held conclusive as to the presumed intention of the testator; and even in the present case, it would present great difficulties, if the eldest son had stood in the settlement in the same line or rank with the other children; that is, as a proper or special *legatee* for a definite sum of money. But though this is *their* condition, *his* is fundamentally different. He is not a *legatee* in the proper sense at all, but the general heir or successor to the father's whole estate, burdened only with the special legacies to his brothers and sisters, or the heirs of their bodies, and insured even against those encroaching on his inheritance beyond a certain amount. It might be very natural, therefore, for the father to express his intention of continuing those special burdens on his general succession, in favour of the issue of his other children, while he considered no such intimation necessary as to the more comprehensive and final destination of that succession to his eldest son.

" It is impossible to read the settlement with its codicils, without seeing that it was the testator's *enixa voluntas*, not to die intestate with regard to any part of this property; and when the concluding words of the deed are attended to, along with the necessary effect of sustaining the claims of the pursuers, it is apprehended that, if effect is to be given to that will and intention, those claims must be rejected. The deed not only leaves the whole residue to the eldest son, but expressly provides, that the portions allotted to the children shall be in full of all *legitim*, executry, and all that they could ask or claim through his (the father's) death, or that of their mother; and farther declares, that if any of them shall in any way quarrel or object to the settlement, they shall forfeit all right under it. Now, though this clause may appear, in words, to apply to the eldest son as well as the other children, it is manifest that, in substance and effect, it can apply to *them only*; since the eldest son is made successor in *universum jus* of the father, and could never therefore be paid off or satisfied of his legal rights by the tender of any specific sum. The meaning of the clause in short is, plainly to exclude and extinguish any claim on the part of the other children or next of kin, as heirs-at-law (*in mobilibus*) of the father. But it is impossible to give it *this* effect as against the eldest son, who, by the very terms of this deed, is made heir-at-law and universal successor to the father, under the burden only of their provisions, which are thus limited and conditioned for his sole and exclusive benefit. But the pursuers of this action are those other children, and the claim now insisted in by them is, that, as heirs-at-law, they shall take beyond what they are limited to by the terms of the deed, and *make an intestate succession*, by denying that there is any ground for presuming that this was in any way contrary to the wish and intention of the testator.

" From what has now been said, it will be easily seen that, in the view the Lord Ordinary takes of the matter, the cases in which the *conditio si sine liberis* merely prevents a partial intestacy (where the deceased has settled his whole property by deed), and excludes only the heirs-at-law, to whom nothing is there provided, in that character, are far more favourable cases for its application, than where its effect is to disappoint and exclude *nominatim substitutes*, who are preferred to such heirs-at-law, and expressly pointed out in the deed as next in the testator's favour to the parents of the children, who are, notwithstanding, allowed to exclude them; and the grounds of this opinion are thought to be too obvious to need explanation. It was not

without some surprise, therefore, that the Lord Ordinary found the pursuers maintaining at the debate, that the case which here occurs was the *least favourable* for the application of the condition in question; and that it was even *inadmissible*, except where introduced to disappoint an express substitution.

"The argument seemed to be very much rested on the circumstance of the principle of extending a provision for a parent to his children, though not mentioned, being generally described as a *condition*; which, it was said, implied that there must be some *ulterior* destination to be effected by such condition; and that this was not the case, where, on the failure of the legatee named, the provision merely fell back into the general estate of the testator. In all this, however, it seems to the Lord Ordinary that the true reason and principle of the law is overlooked for a mere verbal subtlety. It is impossible to reflect for a moment on that principle, without seeing that the *only question* in all such cases, is, whether there is sufficient ground for holding that the testator truly wished and intended that a provision made to an individual should, on his predecease, go to his surviving children, though not named in the bequest, rather than to that person (*whoever he might be*), to whom it must have gone if there had been no such children? There must always be *some one* to whom, in that case, it would have gone; and whether that person was a *nominatim substitute*, or the next of kin of the testator, is plainly a matter of indifference, except as affording more or less ground for concluding as to the testator's probable intention; and in that view, it seems impossible to doubt that the interest of a *nominatim substitute*, who is named to the prejudice of the next of kin, must have been more tenderly regarded by the testator, than his next of kin, who is excluded. If the children, therefore, are allowed to cut out the *nominatim substitute*, it would be strange if they should fail as against the next of kin. Whether they are properly described as succeeding in either case, by virtue of an implied condition on the succession of those who must take, if they do not;—or, whether this is less of the nature of a *condition*, where the person so taking claims only on the *hereditas jacens* of the testator,—are matters which do not seem at all to touch the plain principle upon which they do succeed, and resolve rather into criticism on the language used in law books in relation to this rule of law, than arguments as to the grounds of its application. If the heirs-at-law had been actually called, by a form of words importing a substitution, is it possible to suppose that this would have given the children of the predeceasing eldest son a *better* right to exclude them, than if they had been passed by altogether, and never once named (in that character) in the settlement? and yet this is the argument of the pursuers. If the testator had said, 'and failing my said eldest son, I direct the provision hereby made for him to be divided equally among my next of kin,' the pursuers admit that they would have been excluded by his surviving children. But they contend that the children can have no claim in this case, *because* the next of kin are *not called at all* in the settlement; and that their taking any thing in that character is indeed anxiously precluded. To the Lord Ordinary it seems impossible to give any weight to such an argument, of which he can find no trace in any former case on the subject. On the contrary, it appears that effect was given to the principle, as against heirs-at-law, in one branch at least of the case of Wallace, 28th January 1807 (Mor. App. voce Clause, No. 6), and in the very recent case of Wilkie against Jackson, which was decided last week by the First Division, adhering to an interlocutor of Lord Corehouse of 30th June 1835. That last case indeed pretended both the grounds of difficulty on which the pursuers rely in the present; the children who prevailed having been in existence at the date of the settlement, and the provisions to the *other* children, in the same deed, being taken expressly to their heirs, while those to *their* mother were only given to her individually."

The pursuers reclaimed, maintaining that Mr Dixon, senior, never intended to favour the offspring of his eldest son, and that the *conditio si sine liberis* only applied where there was an *ulterior* substitution.

At advising on the 10th June 1836, the following interlocutor was pronounced:

"Adhere to the interlocutor of the Lord Ordinary submitted to review, in so far as it finds that the provision made in favour of Jacob Dixon, the younger, the testator's eldest son, did not lapse or fall to the heirs *ab intestato* of the father, by the said eldest son predeceasing his father, and assoiliizes the defenders from the whole conclusions of the action, and finds them entitled to expenses: Find additional expenses due, allow an account to be given in, and remit the same, when lodged, to the auditor to tax and report, and decern."

The pursuers appealed, *pleading*—(1.) That according to the doctrines of the Roman law, as explained by the best commentators, the presumption of *pietas paterna*, on which this case was decided in the Court below, is plainly inadmissible in the circumstances, inasmuch as contrary presumptions combine to exclude its application: Justinian, L. 6, Cod. de Inst. et Subst. Voet. ad Lib. Dig. 36, t. 1, § 17, 18, 19. Mantica, Lib. X. t. 8, § 9, 16, 22. Grassus Recept. Senten. Lib. de Fideicom. Quæstio, 25. (2.) The respondents' plea, under the existing circumstances, derives no support from any of the institutional writers, and is plainly inconsistent with the *dicta* of Erskine and Bankton. See Bankt. Vol. I. p. 227. Ersk. B. III. t. 8, § 46. (3.) It is at variance with the principles of many of the decisions of the Scottish Courts, and no one decision can be quoted as plainly and unequivocally supporting it. It is particularly opposed to the case of Yule v. Yule, 20th December 1758, Mor. p. 6400. Watt v. Jervie, 30th July 1760, Mor. p. 6401. Oliphant v. Oliphant, 19th June 1793. It is not supported by the case of Neilson v. Baillie, 4th June 1822, which was not properly a case of presumed intention, but rather of express intention imperfectly worded; and the principle for which the appellants contend was clearly recognised in the cases of Lord Lauderdale, 19th May 1830. Greig v. Malcolm, 5th March 1835, and Leitch v. Leitch, affirmed 17th February 1829. In the case of Wilkie v. Jackson, 11th February 1836, founded on by the Lord Ordinary, the material plea as to the supposed lapsing of the provisions was given up, and not pressed to a decision in the Inner-House, and it cannot, therefore, be a precedent. The *ratio* assigned by the Lord Ordinary, of the eldest son having been evidently the *persona predilecta*, can have no application to the circumstances of his children, whose birth and acquired status of legitimation had been matter of offence to the testator.

The respondents *pleaded* an affirmance, and founded (1.) on the general doctrine of the Roman law, *si sine liberis*, as admittedly embodied into the Scottish law, and recognised in numerous decisions, both of an early and recent date: Magistrates of Montrose v. Robertson, 21st November 1738, Mor. p. 6398. Walker, 7th December 1744, Elchies, voce "Implied Will," No. 5. Wood, 26th June 1789, Mor. p. 13,043. Binning, 21st January 1767, Mor. p. 13,047. Baillie v. Neilson, 4th June 1822. Cuthbertson, 1st March 1781, Mor. p. 6279. Wallace, 28th January 1807, Mor. App., voce "Clause," No. 5. Christie, 5th July 1822, F. C., p. 667. Booth, 8th February 1831. Colquhoun v. Campbell, 5th June 1829. Wilkie, 11th February 1836. (2.) On the true construction of Mr Jacob Dixon's settlement, and its plain meaning, by which the appellants were barred from making any demand against his estate, except for the special provisions given to them by the deed.

Lord Chancellor.—My Lords, in this case, when your Lordships heard the argument *ex parte*, I entertained some doubt as to the interlocutor which is the subject-matter of appeal. Upon looking, however, into the cases that were referred to, and the principle on which the cases depend, I am perfectly satisfied that the interlocutor is right. My Lords, the rule, that where there is a gift to a child, and a gift over upon the death of that child, the gift over does not take effect if the child has issue,—is established beyond all question, and is not matter of dispute. There seems below to have been some contest as to whether that principle applied to the case where the gift was of the surplus, and there was no gift over. Now it appears to me, as it was stated by the Lord Ordinary below, that that is a much stronger case in favour of the principle. Where there is a gift over, the gift over does not take effect because of the presumption of law, that the intention of the settler was that the issue of the child should take; and it would therefore be very strange, if, when there was a mere gift, and no gift over, the same presumption did not arise, and the issue of the child stood in the place of the parent. So far, therefore, as that general principle regulates this case, very little difficulty or doubt has been raised at your Lordships' bar. But it is said, that in this case there are two peculiarities which make it an exception to that rule: The one is, that the father, the settler, was aware of the existence of the issue of the child: The other is, that in the same instrument provision is made for the issue of his other children. Now, with regard to the first, I do not find that that ever has been considered, *per se*, as constituting an exception to the rule. No doubt it is a circumstance by which, aided by other circumstances, the presumption of law may be rebutted, but, *per se*, it does not constitute an exception to the rule; and it would be very strange if it were so decided. In the first place, it would be strange that the father of the child should not know the state of his own family—that may happen from the birth of a posthumous child, or from other circumstances which rarely can occur,—but as soon as the principle is established, viz., that there is a presumption of law in favour of the issue of a child, it naturally follows that the necessity of introducing the words is to a certain degree taken away; and it would be very strange indeed, when the law, under these circumstances, gives the provision to the issue of the child, if the father were presumed not to have intended that which the principle of the law presumes for him. That circumstance, however, *per se*, has never, as far as I can find in the authorities which were referred to, been considered as constituting an exception to the rule. Then the other exception undoubtedly is entitled to a little more consideration, which is, that in providing for his married daughter, he provides for the children of that married daughter. My Lords, the Lord Ordinary makes observations upon that part of the case which are entitled to weight and consideration. He takes notice of the different position in which the daughter and the eldest son (the interests of whose children are now in question) were placed. With regard to the daughter, there is a certain sum of money given to her, and provision is made for her and her children after her, in the event of her death. With regard to the son, he makes him general heir of his real and personal estate,—a difference of disposition which may well explain why the testator has varied the terms of provision for the one and the other. But, my Lords, independently of that, I have not found any cases in which a variation in the provision for children has *per se* been considered to rebut the presumption of law; but, on the contrary, there are several cases in which it has existed, and in which, at the same time, the presumption has been considered as arising—coupled with other circumstances it is true; and other circumstances there are in this case. Now the two cases to which I more particularly refer, are the case of *Roughhead v. Rainnie*, in *Morrison*, 6403, and the other case which is particularly referred to by the Lord Ordinary. In both those cases there were express provisions for the issue of the children, and yet the Court considered that that presumption of law was raised. My Lords—finding, therefore, that the principle is established, that it is clearly not in dispute, but acknowledged to be part of the law of Scotland, and this case not falling within the exceptions to that rule,—I have come to the clear conclusion, that the interlocutor appealed from is correct; and under the circumstances, the inter-

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locutor having been pronounced with the unanimous opinion of the Judges of the Court below, I would propose to your Lordships that it should be affirmed, with costs.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend, that the judgment below is right, and ought to be affirmed; and I shall state to your Lordships the grounds upon which I have, with him, arrived at this conclusion. It is unnecessary to examine the origin of the rule, that the condition of failure of issue is implied where provisions are made for children, and the subject-matter of these provisions is given over, whether to other children or to strangers, and that such provisions generally do not lapse by predecease of the legatee, leaving issue; or to inquire how far the civil law adopted the same rule, which must be admitted to have been exceedingly consistent with its general principle, that children could only be disinherited expressly, and in a certain manner and mode. It is very possible that the Scotch law may have carried the principle somewhat further than the Roman. It appears, indeed, that the late decisions have extended it beyond the doctrine in former times recognised as law; and there seems a doubt, whether, at the time when Mr Erskine wrote, it prevailed to its full extent. The current of these decisions seems to leave no reasonable doubt that such is the rule; that it has been extended even to collateral, though near relations of the settler or testator, and that it must prevail upon the ground of a presumed intention not expressed, unless something appears sufficient to rebut the presumption. The question here is, whether any such thing exists in the present case. The two circumstances to which my noble and learned friend has referred, and which are relied upon, are the existence of Jacob Dixon's children with the knowledge of his father when he made his settlement, and the different manner in which the provision is made for Jacob, and for the other sons and the married daughter. It does not appear that the sons are married, but the eldest daughter is married. It is clear that the existence of children will not take the case out of the rule; for if this had been sufficient, several of the cases could not have been decided as they have been,—among others, the case of *Neilson v. Baillie*, in which the eldest daughter had two children at the time of executing the trust-deed. The words "and *foresaids*" have been relied upon as the ground of this decision; and it certainly does appear that those words were in the deed, and were taken notice of by one of the learned Judges who decided that case. But, on examining the judgment, it appears that only one of the five learned Judges makes any reference to these words; and even he does not ground his opinion upon them, but relies, as the others do, upon the general rule of *si sine liberis*, which would not have been at all necessary had words of inheritance been in the limitation sufficient of themselves to prevent a lapse. Indeed, the words in question ("and *foresaids*") do not appear to affect the whole gift, which is of the general residue, real and personal, while these words are introduced in excepting a part of the estate from the operation of the gift during the life of the wife. In other instances, it has been said, the existence of a child for a length of time after the settlement, without any alteration being made in it, repelled the presumption. But in the leading case of the *Magistrates of Montrose v. Robertson*, this circumstance had no effect: nor does it appear that this circumstance determined the case of *Yule v. Yule*, which was only a partial settlement affecting one-fourth of the father's property. The mention of the heirs of the body in the provision for the other sons and the married daughter, appears to be a stronger circumstance than the existence of Jacob's children, and the existence of Jacob's children known to the settler, otherwise it could not have any effect. But it does not appear sufficient in this case to countervail the presumption which would exclude a lapse. It is needless to inquire what would have been the effect of such a diversity, had the question arisen upon a provision to the eldest son of the same kind with the provisions to the other sons, and differing only by the omission of words of inheritance; because this is not that case. We are here upon a gift of the entire residue of the whole estate, real and personal, as my noble and learned friend has justly observed, and as the Lord Ordinary observed, after special provision carried out of it for the younger children; and that residuary gift fur-

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ther distinguished from the other gifts by a direction, that it shall, at all events, and at the cost, if need be, of the other provisions, be made up to a certain sum at the least, which sum, as the learned Lord Ordinary has remarked, is greater than the largest amount given to any of the other children. This is not a case in which the different frame of the other limitations can exclude the application of the rule by rebutting the presumed intention of the settler,—nor does it appear that such a difference, though certainly a very strong circumstance, can be held, generally and absolutely, as sufficient to exclude the application of the rule, even where the provisions to which the diversity applies are exactly of the same nature. The argument which has been maintained, both in the cases and at the bar, that the rule rests, in many of the decisions, upon the force of the words “children or issue,” can never be extended to the rule generally; but it seems very seldom, if ever, to have been the ground of decision. Indeed, it cannot be the ground of any decision which turns upon the provision being to children; for the rule does not extend to legacies from strangers: it is always rested upon the *pietas paterna*, and proceeds upon the presumption that the parent would not disappoint the issue of his children, if those children happened to predecease himself. But the cases are numerous which leave no doubt on this point, and particularly the case of the Magistrates of Montrose v. Robertson, where the bond was made payable to the four sons by name. Nay, in Wood v. Acheson, 26th June 1789, we find the counsel—who argued against the application of the rule to the case of unborn issue—admitting that the law might be different as to the descendants of those to whom the gift was made *nominatim*, and whom he seems to have thought clearly within the application of the rule. The Court held, that in “all such provisions, both of the one class and the other, the issue of children predeceasing were entitled to the parents’ share. Nor is it immaterial to observe that the counsel, whose admission is referred to, was Mr Wright, and the Judge, whose view of the subject was adopted by the Court, was Lord Braxfield—two of the most eminent lawyers of their day. The case just now referred to (of the Magistrates of Montrose v. Robertson) is exceedingly strong upon the general principle, and appears to have been held as deciding the question for a long time past. We find it referred to in all the decisions. Nor is the decision the less strong for having been given in a question between the party claiming the benefit of provision, and the obligors in a bond granted by them to the father, which obligors had paid the money, as was alleged, and was held by the Court in their own wrong. It is the stronger on this account; and, indeed, it does not distinctly appear that the money in question was the sole provision made for the parties. It amounted only to about £10 among four children, all named. My noble and learned friend having referred to the case of Roughhead, it is unnecessary to observe upon the other cases which have been cited in support of this judgment, excepting that of Wilkie v. Jackson, which is very material, even if we were to admit that there is weight in the observations made for the appellant touching its peculiarities, and that these distinguish it in some respects from the present case. For, in the first place, it affords an additional confirmation of the doctrine already stated, that the implied condition *si sine liberis* is not at all confined to limitations to children or issue,—Margaret and Janet being expressly named, and the claim being made by the grandson of Margaret, as representing her eldest son, against James the grandson of the settler, as representing his uncles, sons of the settler: So that the claimant did not come in under any limitation to children or issue; and, secondly, all the provisions made to Margaret, the settler’s eldest daughter, were held to descend upon her son, and, through him, upon her grandson, as well those which had been made to her without any mention of heirs and assigns, as those which had been made to her with mention of heirs and assigns. This, therefore, meets the principal objection to the application of the rule in the present case. Nor is it any answer to urge, that the general clause making the provisions for the younger children burdens upon the land, has the words “and their aforesaid;” because, admitting this to mean “their heirs aforesaid,” it would only affect those preceding limitations in which heirs had been mentioned, were it not for the implied condition *si sine liberis*, and

would of itself only make those preceding provisions which were limited by such words, burdens on the land, and not the other provisions; and yet J. Wilkie recovered for the whole, as well for those that had not the words of inheritance as for those that had. The ground of the decision is, that by force of the implied condition *si sine liberis*, the provisions to Margaret did not lapse by her predecease; and this, be it observed, is the decision of the same very learned Judge (Lord Corehouse) who has been cited as holding in another case (Greig v. Maleolm), that the difference of omitting the mention of heirs in one limitation and inserting it in another, is, as it were, conclusive proof of a different intention, and excludes the application of the rule. The case of Greig v. Maleolm, when examined, does not at all bear out this inference as to the scope of Lord Corehouse’s observation; but were that left in any doubt, his Lordship’s decision in Wilkie v. Jackson would remove it. I therefore agree entirely with my noble and learned friend, that the decision of the Court below has proceeded upon right grounds; and for the reasons which I have stated, and which have been stated by my noble and learned friend, I agree with him that the decision ought to be affirmed, with costs.

Judgment affirmed, with costs.

Second Division.—Lord Jeffrey, Ordinary.—Archibald Grahame, Appellants’ Solicitor.—Richardson and Connell, Respondents’ Solicitors.—[W.H.D.]

16th March 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 81.—GEORGE CAIRNS, Solicitor-at-Law, Edinburgh, Appellant, v. ROBERT ANSTRUTHER, Esq. of Thirdpart, Respondent.

Mandate—Expenses—Process—Foreign—A foreigner brought an action in this Court, and sisted a mandatory; and while the record was in the course of preparation, the mandatory lodged in process a minute of withdrawal as mandatory, which was not objected to, and a new mandatory was ordered to be sisted, but it afterwards appeared that at the date of lodging this minute, the mandant had died, or was believed to have died abroad; his representatives failing to appear and sist themselves as parties—Held (affirming the judgment of the Court of Session) that the mandatory, though not entitled to carry on the action for the purpose of showing that no expenses would in the issue have been found due to the defender, was nevertheless liable to the defender in the expenses incurred by him in the process during the subsistence of the mandate. 2. That the mandatory was not entitled to be reponed against the judgment of the Court of Session finding him liable in these expenses, on the allegation that it had since been discovered that the mandant was still alive.

In October 1833, John Rogers of Well Street, London, raised an action against Major Anstruther for payment of a £500 bill, on which his name appeared as an indorser. To that action Cairns was sisted as mandatory on behalf of Rogers. Anstruther pleaded a variety of defences; *inter alia*, that the bill had not been duly negotiated, and that he had indorsed it without value; and, after a condescendence and answers had been lodged, a protracted examination, on commission, of havers ensued, and among others, Rogers himself was examined. The diligence was reported; but before the record was closed or parties heard, and while no decerniture, interim or otherwise, had been pronounced, Cairns intimated his intention to withdraw as mandatory. He accordingly lodged a minute in November 1836, to that effect in process, which was duly seen, and not objected to, and intimation was made to Rogers, at his address, by post, of the fact; and thereafter the Lord Ordinary appointed Rogers to

sist a mandatory. No mandatory, however, having been sisted, the defender enrolled the cause and asked decree of absolvitor, and likewise a decree against Cairns for the whole expenses incurred by the defender in the process.

It appeared, or was at all events confidently believed, that, at the date of Cairns's lodging the minute withdrawing from process as mandatory, Rogers had died in America, which accounted for the failure to obtemper the Lord Ordinary's interlocutor. Cairns denied that he knew at that time of the mandant's death.

The Lord Ordinary reported the point as to the mandatory's liability for the expenses, to the Court, when, on consultation, it was suggested that the case should be superseded for some time, in order to allow the representatives of Rogers to sist themselves; but they failed to appear. The Lord Ordinary again reported the case, when the parties were ordered to give in minutes of debate, for the argument maintained in which see *ante*, Vol. XI. pp. 55-57. On advising these, the Court (15th November 1838) found the mandatory liable in the expenses hitherto incurred by the defender, and in the expense of discussing the point.

The mandatory appealed, and in his appeal case *pleaded* a reversal for the following reasons:—1. Because the mandate having fallen, and the action having become abated by the death of Rogers, the pursuer and mandant, whose representative has neither been sisted, nor otherwise made a party, there was no existing process in which any interlocutors, either on the merits of the cause or on the accessory question of costs, could be competently or lawfully pronounced. 2. Because it was premature, irregular, and illegal to give decree for expenses of process, without determining the merits of the cause, or otherwise disposing of the conclusions of the summons. 3. Because, although the action had not become abated, the interlocutors under appeal were erroneous and unjust; in respect the condition of the appellant's obligation as mandatory was, that he should be answerable for costs, only in the event of their being awarded against his constituent; whereas no such award has yet been pronounced, and the appellant did not, either *ex mandato* or otherwise, contract any obligation to guarantee or insure the respondent against the contingency of the pursuer's death, or to be responsible in any other event, except that of a judgment for costs against the pursuer. 4. Because, if the action were to be held as subsisting to the effect of entitling the respondent to ask a decree for costs against the appellant, it follows that it must also be subsisting to the effect of entitling the appellant to show, by trying the cause on its merits or otherwise, that no decree for costs ought to be pronounced against him. 5. Because, even on the respondent's own showing, his claim against the appellant is not such as can be competently made effectual by any step in the original process, but requires a separate suit, in which the respondent must instruct his cause of action *habili modo*, while the appellant, on the other hand, will have the usual privilege of showing cause why decree should not be pronounced against him.

The respondent, in his appeal case, maintained the same argument which had been successful in the Court of Session.

At the hearing of the appeal the appellant stated,

that since the date of the judgment of the Court below, it had been discovered that the mandant Rogers was still alive, and he *pleaded*, that this *res noviter* changed the aspect of the case, and of itself entitled him to be reponed against the judgment under appeal.

The respondent *answered*, that the allegation of the mandant being alive, if true, did not in the least degree affect the *rationes* of the judgment appealed against, which proceeded upon the *failure of Rogers himself*, or his representatives, to find a new mandatory, though regularly called upon to do so.

Lord Chancellor.—My Lords, this case appeared at your Lordships' bar under peculiar circumstances. The course of the proceeding below was to fix a mandatory with the costs of an action in which he had joined with the pursuer, up to the time of his applying to the Court for liberty to be discharged. Now, that it was competent to him to make that application cannot be disputed; and it is equally clear, indeed, that was not disputed at the bar; and if it had been, the case of *Gordon v. Gordon* would have established beyond all question, that although he had a right to withdraw from the situation of mandatory, he could not relieve himself from the costs that had been incurred during the period for which he had continued the mandatory of the pursuer; and it appears from the case of *Gordon v. Gordon* to be equally clear, that, according to the course of proceeding in Scotland, if the principal pursuer have notice that his mandatory has applied for leave to withdraw, and to be relieved from the responsibility of the future costs, and to have a new mandatory substituted in his place, and fail to sist another mandatory, the defender would be absolved from the consequences of the action, and the mandatory would have been liable to pay the costs up to the time of his withdrawal. The case of *Gordon v. Gordon* establishes that proposition to its fullest extent. Now, it appears that in this case the mandatory took that course, and made an application to be relieved from the liability for future costs; and in the second page of the appellant's case, the proceedings for the purpose are thus stated: "And this intimation the memorialist followed up, of this date (23d November 1836), by lodging in process a minute withdrawing from the process as mandatory for the pursuer, Rogers. In this minute the memorialist prayed the Lord Ordinary to authorise notice of his resignation to be given to Mr Rogers, so as to afford him an opportunity of sisting another mandatory, and, for that purpose, to address a letter through the post-office to Mr Rogers at his last-known residence in London, containing a copy of the minute and interlocutor. The minute was of this date,"—that is, 25th November—"allowed to be seen at a calling of the cause, attended by the defender's counsel; and thereafter, of this date (23d December), Lord Corehouse, Ordinary, pronounced an interlocutor appointing intimation to be made in terms of the foregoing minute, in order that the pursuer (Rogers) may have an opportunity of authorising a new mandatory in this cause." Then, under the date of 1st March 1837, "the Lord Ordinary appointed Mr Rogers to give in a mandate in favour of a mandatory ready to sist himself; but no mandatory having been sisted, the defender enrolled the cause, and asked decree of absolvitor, and also a decree for expenses of process against the memorialist, Mr Cairns, as mandatory." In that state of the cause it appears that a proceeding took place with regard to the defender; and before the matter was ultimately disposed of, it appears that an impression prevailed,—which seems to have originated in a communication from the defender, it is true, but adopted without inquiry by the pursuer, the mandatory—that Rogers was dead. Now, the Court had proceeded regularly for the relief of the mandatory from future costs, but had subjected him, undoubtedly, to the costs already incurred,—a new mandatory being to be named by Rogers, the pursuer. In that state of the case, the matter came before the Court with a statement that seemed to be admitted, and acquiesced in on both sides, that instead of Rogers being in a situation to appoint a new mandatory, he was dead. Now, if he had been dead, the course of proceeding, I apprehend, would have been to call upon his representatives to have gone on with the cause; and upon their declining to go on with the cause which

Rogers had instituted in his lifetime, the consequences would have been the same,—namely, that the mandatory would have been liable in the costs incurred up to that period. But it does not appear that anything was done, calling upon the representatives to adopt that course. Whether there was or was not, does not very distinctly appear. There is nothing in the papers showing that anything was done pursuing that course. It is obvious that some proceeding of that sort ought to have been adopted, upon the supposition of Rogers being dead, for this reason, that it was quite possible—perhaps probable—that if any representatives had been called upon to prosecute the cause, it might ultimately have been discovered that there were no costs to be paid by the mandatory at all. The result of the suit, whether carried on by the original pursuer or by his representatives, might have established such a case against the defender as would have made the defender liable for the costs, or, at all events, have prevented the pursuer from being liable for any part of the costs, or have prevented the mandatory from being liable to pay any part of the costs. Notice to the representatives of the pursuer to go on with the cause might, I say, have ultimately produced that effect if they had appeared, and had gone on with the suit; but there is, in substance, no evidence of any notice having been given to the representatives. If the case had stopped there, it would have been for your Lordships to consider whether the better and safer course would not have been to have remitted it to the Court of Session for the purpose of seeing that that course was pursued, which it appears necessary should be pursued, in order to meet the exigency of the case which I have spoken of as likely and possible to exist. But, at your Lordships' bar, the case has taken a completely different turn; for now the appellant, who complains of this procedure, tells your Lordships that the pursuer is not dead,—that Rogers is in fact still alive, although, in the Court below, the interlocutor appealed from has proceeded on the assumption that he is dead. It is stated as a matter of some suspicion, and was so stated at your Lordships' bar when the case was first heard some six weeks ago, and that was repeated when an opportunity for investigating the fact had occurred on the last day when the case was in hearing, but your Lordships have to rely on the statement of the appellant, that there has been that misapprehension as to the fact of the proceeding below. Whether that misapprehension arose originally from any statement on the part of the defender, or from want of due inquiry on the part of the mandatory, is not very material for the present purpose. I am calling your Lordships' attention to it, for the purpose of stating to your Lordships what appears to me to be the right course to be pursued under these circumstances. If the cause were remitted to the Court of Session with a view to further proceedings adapted to the alleged change of circumstances, and, if Mr Rogers is still alive, still these proceedings must terminate in the same order which has been pronounced: whatever difference there may be in point of form, it must be in substance the same. It appears, from what I have stated from the appellant's case, that all the proceedings calling on Rogers to substitute a new mandatory had been gone through, and that he had not done so. The case was in that state in which it was competent for the Court to make the mandatory pay the costs at the time he applied to be discharged: therefore, the obvious result—the necessary result of this proceeding in the Court of Session would be, to obtain an order in substance precisely the same. That being the case in point of fact, it appears to me that it would be an idle course of proceeding, and putting the parties to unnecessary expense, that your Lordships should remit the cause to the Court of Session, and thus oblige them to obtain the same end by an expensive and circuitous proceeding. Under these circumstances,—it being, I understand, admitted by the appellant that the pursuer, Rogers, is alive, and therefore it being admitted that those proceedings were regular in which he was called upon to substitute a new mandatory,—and it being admitted that he had not done so,—it appearing to me from the case of *Gordon v. Gordon*, that the necessary result of that state of proceedings would be to absolve the defender, and to make the mandatory pay the costs up to the time when he applied to be discharged, which is, in substance, the order of which the ap-

pellant complains,—I conceive your Lordships will be of opinion that you are not bound to put the parties to the expense of being exposed to additional delay and costs, for the purpose of arriving at the same end. Under these circumstances, therefore, and on the ground that Rogers is now alive, though the Court below proceeded upon a misapprehension as to the fact, as the reasons for their procedure are in substance proved to be correct, and the result must be precisely the same, I think that your Lordships' safest course would be, to affirm the interlocutor originally appealed from. If, however, it be suggested that there is any doubt as to the fact which has been stated at your Lordships' bar, that might induce your Lordships to take a different course. But, assuming that the appellant is right in stating that Rogers is alive, I think your Lordships, upon the ground of that admission, will be doing that which is best for all parties, by affirming the interlocutor.

Interlocutor affirmed, with costs.

First Division.—Lord Cockburn, *Ordinary*.—Deans and Dunlop, *Appellant's Solicitors*.—Cowburn and Gay, *Respondent's Solicitors*.—[W.H.D.]

29th March 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 82.—DAME ANNE CAMPBELL BAIRD PRESTON of Valleyfield, *Appellant*, v. THE RIGHT HONOURABLE VISCOUNT MELVILLE and OTHERS, *Trustees of Sir Robert Preston, Bart., Respondents*.—(First Appeal).

The SAME PARTY Appellant, v. *The SAME PARTIES Respondents*.—(Second Appeal).

Trust.—Testament.—Entail.—Jurisdiction.—Foreign.—Executory.—Administration, Right of.—*A testator left a general trust-deed of his heritable and moveable property, wherever situated, in favour of trustees, for certain purposes,—the trust to be subject to any entail of the heritage which he might execute, and which entail, it was declared, should be held and taken to be a part of the trust. The testator subsequently executed an entail. On his decease, the trustees named in the trust-deed declined to act. The heiress of entail first entitled to succeed made up titles under the entail and was infest, and likewise confirmed to the moveables in Scotland, and administered to the personality in England. With consent of all concerned, including the said heiress of entail, new trustees were appointed by the Court, in place of those who declined to act. These new trustees then brought two actions against the said heiress of entail; the 1st, to have it declared that the whole property, funds and effects, belonging to the testator in Scotland, England, and elsewhere, including the funds and effects held by the said heiress of entail under the letters of administration, pertain to, and are vested in the pursuers in trust; and the 2d, to have it declared that the pursuers are entitled to all the powers given to the trustees named in the trust-deed, and as such, to make up titles to the lands in which the said heiress of entail was infest, and to obtain themselves seized therein, so as to carry into effect the purposes of the trust—Held (reversing the judgment of the Court of Session), that the power of appointing persons to recover and administer property situated in England is vested exclusively in the ecclesiastical courts of that country, and therefore, that the administration of the testator's property in England must remain with the said heiress of entail, by virtue of the letters of administration held by her; but, 2. (affirming the judgment of the Court of Session), that notwithstanding the infestment of the heiress of entail under the entail, it was feudally competent for the trustees to obtain themselves seized in the whole lands, qua trustees, in order to effect the objects of the trust.*

The late Sir Robert Preston of Valleyfield, who was a domiciled Scotsman, died in this country on 7th May 1834, leaving several deeds regulating his succession. He had executed (in October 1832 and April 1833) a general disposition and deed of settlement, whereby,

under certain reservations, he conveyed his whole property, whether heritable or moveable, and wherever situated, to Sir Coutts Trotter, Bart., Edward Marjoribanks, and Sir Edmund Antrobus, Bart., as trustees, to be held in trust for certain purposes; and these parties were also appointed sole executors and intromitters with his personal funds and estate. This deed did not contain any special enumeration or conveyance of the trustor's property, and there was no procuratory or precept. In regard to the vesting of the property in the trustees, the deed proceeded:

"Surrogating, and by these presents substituting the said trustees, and the survivors of them, in my full right and place of the premises, with power to them to do every thing that I could have done before granting hereof, and binding and obliging me and my heirs to make up complete titles to the said lands, heritages, and heritable debts above disposed, if necessary, and to convey the same in all form to the persons above mentioned" (the trustees named) "and their foresaids, for the purposes hereinafter mentioned."

It was provided that the trustees should hold the lands of Spencerfield, Inverkeithing and others, situated in the county of Fife, and all others belonging to the testator in fee-simple, with the exception of certain other lands therein named,

"subject to the entail or entails thereof, to be executed by me subsequent to the date hereof, in favour of myself and the heirs whatsoever of my body; whom failing, in favour of Dame Anne Preston Campbell or Baird, my niece, eldest daughter of my brother, Patrick Preston, younger of Valleyfield, and relict of General Sir David Baird, Bart., and Knight Grand Cross of the Most Honourable Order of the Bath, and the heirs of her body; whom failing, Catherine Preston, my niece, youngest daughter of the said Patrick Preston, and the heirs of her body; whom failing, Dame Anne Preston or Hay, my niece, daughter of my brother, Colonel George Preston, and wife of Sir John Hay of Smithfield and Haystoun, Bart., and the heirs of her body; whom failing, Charles Dashwood Bruce, merchant in London, nephew of Thomas Earl of Elgin and Kincardine, and the heirs-male of his body; whom failing, the Honourable James Bruce, the second son of the said Thomas Earl of Elgin and Kincardine, so long as he shall not succeed to and be in right of the title of Earl of Elgin, and the heirs-male of the body of the said James Bruce not succeeding to, or in right of the said title; whom failing, to the third and other younger sons of the said Thomas Earl of Elgin and Kincardine, in the order of their seniority, and the heirs-male of their bodies respectively, not succeeding to, or being in the right of the said title; whom all failing, my own nearest heirs whatsoever, or assignees, and subject to all the provisions, declarations, reservations, limitations, burdens, clauses prohibitory, irritant, and resolute, powers, and faculties to be contained in such deed or deeds of entail: which deed or deeds of entail shall be held and taken to be a part hereof."

Power was reserved to execute deeds of entail; and in case of the trustees failing to do so, or the deeds of entail to be executed being thought subject to exception, the trustees were taken bound to execute valid deeds of entail on the series of heirs he had indicated, and containing all the conditions, provisions, &c., of a strict tailzie.

Under the second head of the deed it was provided that the trustees should hold

"the said abbey and estate of Culross, and all other lands and heritages which shall belong to me in fee-simple, and situated within the parish of Culross, and also the lands and farm of Rannieswalls, including the *dominium utile* of the lands of Kirkbrae, to which I have right, subject to the other entail or entails thereof, to be executed by me subsequent to the date hereof, in favour of myself and the heirs whatsoever of my body;

whom failing, in favour of the said Dame Anne Preston Campbell or Baird, for her life; whom failing," in favour of the same series of heirs as above; "which deed or deeds of entail shall be held and taken to be a part hereof; and I not only reserve power and liberty to execute such deed or deeds of entail of the said abbey, estate and others last mentioned, any thing herein contained to the contrary notwithstanding."

The trustor further took his trustees bound to execute a valid entail in favour of that series of heirs, in case any nullity should be objected to the deeds of entail he might execute,—to record the deeds of entail in the proper register after his death; "and to make up and complete all necessary and feudal titles to the lands included therein, so that the said entails may be rendered effectual in law." The deed further provided:

"But declaring that any entails of the said lands and others, whether executed by myself or my trustees, or titles completed thereto in the persons of any of my said heirs, shall not interfere with or come in competition with the ends and purposes declared in the present trust, of and concerning my said fee-simple lands and heritages, during the survivorship of my said three nieces first called to the succession thereof, but said entails shall, during the lives of my said three nieces, and survivors and survivor of them, continue suspended and in abeyance, so far as regards the rents and produce of my said lands and estates, which shall be received and applied by my trustees in the manner after declared."

In virtue of the powers reserved in the above trust-deed, Sir Robert Preston, "agreeably to, and in terms of my trust-disposition and deed of settlement, dated 17th October 1832," executed two separate entails in November 1832, of the heritable property generally conveyed by the trust-deed in favour of the defender and the series of substitute heirs mentioned in the trust-deed.

Sir Robert Preston died leaving, in addition to his heritable property in Scotland, large personal funds vested in Bank of England stock and in the public funds.

The trustees named by the general trust-settlement declined to accept. Meantime, the defender had herself served heiress of entail and provision, and completed her titles under the entail, and was duly infeft. It was averred that these steps had been taken, as one of several measures, with the concurrence of all concerned, with a view to effect an arrangement for the management of the estate situated in Scotland, and further, in view of taking other measures for the management of the personal property situated in England. About the same time (July 1834), letters of administration *quoad* the personal property in England, were expedited in favour of the defender—Miss Catherine Preston and Lady Hay, wife of Sir John Hay, becoming her sureties therein; and, besides, confirmation was expedited in Scotland as to the moveable property there, in favour of the defender *qua* nearest of kin to the testator. These steps, it was said, were taken with a view to a general arrangement, rendered necessary by the state of embarrassment into which matters had been thrown by the trustees declining to act, but not with a view to supersede the trust-deed.

Thereafter, an application was presented to the Court in July 1834, by Charles Dashwood Bruce, Esq., the Honourable James Bruce, and the Honourable Alexander Maconochie of Meadowbank, all of whom were interested in the testator's succession under the trust-settlement, setting forth the deed, the declinature of

the trustees therein named, &c., and subsuming, that as the testator was a domiciled Scotsman, the whole of his moveable property, wherever situated, was subject to the laws and regulations of the Courts of Scotland, and praying the Court, *inter alia*, to appoint James Ferguson, one of the principal clerks of Court, or some other proper person, trustee for executing the foresaid trust-disposition and deed of settlement.

This application was opposed by Sir John and Lady Hay, who were both interested in the succession, and who, on a similar narrative and subsumption to the other application, prayed the Court to appoint the present pursuers (respondents) as trustees, and to ordain the present defender and Dame Anne Hay, as the executrix *qua* nearest of kin and heir-at-law of the testator, to execute such conveyances of the trust-property vested in them, in favour of the pursuers, so named trustees, as might be necessary for vesting in them the right and administration of the whole of the testator's estate, real and personal, situated in Scotland or elsewhere, and for enabling them to carry into effect the purposes of the trust.

The trustees averred that this proceeding, as well as the others, had been taken with the concurrence of the defender, in order that the purposes of the trust might be executed, and matters explicated; and it was not contemplated that the defender was to retain possession of the English funds under her letters of administration, or that she was to throw the affairs into Chancery, but that she was, so far as in her lay, to assist in making over these funds to the parties to be named as trustees by the Court, for the purposes of the trust. These statements were, however, denied.

Appearance was made by the defender and others, who opposed these applications; but afterwards parties came to an understanding, and the Court, on 19th May 1835, of consent,

"appoint the" pursuers, "and the survivors and survivor of them, to be trustees for executing the different powers, and carrying into effect the provisions contained in the said trust-disposition and deed of settlement and will, dated the 17th day of April 1833, executed by the deceased Sir Robert Preston of Valleyfield, Bart., and codicils thereto, referred to in the said petition, and that in room and place of the trustees named by the said Sir Robert Preston, who have declined to accept, and with all the powers and faculties conferred upon the said original trustees by the said trust-deed, and decern."

After extracting the above warrant in favour of the trustees, the defender, Lady Baird, in November 1835, then assigned to the trustees appointed by the Court, the personal property in Scotland to which she had confirmed; but in the deed of assignation she introduced a salvo of any right competent to her under Sir Robert Preston's deeds.

In regard to the personal property situated in England, to which she had administered, the defender admitted that she was bound to apply them, as administratrix, in fulfilment and payment of the purposes and legacies to which the money was destined by the testator; and she had accordingly paid various legacies, &c. She, however, declined to denude of the residue in favour of the pursuers, in consequence of which they filed a bill in Chancery, with a view to compel her to get her accounts passed, and herself exonerated of her intromissions, and the residue vested in the pursuers. The defender filed a counter bill, narrating

the Scotch deeds and proceedings, in which she prayed that the funds should be applied in terms of the trust, under the eye of the Court of Chancery; that the residue should be there ascertained, and her own rights and those of others declared by that Court. She prayed also, that the residue should be paid over to the accountant-general, on the ground that the pursuers wished the funds to be removed to Scotland, which, it was alleged, would be prejudicial to her and other parties interested.

Two actions in the Court of Session arose out of these circumstances. One was an action of declarator and payment at the instance of the respondents, as the trustees appointed for executing Sir Robert Preston's settlements, against the appellant, in which they concluded, *inter alia*, to have it

"found and declared, by decree of the Lords of our Council and Session, that all property and estate whatsoever, or of whatever denomination, which belonged to the said deceased Sir Robert Preston at the time of his death, wherever situated in Scotland, England, or elsewhere; and also all debts and sums of money due or belonging to him at the time of his death, heritable or moveable, real or personal, wherever and in whatever way secured, by heritable bonds or mortgages, or by personal bonds, invested in the public funds or banks, bills, or other documents; as also, all personal estate and effects of whatever nature, quality, or denomination, with the whole writs and title-deeds of the said heritable subjects, and the vouchers and instructions of the said debts, and in particular the whole funds and effects of the said deceased Sir Robert Preston, held by the said Dame Anne Campbell Baird Preston, defender, under the foresaid letters of administration granted and issued in her favour by the foresaid Prerogative Court of the Archbishop of Canterbury, now pertain and belong, and be vested in and transferred to the pursuers, and survivors and survivor of them, as trustees nominated and appointed by our said Lords for executing the settlements of the said deceased Sir Robert Preston, in room and place of the said Sir Coutts Trotter, Edward Marjoribanks, and Sir Edmund Antrobus, but in trust always for the uses, ends, and purposes specified and contained in the foresaid trust-disposition, deed of settlement and will, and that the whole rights, powers, faculties, privileges and immunities, vested in and bestowed by the before-recited trust-disposition, deed of settlement and will, in and upon the persons therein named, are now vested in and bestowed upon the pursuers, as trustees nominated and appointed by our said Lords."

In defence the appellant denied that the respondents stood in all respects in the same situation with the trustees named in the trust, and *pleaded*—1. That, in so far as relates to the personal estate of Sir Robert Preston situated in England, the present action falls to be dismissed, on the plea of *lis alibi pendens*, in respect of the dependence of the above-mentioned actions or suits instituted in England: 2. That the defender having obtained letters of administration of the personal funds in England from the Prerogative Court of Canterbury—having found caution in that Court, and being subject to the jurisdiction thereof, cannot, in any question relative to these funds, be made amenable to the jurisdiction of the Court of Session: 3. That the rights and powers conferred on the pursuers, as trustees foresaid, by the not and decret of the Court of Session, do not extend to the personal funds in England administered to by the defender, and the pursuers are not *in titulo* to discharge the defender of her actings and intromissions relative to these funds, nor can she be competently called on by this Court to make over the same to the pursuers.

The other action was one of declarator and constitution at the instance of the same pursuers (the respondents), and directed against the appellant. The conclusions of this action were, to have it found and declared, (1.) That the pursuers, as trustees appointed by the Court of Session, have vested in them the whole rights, powers, faculties, privileges, and immunities which were vested in the original trustees named by Sir Robert Preston's trust-deed and settlement: (2.) That the pursuers, as trustees, are entitled to make up fental titles, and be infeft in the whole lands and other heritable estate which belonged to Sir Robert Preston, including the lands in which the defender is infeft as heiress of entail; and further, if necessary, to adjudge the lands in implement of Sir Robert's trust-deed and settlement; and that Dame Anne Hay should be decerned and ordained to make up titles to the lands and estates as heiress of line and conquest, and to grant whatever deeds of conveyance might be necessary for completely vesting the pursuers in the estates, in terms of the trust-disposition and deed of settlement: the primary right being always burdened with the right belonging to the heirs of entail, under the deeds of entail.

To this the defender *pleaded*—1. That supposing the original trustees had been entitled to bring such an action, it was incompetent at the instance of the present pursuers, in respect that the appointment of them by the Court gave them no right equivalent to a general disposition of the lands, and, as appointees of the Court, they had not the same powers as the original trustees: 2. That supposing the decree of Court good to that extent, it did not clothe them with power to pursue such an action, to the effect of making up titles; and that the proper form to make up titles was to obtain authority by application to the Court. 3. The Chancery proceedings formed a *lis alibi pendens*: 4. That it was incompetent to have it declared that Lady Hay should enter to all the lands of Sir Robert: 5. That the present action cannot be judged of as a *questio voluntatis*, but must be determined by the strict legal principles applicable to feudal rights; and as the defender has been duly infeft under the entails, and the fee is full in her person, there remains nothing in *hereditate jacente* of Sir Robert Preston which can be taken up by his heir-at-law, or carried from that heir by adjudication in implement: 6. That supposing it to be competent to view the present question as a question of intention, the terms of the trust-deed and entails are sufficient to show that it was not the intention of the granter that feudal titles should be completed in the persons of the trustees, and also in the persons of the heirs of entail, but that the titles of the latter should alone form the feudal investiture of the estates.

The Lord Ordinary reported both these actions on cases to the Inner-House, who, in the first action above mentioned, pronounced the following interlocutor:

"Repel the defences, and decern in terms of the libel: Find the defender, Lady Baird Preston, liable to the pursuers in expenses," &c.

And in the second action above mentioned, they pronounced this judgment:

"Find and declare in terms of the first conclusion of the libel, and decern, and to this extent allow an interim decree to

go out: *Quoad ultra*, supersede consideration of the other conclusions of the libel, as also of the question of expenses."

The defender appealed these judgments to the House of Lords, and both appeals were advised of the same date.

On the appeal in the first action above mentioned, the Lord Chancellor said—

My Lords, by the interlocutor appealed from in this case, the Court of Session found and declared in terms of the first conclusion of the libel. Some question was made as to what came within the description of the first conclusion of the libel; but it is clear that it embraces so much as prayed that it might be found and declared that all property and estate whatsoever which belonged to Sir Robert Preston in Scotland, England, or elsewhere, all debts, sums of money due and belonging to him at his death, and all personal estate and effects of whatsoever nature, and in particular, the whole funds and effects held by the appellant under the letters of administration, pertain and belong, and are vested in and transferred to the pursuers in trust, for the purposes of Sir Robert Preston's settlements, and that his whole rights, powers, faculties, privileges, and immunities vested by his trust-disposition and settlement upon the trustees therein named, are vested in, and bestowed upon, the pursuers. The appellant is the administratrix of Sir Robert Preston in England, by virtue of letters of administration from the Prerogative Court. The pursuers have been appointed trustees by the Court of Session in the place of certain persons who were named as trustees and executors by Sir Robert Preston, but who declined to act. This appointment took place with the consent of the appellant. The act of appointment is dated 19th May 1836, and is expressed to be by such consent, and it nominates and appoints the pursuers to be trustees for executing the different powers, and carrying into effect the provisions contained in the trust-disposition, deed of settlement, and will of Sir Robert Preston, and that in the room and place of the trustees named by him who had declined to accept, and with all the powers and faculties conferred upon the said original trustees by the said trust-deed. In January 1836, the respondents filed a bill in the Exchequer in England, praying that the whole of the personal estate in the hands of the administratrix might be paid to them, they undertaking to pay the debts; or if the Court should be of opinion that such personal estate ought to be administered in this country, then that such estate might be administered accordingly, and the residue paid to the plaintiffs upon the trusts of the settlement. In February 1836, the appellant, the administratrix, filed a bill in the Court of Chancery in England, praying the usual decree for the accounts and administration of the personal estate, and that the residue might be secured for the benefit of the parties interested, and that the respondents, the trustees, might be restrained from proceedings in Scotland to compel the appellant, the administratrix, to pay over the personal estate to them. In March 1836, the respondents, the trustees, abandoned their suit in the Exchequer, and filed a bill in the Court of Chancery for the same purposes. The effect of the interlocutor appealed from is to declare, that all the funds and personal estate in the hands of the appellant or administratrix belong to, and ought to be transferred to the pursuers as trustees,—that is to say, that the personal estate in this country at the time of the death of Sir Robert Preston, and now in the hands of his administratrix, under letters of administration from the Prerogative Court, ought not to be administered in this country, but ought to be paid and transferred to the trustees in Scotland, appointed by the Court of Session, who are not the personal representatives of the deceased. By the law of England, the person to whom administration is granted by the ecclesiastical court, is, by Statute, bound to administer the estate, and to pay the debts of the deceased. The letters of administration under which he acts directs him so to do, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration. That such are the duties of an executor or administrator acting under a probate or letters of adminis-

tration in this country is certain, although the testator or intestate may have been domiciled elsewhere. The domicile regulates the right of succession, but the administration must be in the country in which possession is taken, and held under lawful authority, of the property of the deceased. The interlocutor appealed from assumes that this is not so, and that all the property in the hands of the administratrix, though unadministered, ought to be transferred to the trustees, leaving the creditors of the deceased in this country, if any such there be, and others having claims upon his property, to follow it to Scotland. It is true, that so long as the appellant remains in England, this declaration will be inoperative; but as the interlocutor stands, if she should happen to come within the jurisdiction of the Court of Session, she would be liable, upon the footing of such declaration, to transfer the property to the trustees, and by so doing to act in violation of the oath she has taken, and in dereliction of the duties of the office with which she has been invested in this country. It is not possible this could have been intended. The pursuers, as trustees appointed by the Court of Session, assuming that to have been properly done, have no right to administer the estate in England, as against the administratrix appointed for that purpose by the proper ecclesiastical court; and of this the Courts in Scotland are bound to take notice. The confusion seems to have arisen from Sir Robert Preston having appointed the same persons trustees and executors; and if they had proved the will in England, and taken upon themselves the execution of the trusts, the duties of administering the property and of carrying into effect the trusts declared, would have been united in the same persons. It may be assumed for the present purpose, that upon their refusal the Court of Session properly appointed the pursuers, as trustees in their place; but that Court had not any jurisdiction to appoint persons to exercise the duty of recovering or administering the property which happened to be in England. That power, by the law of England, is vested exclusively in the ecclesiastical courts of this country, and can only be exercised by executors or administrators acting under their authority; and in that situation the appellant now is. Sir Robert Preston might, indeed, have appointed whom he pleased to administer his property in England, by naming them as executors, but he had no power to authorise or enable any persons to act in such administration, otherwise than under the authority of the ecclesiastical courts. The pursuers, the trustees, have no such authority, nor has the Court of Session any jurisdiction or power to confer it. The administration of the personal estate in England rests, therefore, and must remain with the appellant. If, after such administration shall have been completed, any surplus should remain, and it shall appear that there are trusts to be performed in Scotland, to which it was devoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers for the purpose of being applied in the performance of such trusts; and in considering that question, every attention ought to be paid to the authority under which the pursuers have been appointed trustees, and the consent which led to such appointment. It is premature to decide that point, it being at present unascertained whether there be any surplus of the personal estate in this country, or what will be the amount of it; and no declaration of right by the Court of Session would be binding upon the Court of Chancery, under whose jurisdiction the property in England is placed by the suits which have been instituted; but although the transfer of the surplus of the property in England, if any, must depend upon the judgment of the Court of Chancery, it may be very competent for the Court of Session, at the proper time, to declare the rights and duties of the trustees appointed under its authority. But, if such trustees have not any right or title to the funds in England, until the administration shall have been completed in England, and the surplus ascertained, it does not appear that any benefit can arise from any declaration of such rights and duties, before it has been ascertained that there will be any surplus to which such rights and duties will attach. This, however, may be left to the discretion of the Court of Session. The interlocutor, proceeding upon the ground that the trustees are entitled to have transferred to them the property in England before the administration has been completed, must, I think, be reversed; but as the pursuers may be entitled to some declara-

tion of right, and to some decree of the Court of Session, so far as the Court of Session has jurisdiction over the property, I think the better and safer course will be, to declare that the property of Sir Robert Preston in England ought to be administered by the appellant, by virtue of the letters of administration granted by the Prerogative Court of Canterbury; and with this declaration, reverse the interlocutor appealed from, and remit it to the Court of Session to consider and adjudicate upon the first conclusion of the libel, either separately or altogether with the other conclusions of the libel, as such Court shall think fit, in conformity with the above declaration.

Interlocutor reversed, and cause remitted to the Court of Session, with a declaration.

On the appeal in the second action above mentioned, the Lord Chancellor said—

My Lords, in this case, the interlocutor appealed from repelled the defences, and decerned in terms of the libel,—the conclusion of which was, that the pursuers might be declared entitled to all the powers given by the trust-deed executed by Sir Robert Preston to the trustees therein named, and as such, to make up titles to the lands in question, and to obtain themselves duly seised therein, so as to carry into effect the trusts of that deed, and if necessary, to adjudge in implement of this trust-deed, and that Dame Anne Preston, otherwise Hay, as heiress of line of Sir Robert Preston, might procure herself to be served and retoured as such heiress of line and of conquest of the said lands; and after completing her titles to the said lands, to dispose and make over the same to the pursuers, as such trustees, without prejudice to any right or interest which might belong to the defenders, after being so vested in the pursuers; and also, that the appellant, as heiress of entail, and Catherine Preston, substituted heiress of entail, might be called as defenders for their interest. The judgment of the Court giving to the pursuers what they so asked, has decided that the pursuers are entitled to the feudal title, or the legal estate in the lands comprised in the testamentary dispositions executed by Sir Robert Preston, and to the assistance of the Court to complete such titles. This the appellant, who completed her title by infestment under the deeds of entail, disputes, and contends, *first*, that the title claimed by the pursuers is inconsistent with that given to her, and that hers ought to prevail; and, *secondly*, that there was no intention expressed by Sir Robert Preston, that the pursuers should have the feudal or legal title in the lands. With respect to the first, it is, I think, sufficiently shown that there is not that inconsistency in the titles claimed by the pursuers, and possessed by the defenders, which can impeach the interlocutor appealed from, if it shall appear that the titles claimed by the pursuers were intended to be given to them by Sir Robert Preston, and are necessary for the due execution of the trusts of his dispositions. The real question therefore is, whether such intention is to be collected from those dispositions, and whether such necessity exists. I think it quite unnecessary to consider one point, which is the subject of much argument in the papers, namely, whether the Court of Session have the power of appointing new trustees in cases in which the trustees named by the authors of the trust-disposition fail, or decline to act; because, in this case, the pursuers were carrying into effect the provisions contained in the trust-disposition and deed of settlement and will of Sir Robert Preston, in room and place of the trustees named by him, who had declined to accept, with all powers and faculties conferred upon the said original trustees, and this with the consent of the appellant. This appointment stands in full force; and whilst it so stands, the title of the pursuers under it cannot be disputed by the appellant. I proceed, therefore, to examine the trust-disposition and will creating the entail, for the purpose of ascertaining whether they contain satisfactory proof of Sir Robert Preston's intentions as to whether the feudal or legal title should, during the continuance of the trust, vest in the trustees or in the appellant, the heiress of entail. The trust-disposition, which is dated 17th October 1832, commences by stating that the author, Sir Robert Preston, had resolved to vest all his estate in trustees, and bound himself and his heirs to make up complete titles to the lands if necessary, and to convey the same in all form to the trustees;

but he declares that the trustees shall hold such lands subject to the entail or entails thereof, the provisions and declarations of which are there specified, and under which the appellant claims,—which deed or deeds of entail were to be taken as part of the deed; and he reserved to himself the power of executing such deed or deeds of entail; and in the event of his failing so to do, he directed his trustees to execute such deed or deeds of entail, so as to settle the lands upon the persons therein mentioned, of which the appellant was the first-named, after failure of issue of the settler, and he appointed his trustees, as soon after his death as might be, to obtain it to be recorded in the Register of Entails, and to make up and complete all necessary feudal titles to the lands included therein, so that the said entails might be rendered effectual in law; but he declared that any entail of the said lands, whether executed by him or his trustees, or titles completed thereto in the persons of any of his heirs, *should not interfere with, or come in competition with the ends and purposes declared in the trust, during the survivorship of his three nieces first called to the succession thereof* (of whom the appellant is the first), but that such entails should, during the lives of his said three nieces, and the survivor or survivors of them, continue suspended and in abeyance, so far as regards the rents and produce of his said lands, which were to be received and applied by his trustees in the manner after declared. He then gives to his trustees a power of selling his estates, and after payment of his debts, directs them to invest what shall remain of the produce of such sale, and of his personal estate, in the public funds or real securities. He then, after giving many annuities and legacies, directs his trustees to hold the abbey or estate of Culross, contained in the foresaid entail, as a residence and possession common for his three nieces during their lives, conferring on all of them, jointly, the right to live at, and manage the same, but without prejudice to feudal titles being completed thereto, under the said entails, in the persons of his nieces, or other heirs of entail in succession, as before directed. He then, in the *ninth* place, directed his trustees to pay and apply the free yearly produce of his property, in equal three parts, to his three nieces, with survivorship, and in order to give effect to that direction, he declared that the entails to be granted by him or his trustees in favour of his said nieces *seriatim, should stand suspended during their lives, except that his nieces in succession, should exercise all rights of patronage belonging to his estates, and to enter vassals and feuars, for which purpose it should be competent for his trustees, immediately after his death, to apply for the recording of all deeds of entail executed by him, and to complete, at the expense of the trust-estate, proper feudal titles under the same to the said lands, in the persons of his said three nieces, according to their order of succession; but declaring, that notwithstanding the completion of such feudal titles in the persons of his said nieces, the whole rents and produce, and casualties of superiority, should be receivable by his trustees for the purposes expressed.* He then directed his trustees, upon the death of the survivor of his nieces, to lay out the residue of his personalty in the purchase of lands in Scotland, and to execute and grant deeds of entail thereof, according to the declaration before directed, of his estates, and to cause such deeds of entail to be recorded, and to make up and complete feudal titles to the lands therein contained in the person of the heir having right thereto; and on such steps being taken as were necessary to render the said entails valid in law, and the prior purposes of the present trust being duly accomplished, the heir entitled to succeed should be thereupon let into possession, and that the trust should then be considered at an end. He then declared that the receipts and conveyances by his trustees should be available to all purchasing from, or assigning to them, and directed his trustees not to sell a part of his property during the lives of his nieces, but to sell it after their deaths; declaring, that such parts and other lands specified, were intended to be included in the present conveyance to his trustees. By two dispositions or deeds of entail, both dated 3d November 1832, he created entails of the different parts of his estate under which the appellant claims. Those deeds are in the usual form, but both commence by reciting that the same were made for the preservation of the estate in the line of succession thereby pointed out, and agreeably to, and in terms of his trust-disposition and deed of settlement. When the provisions of

this trust-deed are considered, there does not appear to be room for doubting that the author of it intended that his trustees, during the continuance of the trust, should have the complete dominion over the property, and all the estate, power and interest in it which could be necessary to carry his object into effect; which, indeed, if it were necessary, will be found further confirmed by the codicil of 17th April 1833, being after the date of the deeds of entail. That these trusts, and these objects of the testator, could not be carried into effect without the feudal or legal title to the estate, seems to be equally free from doubt; but as the trust-deed did not contain any precept of sasine, or covenant for infeftment in favour of the trustees, it was found necessary for them to complete their feudal title by constitution and adjudication in implement, which was therefore the object of the suit, and is the substance of the interlocutor appealed from. But the appellant contends that she has made up her feudal titles as heiress of entail, and that such title existing is inconsistent with that feudal title to be made up in favour of the trustees. There seems to be a sufficient answer to that proposition in law, but it does not appear to me to be necessary to enter into that point, because the interlocutor deals only with the heiress of line, and not with the appellant as heiress of entail. It only directs the heiress of line to do what the testator, by his trust-deed, undertook she should do; namely, if necessary, to make up and complete titles to the lands, and if necessary, to convey them to the trustees. If, under this trust-deed, the trustees are entitled to have such titles made up, how can the appellant, claiming as a purchaser under the author of this deed, and under an instrument declared to be agreeable to, and in terms of the trust-deed, by having made up her title under the entail which is directed to be suspended during the trust, be permitted to frustrate the intentions of the donor under whom she claims, and defeat the estate which he intended his trustees should hold for the purposes of the trust? For these reasons, I move your Lordships that the interlocutor appealed from be affirmed, with costs.

Interlocutor affirmed, with costs.

First Division.—Lord Fullerton, Ordinary.—Spottiswoode and Robertson, Appellant's Solicitors.—Meggison, Pringle and Manisty, Respondents' Solicitors.—[W.H.D.]

1st April 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 83.—THE MARQUESS OF BREADALBANE and JAMES AUCHINLECK CHEYNE and OTHERS, Appellants, v. CHARLES CAMPBELL of Combie, Respondent.

Entail—Fetters—Institute—Irritant Clause—An entail, with prohibitory and resolute clauses directed against the institute nominatim, but with an irritant clause directed against "any of the heirs succeeding to the said lands and estate"—Held (affirming the judgment of the Court of Session) not to be so fenced, in the irritant clause, as to strike at a sale of the estate by the institute.—Observed by the Chancellor, That reference cannot be made to other parts of a deed of entail, for the purpose of giving more effect to the irritant clause than is to be derived from the expressions used in that clause itself.

On the 25th of February 1809, David Campbell, Esquire of Combie, executed a procuratory of resignation of the estate of Combie, on the narrative that he was desirous to preserve the estate in the course of succession thereby established; and it directed resignation to be made in favour of himself in liferent, during all the days of his lifetime, and to Charles Campbell, his only lawful son, and the heirs-male to be lawfully procreated of his body;

"whom failing, to the heirs-female to be lawfully procreated of the body of the said Charles Campbell; whom failing, to Susanna Campbell, my only lawful daughter, and the heirs-male to be lawfully procreated of her body; whom failing, to the heirs-female to be lawfully procreated of the body of the said

Susanna Campbell; whom failing, to such other person or persons as I shall hereafter name and appoint to succeed to my said lands and estate, by any writing under my hand, and even upon deathbed; and failing of such nomination, or the person or persons therein named, and their heirs to be therein mentioned, then to my own nearest heirs and assignees whomsoever, heritably and irredeemably, the eldest heir-female, so oft as the succession shall devolve upon females, excluding all other heirs-portioners, and succeeding always without division in all time coming, throughout the whole course of succession, whether of heirs of tailie, or as heirs whatsoever, who may happen to succeed in terms of the destination above specified."

The deed contained prohibitory, irritant, and resolute clauses. The first condition of the tailie was, "that the said Charles Campbell, and my whole heirs of tailie succeeding to the said lands and estate," should be obliged to use the name and arms of Campbell of Combie. It proceeded:

"And that it shall not be lawful to, nor in the power of the said Charles Campbell, or of any of the said heirs of tailie, to alter this present tailie, or the nomination, or other deed to be granted by me, or order of succession prescribed or to be prescribed thereby, or to grant any act or deed which may import or infer any innovation or change thereof, directly or indirectly, in any sort."

The prohibition against sale was thus expressed:

"And with and under this restriction, that it shall not be in the power of the said Charles Campbell, or any of the heirs succeeding in my said lands and estate, to sell, alienate, impignorate, or dispose the same, or any part thereof, either irredeemably, or under reversion, or to burden the same, in whole or in part, with any debts or sums of money, infestments or annualrent, or liferent, or any other burden, encumbrance or servitude whatever."

The irritant and resolute clause was expressed in the following manner:

"And with and under this irritancy, as it is hereby conditioned and provided, that in case the said Charles Campbell, or any of the heirs succeeding to the lands and estate before resigned, shall contravene the other before-written conditions herein contained, or any of them, that is, shall fail or neglect to obey or perform the said conditions and provisions, or any of them, or shall act contrary to the said before-written limitations or restrictions, or any of them; then, and in these cases, the person or persons so contravening shall, for him or herself only, *ipso facto* amit, lose and forfeit all right, title and interest which he or she hath to the lands and estate before resigned; and as such right shall become void and extinct, so the said lands and estate shall devolve, accresce, and belong to the next heir appointed to succeed, although descending of the contravener's own body, if enable to possess and enjoy the said estate, in the same manner as if the contravener were naturally dead, and had died before the contravention; and upon every contravention which may happen, by and through any of the heirs succeeding to the said lands and estate their failing to perform all or each of the conditions and provisions, or acting contrary to all or any of the restrictions and limitations before written, it is expressly provided and declared, not only that the lands and estate before resigned shall not be burdened with, or liable to the debts and deeds, crimes and acts of the heirs contravening, as is already herein provided, but also all debts contracted, deeds granted, or acts done contrary to the conditions and restrictions appointed by me, or to the true intent and meaning hereof, shall be of no force, strength or effect, and ineffectual and unavailable against the other heirs called to succeed, and who, as well as the said lands and estate, shall be noways burdened therewith, but free therefrom, in the same manner as if such debts or deeds had not been granted or contracted, or such crimes, acts or omissions, had never been done or happened."

It was also provided:

"That it shall be free and lawful to every heir who shall have

a title by and through any contravention, or the incapacity of any former heir, and although minor at the time, to sue and obtain declarator of his own right, and of the irritancy of the former heir's right, or to serve heir to the person who died last vested and seised in the lands and estate before resigned, preceding the heir becoming incapable or contravening, and thereby, or by adjudication, or any other formal or legal way or method, to establish in his or her person the right and title of and to the lands and estate, and that without being subjected or liable to the debts or deeds of the person or persons becoming incapable or contravening, excepting provisions to widows and children, as aforesaid, and without regard to their neglects or omissions, or any alterations made or intended, or acts done by them contrary to the conditions and restrictions appointed by me: But all the heirs succeeding upon any incapacity or contravention, and the heirs succeeding to them, shall be subject and liable to the conditions, restrictions and irritancies aforesaid, throughout the whole course of succession, for ever."

The deed contained a reservation of the granter's liferent, and power to nominate other heirs:

"Reserving always to me, the said David Campbell, not only my own liferent of all and sundry the lands and others particularly and generally above resigned, during all the days of my lifetime, but also full power and liberty to me, at any time during my lifetime, to execute a farther nomination of heirs who are to succeed to my said lands and estate after the said Charles Campbell, and the heirs of tailie above mentioned."

The institute, being advised that the debts contracted, or acts of contravention done by him, were not struck at by the irritant clause, sold a part of the estate to the Marquess of Breadalbane for £23,500, and another portion to Mr James Auchinleck Cheyne for £16,500. He also, to try his right, brought an action against the substitute heirs of entail, to have it declared that he was entitled to sell and alienate the estate. To that action the tutor *ad litem* for the pursuer's children gave in defences denying the libel, and the power of their father to sell. The pleas maintained by them involved the same reasons as those maintained in the suspensions brought by the Marquess of Breadalbane and Mr Cheyne.

The Marquess of Breadalbane and Mr Cheyne refusing to pay till a valid title should be given to them, brought separate suspensions, as of a threatened charge for payment of the price stipulated for the lands sold to them. The grounds of suspension were:

"First, The substitute heirs of entail having been advised that the entail is effectual, and that the sale to the complainer being in contravention of its fetters, is null and void, intend, as the complainer is informed, to lodge defences to the said action of declarator, for the purpose of trying that question;—as the same points are necessarily involved in this suspension, it is a matter of invariable practice to pass the bill, that the merits may be determined on the expedite letters: Second, The entail is valid and effectual in terms of the Act 1686, and in particular, the fetters are effectually directed against alienations or other sales of the lands. The prohibitory and resolute clauses before quoted, include Mr Charles Campbell, the institute, and they are in every respect regular and sufficient, and they give the substitute heirs a sufficient title to challenge, so as effectually to resolve the right of Charles Campbell, the institute, in the event of his contravening the entail. With regard to the irritant clause, it would appear from the summons of declarator before referred to, that it is considered defective as directed solely against the substitute heirs, and not against Mr Campbell, the institute. The complainer does not admit that this is a correct interpretation of the irritant clause. It is expressed somewhat differently from the usual style of such clauses in entails, but still he conceives that it is so expressed as to affect the acts and deeds of the institute, as well as those of the substitute heirs of entail. By

referring to the terms of the irritant and resolute clauses before quoted, it will be observed, that they are united, and form one single clause or paragraph, commencing with the words, 'and with and under this irritancy.' The grammatical construction and true meaning of this whole paragraph evidently is, that if Mr Campbell, the institute, or any of the heirs of entail contravene, not only shall they forfeit their right to the estate, which shall not be affected with their acts and deeds, but these acts and deeds shall be null and void. This construction will be rendered apparent by an examination of the paragraph in detail. It commences with the proper resolute clause, whereby it is provided, that in 'case the said Charles Campbell, or any of the heirs-substitute, shall contravene the entail, they shall forfeit their right, and the estate shall pass to the next heir in succession;' then follows a repetition or abridgement of the prohibitions of the entail, declaring, that 'upon every contravention which may happen by and through any of the heirs succeeding to the said lands and estate their failing to perform all or each of the conditions and provisions, or acting contrary to all or any of the restrictions and limitations before written,' not only shall the lands not be burdened with or liable to the debts and deeds, &c. of the heirs contravening, as is already herein provided; that is, in other words, not only shall the particular conditions, provisions, restrictions and limitations of the entail be effectual according to their true meaning and legal construction, for this is undoubtedly the effect of the reference to the foregoing clauses of the deed contained in the words, 'as is already herein provided.' This part of the paragraph, however, is evidently a redundancy—a mere repetition of what was before provided by several separate formal clauses, and cannot be held to supersede the intention of those clauses to which it refers for a more full explanation of its own meaning. What remains of the paragraph may be properly considered as the whole irritant clause of the deed. The words 'but also,' following immediately after the general reference, connect this clause with the other important essential clauses of the entail, whilst the clause itself is expressed in terms so general, and at the same time so specific, as to embrace all acts and deeds, by whomsoever committed or granted, which are contrary to all or any of the conditions or provisions of the entail. Nothing could be more general and comprehensive than the terms of this clause; it declares that 'all debts contracted, deeds granted, or acts done contrary to the conditions and restrictions appointed by me (the entailor), or to the true intent and meaning hereof (of the entail), shall be of no force, strength, or effect,' &c. The test here put of the validity of any act or deed affecting the entailed estate, or any part of it, is, whether it is or is not contrary to the true intent and meaning of the entail; and, tried by this test, it must be admitted that the act of selling part of the entailed lands, and granting to the complainer a disposition of these lands in implement of the minute of sale before set forth, are acts and deeds most distinctly prohibited. The addition which follows this clause, viz., 'and ineffectual and unavailable against the other heirs called to succeed,' &c., does not limit the foregoing general declaration, but is merely a repetition of the former provision of the entail, by which it is declared that any party contravening forfeits his own right merely, and does not injure the rights of after heirs of entail. On these grounds it is conceived that the entail in question is so effectually fenced, that Mr Charles Campbell had no power to sell any part of his entailed estate, and that he cannot grant a legal and valid title to the lands sold by him to the complainer."

In the record which was made up in the suspension, Campbell *pleaded*—(1.) The entail under which the respondent holds the estate sold to the suspender being defective, he is in a condition to give an effectual title to a purchaser; and the reason of suspension founded upon the alleged want of power in the respondent to give such a title, falls to be repelled as groundless. (2.) The irritant clause of the entail being exclusively directed against the acts, deeds, or debts of substitute heirs, cannot be held to render null and void the acts done or deeds executed by the respondent, who is not an heir-substitute, but the institute under the entail, and there-

fore the deed, in so far as relates to the respondent, is not in conformity to the provisions of the Act 1685. (3.) The entail being otherwise defective, both as regards the imposition of fetters on the respondent, and as relates to the right of substitute heirs to challenge acts done by him, or to complete titles on any contravention being committed, cannot prevent the completion of an onerous transaction of sale, or affect its validity when completed.

In the conjoined processes, the Lord Ordinary pronounced the following interlocutor:

"29th June 1838.—The Lord Ordinary having heard the counsel for the parties on the closed record in the conjoined processes, In respect that the irritant clause in the deed of entail libelled is not directed against the institute, repels the reasons of suspension, and finds the letters and charges orderly proceeded in the processes of suspension, and decerns; and in the action of declarator, finds, declares and decerns, conform to the conclusions of declarator."

Against this judgment the tutor *ad litem*, on behalf of the children, and the Marquess of Breadalbane and Mr Cheyne, reclaimed; but the Court unanimously *adhered*.

The Marquess of Breadalbane, Mr Cheyne, and the children of the institute, appealed, *pleading*—That although the rule of law recognised in several decisions be, that in order to bind the institute, it is essential that the prohibitory, resolute and irritant clauses should be specially directed against him, there is no precise form of expression necessary, in order to make these clauses effectual. It is enough if the matter intended be actually done. Now, the irritant and resolute clause is in this case thrown into one. It is introduced with the words, "under this irritancy." It is then "conditioned and provided," that in case "the said Charles Campbell, or any of the heirs succeeding to the lands and estate before resigned, shall contravene," &c., then the person so contravening shall "forfeit all right," and as "such right shall become void and extinct, so the said lands and estate shall devolve," &c. to the next heir; "and upon every contravention which may happen by and through any of the heirs succeeding to the said lands their failing to perform all or each of the conditions and provisions," &c., it is expressly provided that the lands shall not be liable for their debts and deeds, "but also all debts contracted, deeds granted, or acts done contrary to the conditions and restrictions appointed by me, or to the true intent and meaning hereof, shall be of no force, strength, or effect, and ineffectual and unavailable against the other heirs called to succeed, and who, as well as the said lands and estate, shall be noways burdened therewith, but free therefrom, in the same manner as if such debts or deeds had not been granted or contracted, or such crimes, acts, or omissions had never been done or happened." Now, this clause is differently constructed and expressed from any that have occurred in former cases of this description. The whole is one continued sentence, and both the declaration that the deed done shall be void, and that the right of the contravener shall be irritated, is contained within one clause, in which Charles Campbell, the institute, is named in the outset as the party against whom, along with the whole heirs of entail, the irritancy is directed. Admitting, then, to the fullest extent, the doctrine that the fetters must be imposed upon the institute, and that he is not

to be considered as an heir of entail, and bound by what is directed against heirs of entail only, it is submitted that here, on a proper construction of the instrument, the respondent is bound, and that he is not in a condition to give the purchasers a sufficient title, on the one hand, nor, on the other, entitled to sell the estate to the prejudice of the substitute heirs.

Lord Chancellor.—My Lords, nothing but the extreme caution which, I think, it is the duty of this House to exercise in coming to any decision, or acting upon a first impression, however strong, would have made me think it necessary to take an opportunity of looking into this deed of entail. I have, however, since the hearing that took place on the day before yesterday, looked into this deed, and I cannot suggest to myself even a doubt as to the propriety of the interlocutors appealed from. Nothing can be more simple, with regard to a Scotch entail, than that the institute is not fettered unless the irritant clauses either name him or describe him. This must be considered as perfectly settled law. Now in those irritant clauses he is not named, nor is he described. The persons whom the irritant clauses describe are "heirs," and therefore, according to the decisions, he is not included within the irritant clauses. But then it is said, that though the word "heirs" only is used, the whole is one sentence, and that, in the commencement of the sentence, there are words which would supply the defect. Even that would be contrary to the rules which have been adopted. You cannot refer to other parts of the deed for the purpose of giving more effect to the irritant clauses than is to be derived from the expressions used in those clauses. But in point of fact, though it may be grammatically one sentence, yet in substance the two parts are totally distinct. The part which proceeds to impose the irritancies is quite distinct from those parts of the deed which contain the prohibitions. But even if that were not so, it is said that that part which is admitted to be prohibitory contains words which would apply to the case of selling. Now, I am very clearly of opinion, that, according to the rule of construction adopted in several other cases, although there may be found in the sentence words which, taken from the rest of the sentence, and used by themselves, might be applied to selling, namely, the words which speak of deeds affecting land, yet that, where they are mixed up in clauses clearly directed to another purpose, you cannot, in the strictness required in deeds of entail, select particular words, and give a sense to them inconsistent with the general sense of the sentence itself. That the sentence is intended to apply to deeds, and not to sales, is quite clear from the general construction of the sentence. But it is not necessary to resort to that part of the argument here. It is sufficient that there are irritant clauses which profess to name the heirs of entail, and do not name or describe the institute. For these reasons your Lordships will probably concur in the opinion, that there is no doubt of the propriety of the interlocutors appealed from.

Interlocutors affirmed, with costs.

First Division.—*Lord Fullerton, Ordinary.*—*Spottiswoode and Robertson, Appellants' Solicitors.*—*Caldwell and Son, Respondent's Solicitors.*—[W.H.D.]

20th January 1842.

SECOND DIVISION.—(J. W.)

No. 84.—*MACPHUN v. MARSHALL.*

Process.—Suspension and Liberation.—Statute 1 and 2 Vict. c. 86, § 5.—*Held that a note of suspension of a decree in absence, presented under the 5th section of 1 and 2 Victoria, c. 86, and containing a prayer for liberation, is incompetent, in so far as it embraces liberation.*

A decree in absence having been obtained against a party in the Court of Session, it was put in execution about ten or eleven months thereafter, and the debtor was incarcerated. He presented a note of suspension under the 5th section of the 1st and 2d Victoria, and

prayed also for liberation. The note was strictly formal, and contained no statement of facts on which the application for liberation was founded. The Lord Ordinary, entertaining doubts of the competency of such a form of note, reported it verbally to the Court with a view to being advised as to the disposal of it. The 4th section of the Act relates to the judgment of any Inferior Court pronounced *in foro*, and provides, that "it shall be competent to suspend the decree, and any diligence or proceeding following thereon, by lodging in the Bill-Chamber a written note of suspension," &c. The 5th section relates to any decree in absence pronounced in the Court of Session, and provides for its suspension "by lodging in the Bill-Chamber a note of suspension, of the form and effect of notes of suspension before allowed to be brought of decrees *in foro* of Inferior Courts," &c. The 6th section enacts, "that all suspensions not otherwise provided for in this Act, may be brought by lodging in the Bill-Chamber a note in manner aforesaid, and there shall be annexed to such note an articulate statement of the facts on which such suspension is founded." The forms of these notes are not provided for by the Statute, but they are regulated by the Act of Sederunt, 24th December 1838; and a clause of liberation is given for insertion in the form which is applicable to the 6th section.

In support of the note it was *pleaded*—That although the suspension of a decree which has been already completed, be incompetent, imprisonment is not implement of the decree, nor satisfaction of the debt. Suspension, therefore, is still competent, and the party is not bound to bring a reduction. The 5th section provides, that a decree in absence, pronounced in the Court of Session, shall be suspended by a note of the form and effect of suspensions before allowed. Now, by the 4th section, the effect of such suspensions is declared to be, "to suspend the decree, and any diligence or proceeding following thereon." The passing of the bill is therefore incompatible with the farther imprisonment of the debtor, for the decree is suspended, and the charge and whole grounds and warrants thereof.

Lord Medwyn.—The 1st and 4th sections of the Act refer to the suspension of the judgment of any Inferior Court pronounced *in foro*; the note is to be passed *de plano*, and its effect is to operate as an interim sist of diligence; but here the diligence has been actually carried into effect. The 5th section relates to decrees in absence pronounced in this Court, and the note of suspension is to be of the same form and effect as those before allowed; but I think the word *effect* there, refers only to a sist of diligence. A note praying for liberation is distinct from a note of suspension only. Formerly, a note of suspension and liberation could be passed only in the Inner-House, and is a well-known form of process. If the Legislature had intended that the debtor should be liberated on the simple passing of the bill of suspension, it is inconceivable that it should not have stated so in the 5th section. The 6th section provides for all suspensions and interdicts, and suspensions not otherwise provided for in this Act. The only other suspension conceivable, is a suspension and liberation, which must have annexed to it a statement of facts, and be intimated to, and answered by, the opposite party. The complainer having allowed the charge to expire, and a delay having taken place of not less than ten or eleven months from the date of the decree, he must now apply for liberation by presenting a note in the ordinary form.

Lord Moncreiff.—I am clearly of the same opinion. At first I was struck with the words—"of the same form and effect," which occur in the 5th section. There is a great distinction between suspension and liberation. Imprisonment is ultimate

diligence, and this has always been considered different from decree, or diligence merely in progress. There never was such a thing heard of as liberation on a bill of suspension, without a conclusion for liberation; nor does it always follow, that where there is such a conclusion, liberation follows upon the passing of the bill. The 5th section provides for the suspension of a decree in absence, but it says nothing of suspension and liberation; and were we to give this effect to it, we would not be stopping any thing *in cursu*, but breaking down a thing already done, and that without knowing any thing of the matter. The 4th section provides for the suspension of a decree *in foro*, and stops progress, but it does not break down any thing. Still, if the decree *in foro* were completed, and a note of suspension were presented without a statement of facts and reasons assigned, it would not do. I don't think that the Legislature contemplated liberation without reasons assigned.

Lord Justice-Clerk.—If I could separate the 5th from the 4th section, I would concur. The distinction is deeply rooted in our law between decrees in absence and *in foro*; so deeply, that suspensions of decrees in absence pronounced by this Court are put in the same situation as decrees *in foro* in Inferior Courts. The terms of the 4th section are not repeated in the 5th section, but it is only in consequence of the word "effect" referring back to the 4th section, that you suspend a decree in absence at all: "Suspend the decree, and any diligence or proceeding following thereon." I cannot limit these words. Imprisonment is not so high as a poinding, which is for satisfaction of the decree. Here we have a statutory declaration, and, in my opinion, it is imperative. The presenting of the note suspends the decree in absence, in consequence of the word "effect," from which the clause derives its virtue and its value. Why has it not the same effect as to diligence—regarding imprisonment in the light of diligence? The 6th section says—other suspensions than those provided for in this Act; but is not this a suspension of a decree in absence, which is expressly provided for. If, under the 6th section, a separate note were to be presented with reasons for liberation, it would involve two processes; and although the Lord Ordinary conjoined the causes, the party might make a different case in answer to the bill, from what he did in his original summons. We are to construe liberally in favour of personal freedom; and the charger has himself to blame for the delay which has taken place. If the 5th section were to be viewed as merely superseding the necessity of a reduction, that would relieve it greatly from difficulty.

Lord Meadowbank absent.

The Court advised the Lord Ordinary to pass the bill to the effect of reponing, and to refuse, *quoad ultra*, as incompetent, reserving right to the suspender to present a note of suspension and liberation in common form.

Lord Ordinary, Ivory.—*Act. Buchanan.*—*Alt. Moncreiff.*—[J.W.]

21st January 1842.

FIRST DIVISION.—(H.B.)

No. 85.—WILLIAM BALLANTYNE, Pursuer, v. MRS ELIZABETH CARTER, Defender.

Caution—Relief—Obligation—Cash-Account—*Rei Interventus*—A letter of relief, addressed to a cautioner in a cash-account, enforced for all the sums paid by him under his cautionary obligation,—the letter having been dated the 28th January, and the bond of credit, though signed by him on the same day, not having been signed by the other cautioner till the 5th, nor operated upon till the 6th of February.

Alexander Moffat having obtained a cash-account for £1200 from the Commercial Bank, a bond of credit was granted in the usual form by him, his brother Thomas Moffat, and the pursuer William Ballantyne. The bond was signed by Alexander Moffat and William Ballantyne at Dalkeith, on the 30th of January,

and by Thomas Moffat at Edinburgh, on the 5th of February 1838. Of the former date (30th January), the following letter was granted to Ballantyne by Mrs Elizabeth Carter, Alexander Moffat's mother-in-law:

"As you have become co-surety with Mr Thomas Moffat, 24, Middle Market, Edinburgh, for a cash-account with the Commercial Bank of Scotland, in favour of my son-in-law, Alexander Moffat, Dalkeith, I hereby bind myself to relieve you and your co-obligant from your guarantee."

The account was first operated upon on the 6th of February.

Alexander Moffat became bankrupt, and the sum due by him to the bank, under the bond of credit, was £1251. 14. 9. Thomas Moffat and William Ballantyne having each paid a half, and obtained a discharge and assignation from the bank, William Ballantyne, founding on the letter granted to him by Mrs Elizabeth Carter, on the narrative that he had "declined to be a party to the bond unless he should previously receive such a letter of relief;" and "that the granting of that letter by her was followed by an important *rei interventus*, inasmuch as it was on the faith of that letter, and the obligation of relief therein contained, the pursuer afterwards signed the bond of credit, and became liable for the sums he has been compelled to pay," concluded against her for payment of £625. 17. 4½, with interest, and of £100, more or less, as the expenses of process, and "of any diligence to be used on the dependence."

Mrs Carter, in her defences, stated, that "on the 30th January 1838, she was residing at Dalkeith with her daughter and her son-in-law, Alexander Moffat. On that day, her son-in-law told her, in presence of her daughter, that he was getting a new cash-account, and that the pursuer and Thomas Moffat were his cautioners, and requested her to become bound for the relief of the pursuer, by which she could not at the worst be subjected in payment of more than £400. With considerable reluctance she consented, and subscribed a document written by her son-in-law, but without examining it. The letter of relief now produced by the pursuer is quite at variance with the understanding of the defender, and proposed arrangement. The defender, therefore, now denies that she came under any such obligation as that expressed in the letter produced, and now libelled." She therefore *pleaded*—1. The letter or writing founded on not being stamped, is null. 2. The writing libelled being neither probative nor holograph of the defender, and no *rei interventus* having taken place, action upon it cannot be maintained. 3. The conclusion in the summons for the expense of diligence is incompetent: *Taylor v. Taylor*, 25th January 1820, F. C.

The letter founded on having been stamped, the Lord Ordinary pronounced the following interlocutor:

"16th December 1841.—The Lord Ordinary having heard parties' procurators, and considered the process, repels the three first defences, and decerns in terms of the libel, with the exception of that part of the last conclusion which relates to the expense of diligence, which is reserved *hoc statu*: Finds the defender liable in expenses; appoints an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and to report.

"*Note.*—The averment that the pursuer's bond to the bank

was signed after obtaining the defender's letter of relief is not proved, and must therefore be disregarded. The Lord Ordinary, therefore, proceeds entirely on the *rei interventus*.

"He cannot go along with the reasoning by which the defender tries to maintain that there can be no *rei interventus* unless something be positively done, and that the pursuer did nothing. There are some loose expressions thrown out in the pleadings in the case of the Dunmore Coal Company (1st February 1811,) about the insufficiency of 'the assertion of a negative' to constitute real intervention. But what, in common sense, can amount more to acting on the faith of a letter of relief, than letting another continue to run the holder of the letter into debt? The pursuer could have stopped his guarantee at the bank whenever he chose; but relying on this letter from the defender, he allowed her son to go on drawing; and it is gravely said, that because permission is merely passive, it cannot imply positive *rei interventus*. The Lord Ordinary has no doubt that a mere abstinence from diligence, if it could be proved, would exclude the plea of *locus penitentiae* as effectually as the actual liberation of a debtor. A person is asked to become a cautioner that a gunpowder work will not injure a house. He agrees on getting a letter of relief. Trusting to this letter, he lets his caution be acted upon till the house is blown up. He is then told that the letter is informal, and that mere inactive acquiescence in the continuance of the danger and of the caution cannot form a *rei interventus*. Is there any practical sense in this?

"But, moreover, was not the letter in question granted in *re mercatoria*?"

The defender reclaimed. At advising,

Lord Mackenzie.—I am not prepared to say that the interlocutor should be altered. The Lord Ordinary, in his note, puts the question, whether the letter in question was not granted in *re mercatoria*? but his Lordship has not decided the point; and I would rather not decide it, as it is unnecessary. If the letter was not granted after the signing the bond, it was granted *unico contextu*. It is plain that the two formed one transaction. If the defender concurs in this joint transaction, and the parties proceed to act upon it, is it possible to say there is no *rei interventus*? Suppose Mrs Carter, after granting this letter, had gone to the bank, and, standing by, had seen money got upon the bond,—or suppose that all the parties had gone together,—would it have been possible to say that she was not answerable on the ground of there being no *interventus*? What more perfect *interventus* could there possibly be than actual advances after the letter of relief was granted? This supposition does not differ much from the actual case. This bond was granted in favour of the defender's son-in-law. She could not forget that it had been granted, or that he would proceed to operate upon it. She knew this as well as if she had seen him go, or gone with him to the bank; and she also knew just as well that the cautioners, in allowing their obligation to continue, were relying on her letter of relief. She must have known all these things, and therefore the case is almost the same as that which I have supposed. The continuance of the cautionary obligation, in reliance on the relief, is a complete *interventus*. It is true the letter was granted at the beginning of the transaction; but it appears to me to be just the same as if it had been renewed on every separate occasion when a sum was drawn from the account. In these circumstances, it is impossible for the defender to draw back and escape from her obligation of relief.

Lord Gillies.—The case is not free from difficulty, but I concur. There is something very metaphysical in the idea of a negative *interventus* of which the Lord Ordinary speaks; but I think there was something here very like a positive *interventus*. The pursuer says he would not have signed if he had not previously received the letter of relief. This statement, however, does not appear to be correct, for he did sign before receiving it; and I cannot, therefore, admit that this plea is available. But then he says, that though he signed, there was nothing drawn from the account before he received the letter, and that if he had not received it, he would have withdrawn his name from the bond. This is a better plea. The case, however, is not similar to the case of diligence supposed by the

Lord Ordinary; and I would not readily subscribe to the opinion of his Lordship on that case. In the present circumstances, I think there is a positive *interventus*. I do not think, however, it can be held that this letter was granted in *re mercatoria*. It is true that bonds are often granted by mercantile men for mercantile purposes, but they are also granted by men who are not merchants. The present letter I consider to be of the latter description.

Lord Fullerton.—I am of the same opinion. The case is complicated a little by the specific terms in which the action is laid, making it desirable to show that the granting of the letter corresponds with the execution of the bond. I do not think the case turns much on that, for it is admitted that the account was not operated upon till the 6th of February. It is said there is here a kind of negative *interventus*; but that is owing merely to the form of stating it, for it equally admits of being stated positively. The pursuer might have withdrawn his cautionary obligation at any time; and the true interpretation of the letter of guarantee was simply this,—“As you are bound, and are to continue bound for the cash-credit, I engage to indemnify you for all the claims that may come against you on that account.” In this way the pursuer does not withdraw his obligation, but continues bound, and, in consequence, large sums are drawn. This continuance is, in its nature, affirmative, and just amounts to a positive *interventus*. I do not enter into the question, whether this letter is to be considered as granted in *re mercatoria*. I think there would be great difficulty in holding that it is.

Lord President.—I agree. Were we to go upon the ground of its being an obligation in *re mercatoria*, I would have great doubt; but, on the other ground, I have no difficulty whatever. It is impossible to look at the terms of the letter without understanding its true nature. It is a great misfortune for the lady, but her son-in-law requires a cash-account, and applies to the pursuer to be one of his sureties. He scruples, and then she grants the letter in question. The obligation constituted by that letter obviously looks forward to the future. It was not a guarantee for a day, but for all the days during which the pursuer, trusting to his relief, continued bound for the cash-account. This is the only fair inference which can be drawn from the letter. But then it is said that the letter was granted on the 28th of January, and that the bond of credit was not executed till the 5th of February. In one sense this is true, as the other cautioner did not sign till the latter date; but in another sense it is not; for it is to be observed, that both the letter of guarantee and the pursuer's signature were obtained on the 28th of January. It is also a material fact, that the account was not operated upon till the 6th of February. The guarantee thus contemplating future transactions, I am clear that there was a positive *interventus*. As to a negative *interventus*, I agree with Lord Gillies, that the idea is too metaphysical. However, we are not bound by the observations in the Lord Ordinary's note, though we concur in adhering to his Lordship's interlocutor.

The Court adhered, with additional expenses.

Lord Ordinary, Cockburn.—Act. Solicitor-General (M'Neill), Marshall; Thomson, Elder and Burn, W.S., Agents.—Alt. G. Bell, Cleghorn; Joseph Grant, W.S., Agent.—N. Clerk.—[H.B.]

21st January 1842.

SECOND DIVISION.—(J. W.)

No. 86.—JAMES BEAUMONT NEILSON and OTHERS, Pursuers, v. HOUSEHILL COAL and IRON COMPANY, Defenders.

Exclusive Privilege—Patent—Process—Jury Trial—Issues—Reparation.—In an action of damages for the violation of a patent granted for “an invention for the improved application of air to produce heat in fires, forges and furnaces, where bellows or other blowing apparatus are required”—Found that the pursuer was entitled to an issue, whether the invention described in the letters-patent and specification is not his original invention?—and that he was not bound to limit his issue to the question, whether he is the true and first inventor of the

machinery and apparatus, for which the letters-patent were granted?

This was an action of damages for the contravention of a patent for "an invention for the improved application of air to produce heat in fires, forges and furnaces, where bellows or other blowing apparatus are required." The warrant for the letters-patent, gives and grants to the pursuer, James Beaumont Neilson, "leave, license, and full power, sole privilege and authority," to "make, use, exercise, and vend the said invention within that part of his Majesty's united kingdom of Great Britain and Ireland called Scotland," to the full end and term of fourteen years from the date of these presents: "Provided always, that if at any time during the said term hereby granted, it shall be made appear to his Majesty, his heirs or successors, or to any six or more of his or their Privy Council, that his grant is contrary to law, or prejudicial or inconvenient to his Majesty's subjects in general; or that the said invention is not a new invention, as to the public use and exercise thereof, in that part of his Majesty's said united kingdom called Scotland, or not invented by the said James Beaumont Neilson as aforesaid; then, upon signification thereof to be made by his Majesty, his heirs or successors, under his or their Signet or Privy Seal, or by the Lords and others of his or their Privy Council, or any six or more of them, under their hands and seals, these letters-patent shall forthwith cease, determine, and be utterly void, to all intents and purposes;" Provided also, that "the said James Beaumont Neilson, within the space of four calendar months, to be computed from the date of the said intended letters-patent, do cause a particular description of the nature of his said invention, and in what manner the same is to be performed, by writing under his hand and seal, to be enrolled in his Majesty's Court of Chancery in that part of his Majesty's said united kingdom of Great Britain and Ireland called Scotland, otherwise the said letters-patent to be void."

In compliance with this proviso, the specification proceeds in these terms: "I, the said James Beaumont Neilson, do hereby declare, that my invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required, consists in introducing into, and applying to the fires, forges, and furnaces, atmospheric air, in the following manner:" Here follows a specific description of the manner.

The following draft issues were framed by the issue clerks:

"It being admitted, that on the 1st day of October 1828, the pursuer, James Beaumont Neilson, obtained letters-patent under the Great Seal used in Scotland, in place of the Great Seal thereof, whereby there was granted to him the exclusive privilege during the period of fourteen years from the said 1st day of October 1828, of using, as his original invention, certain machinery or apparatus for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required, as described in the said letters-patent, and in the specification, which, it is admitted, was duly enrolled in terms of the proviso contained in the said letters-patent:

"It being also admitted that the pursuers, other than the said James Beaumont Neilson, have acquired by assignment from him, a joint interest with him in the said patent:

"Whether the said James Beaumont Neilson is the true and first inventor of the said machinery or apparatus for which the

said letters-patent were granted? and Whether, in the course of the year 1840, and during the currency of the said letters-patent, the defenders, in or at their iron-works at Househill, did by themselves or others, without the license, consent, or permission of the said James Beaumont Neilson, or the other pursuers, wrongfully, and in contravention of the privileges conferred by the said letters-patent, use in or at their said works, machinery or apparatus in imitation of, and substantially the same with the machinery or apparatus described in said specification, to the loss, injury, and damage of the pursuers? Or,

"Whether the description of the machinery or apparatus contained in the said specification, is not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effects set forth in the said letters-patent?

"Whether machinery or apparatus, constructed according to the description in the said letters-patent and specification, is not practically useful for the purpose therein set forth?

"Whether machinery or apparatus, substantially the same with that described in the said letters-patent and specification, was used within Great Britain for the purpose aforesaid, before the said patent was obtained?"

The draft issues proposed by the pursuers were in these terms:

"It being admitted, that on the 1st day of October 1828, the pursuer, James Beaumont Neilson, obtained letters-patent under the Great Seal used in Scotland, in place of the Great Seal thereof, whereby there was granted to him the exclusive privilege, during the period of fourteen years from the said 1st day of October 1828, of using, exercising, and vending an invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required, as described in the said letters-patent, and in the specification, which it is admitted was duly enrolled in terms of the proviso contained in the said letters-patent:

"It being also admitted that the pursuers, other than the said James Beaumont Neilson, have acquired by assignment from him a joint interest with him in the said patent:

"Whether the said James Beaumont Neilson is the true and first inventor of the invention for which the said letters-patent were granted? and Whether, in the course of the year 1840, and during the currency of the said letters-patent, the defenders, in or at their iron-works at Househill, did by themselves or others, without the license, consent, or permission of the said James Beaumont Neilson, or the other pursuers, wrongfully, and in contravention of the privileges conferred by the said letters-patent, use, and put in practice the said invention in the smelting of iron, or otherwise, to the loss, injury, and damage of the pursuers? Or,

"1. Whether the specification engrossed in the schedule hereunto annexed, does not sufficiently describe the nature of the invention, and in what manner the same is to be performed?

"2. Whether the invention, as described in the said specification, is not practically useful for the purposes set forth in the letters-patent?

"3. Whether the said invention was not, at the time of granting the said letters-patent, a new invention, as to the public use and exercise thereof, in that part of the united kingdom called Scotland?"

The Lord Ordinary made avizandum with both drafts, accompanying his interlocutor with the following note:

"This is an action at the instance of a patentee and his partners, for the alleged infringement by the defenders of a patent granted to the pursuer, Mr Neilson, 'for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required.'

"Upon the record, as prepared and ready to be closed by the parties, the clerks have given out issues, in which the leading question put to the jury is expressed in the following terms,— 'Whether the said James Beaumont Neilson is the true and first inventor of the said machinery and apparatus for which the said letters-patent were granted,' &c. To which the pursuers

object, and contend that they are entitled to have the question sent to the jury in more general and comprehensive terms, so as simply to require the jury to say, 'whether he is the true and first inventor of the invention for which the said letters-patent were granted,' &c., and corresponding corrections to the same effect are proposed in the alternative issues.

"The pursuers, in support of their draft, contend that the terms in which they have framed the issues present the correct questions which the Court and jury have to try in every case of patent;—that these should be framed with a due regard to the Statutes by which patents are regulated, and with specific reference to the conditions inserted in the patent itself; and that, accordingly, the words used in their draft are those in which the pleas of parties urging similar objections to patents in England, as those now maintained by the defenders, are technically expressed. The pursuers further allege, that the issues as framed by the clerks, might expose them to great hazard, even if they proved their invention to be new, as the question is limited to *machinery and apparatus*, and not to the principle or substance of the invention itself, for which the patent was granted.

"The defenders, on the other hand, maintain that the issues, as framed by the clerks, are those which have been sanctioned by this Court for a course of years in all analogous cases, and that there is no good reason for changing them, even though the pleas in English practice may be framed in the terms mentioned by the pursuers. They aver, that the question put by the clerks is best adapted to try the case, just because it is more specific and precise than that submitted by the defenders, and the terms of the presiding Judge's charge to the jury, in a case tried in England upon this very patent, were quoted, to show that truly the validity of the patent depended on the novelty of the machinery and apparatus described in the specification.

"It is fit that such a question should be decided by the Court before the ulterior proceedings must be conducted after the issues are adjusted.

"Had the Lord Ordinary given any decision on the point himself, he should have thought that there was great weight in the objection of the pursuers, at least as to the first issue. In Scotland, it is well known that prior to the Union, we had no special Statute legalizing patents; and none of our institutional writers before Professor Bell, allude to the subject, except Bankton, in whose work (published in 1751) some doubt is thrown out (Vol. I. p. 411,) as to the validity of exclusive privileges granted by the Sovereign in Scotland to private individuals or companies in matters of trade or manufacture. But it was soon found that the validity of these rights was incontestable, not only under the King's prerogative, which was probably never more limited in Scotland than in England, but under the Articles of Union, which provided (Art. 6,) 'that all parts of the united kingdom, for ever after the Union, shall have the same allowances, encouragements and drawbacks, and be under the same prohibitions, restrictions, and regulations of trade.'

"In virtue of that compact, the English Act of James I. cap. 23, legalizing patents for limited terms, has become law in Scotland,—and the late Statute passed in 1835, (5 and 6 Will. IV. cap. 83, commonly called Lord Brougham's Act,) contains specific regulations for the protection and trial both of English and Scotch patents. The latter Statute, in particular, contains the following provision, which is much relied on by the pursuers. It is enacted, § 2, that where, 'by verdict of a jury, it shall be proved or specially found, that any person who shall have obtained letters-patent for any invention, or supposed invention, was not the first inventor thereof, or of some part thereof, by reason of some other person having invented or used the same, or some part thereof, before the date of such letters-patent; or if such patentee shall discover that some other person had, unknown to him, invented or used the same, or some part thereof, before the date of such letters-patent, it shall be lawful for such patentee, or his assignees, to petition his Majesty in Council to confirm the said letters-patent, or to grant new letters-patent.'

"Now the first issue, as drawn by the pursuers, is framed in literal accordance with this provision of the Statute.

"It is also said, that the form of issue proposed by them is

agreeable to the condition of the patent, which (in the language of the warrant) contains this limitation and provision:—'Provided always, likeas it is expressly provided and declared, that if, at any time during the said term hereby granted, it shall be made appear to his Majesty, his heirs or successors, or to any six or more of his or their Privy Council, that his grant is contrary to law, or prejudicial or inconvenient to his Majesty's subjects in general; or that *the said invention is not a new invention*, as to the public use and exercise thereof in that part of his Majesty's said united kingdom called Scotland, or not invented by the said James Beaumont Neilson as aforesaid, then, upon signification thereof, to be made by his Majesty, his heirs or successors, under his or their Signet or Privy Seal, or by the Lords and others of his or their Privy Council, or any six or more of them under their hands and seals, these letters-patent shall forthwith cease, determine, and be utterly void to all intents and purposes.'

"Although the Statute and the patent are framed in the terms before quoted, it is probable that either form of the issue, now under consideration, would, under a proper direction from the Judge, be sufficient to try the case. At the same time, the issue suggested by the words of the Statute seems preferable: as it is the more general, and comprehends the chief question to be solved by the jury, almost under any conceivable form of patent which can be granted by the Crown. It is notorious that some patents are granted for new or improved machinery,—some for the discovery of a new principle in arts and manufactures,—and many for new chemical combinations, and generally for inventions in every art that human ingenuity can devise. But whatever may be the nature or object of the patent, the primary condition on which the validity of all patents depends, seems to be sufficiently brought to issue by the question put in the words of the Statute.—Whether or not the patentee was 'the first inventor of the invention for which the letters-patent were granted.'

"If there were any usage or fixed style of issues relative to patents already adopted in our practice, it might be inconvenient to depart from them; but the Lord Ordinary doubts the supposed universality of the practice, and there certainly has been none since the Statute of 1835, sufficient to preclude the Court from reconsidering the proper style of issues applicable to questions of this sort. Prior thereto, the issues sustained by the Lord Chancellor (Eldon) in the case of Astley and Taylor (1 Shaw's App. Cases, p. 54), were perhaps the most authoritative that could be referred to in our practice. These were not precisely in the words of either of the drafts now proposed, though they were more nearly parallel with that of the pursuers than with the issues of the clerks; but it is rather thought that the later Statute supersedes former practice, and indicates the primary issue best adapted for the trial of the validity of patents in future cases.

"It is very material also to observe, that the issues suggested by the Statute are precisely those raised by the technical pleas, which seem to be now adopted in English practice, as the proper and relevant objections to the validity of patents. This is satisfactorily proved by the record of a question recently tried in the Court of Exchequer in England upon the very patent now libelled on. In the case referred to (Neilson v. Harford), the first plea put on record for the defendant was, 'that the said J. B. Neilson was not, at the time of the making of the said letters-patent, the true and first inventor of any invention for the improved application of air to produce heat in fires, forges, and furnaces,' &c.

"Under a plea to that effect, it seems plain from the proceedings on the trial now referred to, that it will be open to the defenders to enter into the most extensive inquiry as to the nature and merits of the machinery or apparatus invented by the pursuer for supplying heated air to furnaces. For in the final opinion which the learned Judge (Mr Baron Parke) delivered as the judgment of the Court, he stated, that 'taking the construction of this specification on ourselves, as we are bound to do, it becomes necessary to examine what the nature of the invention is which the plaintiff has disclosed by this instrument. It is very difficult to distinguish it from the specification of a patent for a principle, and this at first created in the minds of some of the Court much difficulty; but after full

consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by mechanical apparatus to furnaces, and his invention then consists in this,—by interposing a receptacle for heating air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which before was of cold air, in a heated state, to the furnace.—See octavo edition of the trial, p. 374.

“While these are the views of the Lord Ordinary on the first and leading issue proposed in the present case, he is inclined to think that the questions stated in the *alternative* issues of the clerks are not liable to the same objections as have been urged against the first issue. The Statute does not contain any specific reference to these points, and the pursuers’ argument, in support of their own style, is founded chiefly on the conditions of the *letters-patent*, which are expressed in terms similar to those used in the pursuers’ issues. But it is rather thought that the issues framed by the clerks bring out more precisely the points to which the inquiry of the jury must be directed under these heads, although it is probable that either form of issue would be sufficient to try the case.”

The following were the issues as adjusted by the Court :

“It being admitted, that on the 1st day of October 1828, the pursuer, James Beaumont Neilson, obtained letters-patent under the Great Seal used in Scotland, in place of the Great Seal thereof, and duly enrolled a specification in terms of the proviso contained in said letters-patent, being Nos. 21 and 22 of process :

“It being also admitted that the pursuers, other than the said James Beaumont Neilson, have acquired, by assignment from him, a joint interest with him in the said patent :

“Whether, in the course of the year 1840, and during the currency of the said letters-patent, the defenders did, in or at their iron-works at Househill, by themselves or others, wrongfully, and in contravention of the privileges conferred by the said letters-patent, use machinery or apparatus substantially the same with the machinery or apparatus described in said specification, and to the effect set forth in the said letters-patent and specification, to the loss, injury, and damage of the pursuers? Or,

“1. Whether the invention, as described in the said letters-patent and specification, is not the original invention of the pursuer, the said James Beaumont Neilson?

“2. Whether the description contained in the said specification, is not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in the said letters-patent and specification?

3. Whether machinery or apparatus constructed according to the description in the said letters-patent and specification, is not practically useful for the purposes set forth in the said letters-patent?

“The damages are laid as under,—

“Profits claimed, as at the date of the action, £10,000
“Other damages, as at the same date, 2,000

£12,000”

Pursuers’ Authorities.—*Bolton v. Watt, Davis*, p. 163. Statutes, 5 and 6 Will. IV. c. 83; 2 and 3 Vict. c. 67. *Rex v. Wheeler*, 2 Barn. and Ald. p. 349. *Hullet v. Hague*, 2 Barn. and Ald. 370. *Godson on Patents*, p. 76. *Astley*, 1 Sh. App. p. 54. *Neilson v. Harford*.

Defenders’ Authorities.—*Adam on Jury Trial*, p. 110. *Russel and Crichton*, 8th June 1839. *Brown* 15th May 1841, and 28th June 1841. *Godson*, p. 36.

Lord Ordinary, Cuninghame.—*Act. Rutherford, Robertson, Anderson, Inglis; G. and G. Dunlop, W.S., Agents.—Alt. Solicitor-General (M’Neill), Whigham, Muir; Tod and Romanes, W.S., Agents.—Jury Clerk.—[J.W.]*

SCOTTISH JURIST.

21st January 1842.

SECOND DIVISION.—(J. W.)

No. 87.—*JOHN COX, Pursuer, v. GEORGE TAIT and OTHERS, Defenders.*

Process.—Summons, Amendment of.—*It being set forth in a summons that the pursuer had granted an acceptance, for which he was to receive value in hides and skins; that by a letter of guarantee, a cautioner had become bound to see him so paid; and that the principal had failed to complete his agreement—Held, in an action for the balance, that the libel assumed payment of the bill by the acceptor when due, and that an averment of it on the record was sufficient.*

The pursuer set forth in his summons, that he had granted a promissory-note to the defender, George Tait, for which he was to give value in hides and skins, and that Ann Tait, whom the other defenders represented, became bound, by a letter of guarantee, to see the pursuer paid in hides and skins to the value of his acceptance. The defender failed to complete his agreement, and action was brought against him and the representatives of the cautioner for the balance. It was averred on the record that the pursuer had retired the bill when it fell due, but it not having been so libelled, he tendered an amended summons containing that addition. The Lord Ordinary simply refused to admit the proposed amendment; and a reclaiming petition having been presented, was refused on the ground that the amendment was unnecessary.

Lord Ordinary, Cockburn.—*Act. G. G. Bell, Pattison; A. Kennedy, W.S., Agent.—Alt. Moir; John Murdoch, S.S.C., Agent.—T. Clerk.—[J.W.]*

21st January 1842.

SECOND DIVISION.—(J. W.)

No. 88.—*ROBERT GREIG and OTHERS, Petitioners.*

Burgh—Disfranchisement—Managers, Appointment of.

A royal burgh, not comprehended under the Reform Act, having become disfranchised by the wilful absence of a majority of the councillors from the meeting called for the election of the new councillors, and in consequence of which no election took place,—on the application of the minority, the Court remitted to the Sheriff to report the names of persons qualified to act as managers of the burgh, from whom they selected three—two who were not of the number of absentees, and one who was, but to whom the objection was waived. These they appointed to the office of managers of the affairs of the burgh, any two of whom to be a quorum.

Act. Solicitor-General (M’Neill), Monro; T. and R. Landale, S.S.C., Agents.—Alt. Rutherford, Deas; Sang and Adam, S.S.C., Agents.—[J.W.]

22d January 1842.

FIRST DIVISION.—(H. B.)

No. 89.—*THE EARL OF EGLINTON, Pursuer and Charger, v. LORD MONTGOMERIE and OTHERS, Defenders, and JAMES DUNLOP and OTHERS (Paterson’s Trustees), Suspenders.*

Entail, Unrecorded, Powers of Heir possessing under.—*A party possessing under an entail of lands situated in two different counties, obtained an Act of Parliament authorising a sale of those in the one county for the purchase of lands in the other, to be settled on the heirs of entail “in the same order and*

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course of succession," and subject to the same "restrictions and limitations, clauses irritant and resolute." Under the authority of this Act the lands were sold, and others purchased and entailed, and the entail recorded. Thereafter, the party who had obtained the Act, on the marriage of her son executed a deed, in which, reserving her own liferent, she disposed to him, her "heir of tailzie," and the other substitutes, as before, the whole of the lands of the original entail not sold, and those purchased under the Act, under the same fetters, but providing that he, his heirs and successors, should be bound to possess "by virtue of these presents." On this deed infestment was taken, and possession followed for more than forty years—Held, 1. That this deed must be considered as an original substantive entail, and not having been recorded in the Register of Tailzies, was ineffectual against creditors or purchasers; and 2. That the heir in possession had full power to sell and use the price at pleasure, free from all claims whatever at the instance of the substitute heirs of entail.

In 1728, Hugh Montgomerie of Hartfield executed an entail of certain lands in the counties of Renfrew and Ayr—those in Renfrew being described as "the eight-pound land of old extent of Lochliboside and Hartfield," and those in Ayr as "the ten-pound land of old extent of Skelmorlie" and others. The destination, failing issue of the entailer's own body, was, to and in favour of

"Sir Robert Montgomerie of Skelmurely, Baronet, my nephew, in liferent, for his liferent use alienary, and to the heirs-male of his body; whilks failzeing, to the eldest heir-female of the body of the said Sir Robert Montgomerie, and the heirs-male of the body of the said eldest heir-female; whilks failzeing, the next heir-female successive of the body of the said Sir Robert Montgomerie, and the heirs-male of the body of the said next heir-female successive; whilks failzeing, to Alexander Clark, son to the deceased Mr James Clark, minister of the gospell at Glasgow, procreat betwixt him and Christine Montgomerie, his spouse and my sister, and the heirs-male of his body; whilks failzeing, to the eldest heir-female of the body of the said Alexander Clark, and the heirs-male of the body of the said eldest heir-female; whilks failzeing, the next heir-female successive of the body of the said Alexander Clark, and the heirs-male of the body of the said next heir-female successive; whilks failzeing, to any other heirs of tailzie to be nominat and appointed by me by wryte under my hand at any time in my life in my *liege poustie*; whilks also failzeing, to my own nearest lawful heirs and assigneys whatsoever, the eldest heir-female always excluding all other heirs-portioners, and succeeding without division in fee heritably."

Sir Robert Montgomerie predeceased the entailer without issue-male, but leaving three daughters, Lillias, Isabella and Agnes. On the death of the entailer, became Sir Hugh by his nephew's death, Lillias Montgomerie completed her title under the entail. She was afterwards married to Alexander Montgomerie of Coilsfield, and in 1757 an Act of Parliament was obtained, entitled "An Act to enable Lillias Montgomerie of Skelmorlie to sell lands in the county of Renfrew, and to lay out the monies arising thereby in the purchase of lands contiguous to other lands of the said Lillias Montgomerie in the county of Ayr, and for other purposes therein mentioned." This Act, after narrating the entail of 1728, the succession of Mrs Lillias Montgomerie, and the prohibition against selling, proceeds as follows:

"And whereas the lands of Skelmorly was the ancient inheritance of the family, where they had and still have their seat, and from whence they drew their designation; and these lands make part of the entailed estate, and are situated within the sheriffdom of Air: And whereas the lands of Ormesheugh, another part of the said entailed estate, lie also within the sheriffdom of Air: And whereas the lands of Lochliboside and

Hartfield, which are also part of the entailed estate, lie within the sheriffdom of Renfrew, remote from the other parts of the estate, in a barren and billy country, little capable of improvement: And whereas it would be highly beneficial to the said Lillias Montgomerie, and the other heirs of entail, and to the entailed estate, if the lands of Lochliboside and Hartfield could be sold, and the price thereof applied to the purchase of other lands more improveable, and lying in the shire of Air, where the lands of Skelmorlie, the ancient seat of the family, is situated: But these advantages cannot be obtained without the authority of Parliament:—

Be it therefore enacted,

"That it shall and may be lawful to and for the said Lillias Montgomerie, at any time during her life, and to and for the respective tenants in tail for the time being, who shall be in possession of the premises by virtue of the said deed of entail, and of the age of twenty-one years, by and with the approbation and consent of Robert Dundas of Arniston, Esq., his Majesty's Advocate for Scotland" (and others), "to sell the foresaid eight-pound land of Lochliboside and Hartfield, with the teinds," &c., "and that without importing a contravention of the entail."

It is further enacted, that the price arising from the sales shall be vested in the said Robert Dundas (and others),

"in trust, and to the end that the said trustees, or any three of them, shall, with the privity, consent, and approbation of the said Lillias Montgomerie, or of such respective tenant in tail, in possession, and of the age aforesaid, immediately after such sale or sales shall be made, or as soon after as conveniently may be, apply and dispose of the moneys arising by such sale or sales in the purchase of other lands, lying in the shire of Air, more commodious and contiguous to the said lands of Skelmorly and Ormesheugh; which said lands so to be purchased shall, immediately after the purchase thereof, be settled, disposed, and provided to and for the use, benefit, and behoof of the said Lillias Montgomerie, and the said other heirs of entail, according to the different rights and interests, and in the same order and course of succession as the same premises are secured to and for them and their benefit respectively, in and by the said deed of entail, and subject to the restrictions and limitations, clauses irritant and resolute therein contained, and shall immediately after record the said settlements and dispositions so to be made, in the Register of Tailzies, pursuant to an Act passed in the Parliament of Scotland in the year 1685, intituled Act concerning Tailzies; and in the meantime, till such purchases can be made, to place out such moneys arising by the said sale or sales, with such consent and approbation as aforesaid, upon real security, at interest, for the uses aforesaid, and upliftable only with the like consent and approbation."

Under the authority of this Act the lands of Lochliboside and Hartfield were sold, and the price applied in the purchase of certain parts of the estate of Coilsfield belonging in fee-simple to Alexander Montgomerie, Mrs Lillias Montgomerie's husband. Accordingly, Mr Alexander Montgomerie, with the consent of Mrs Lillias Montgomerie and a quorum of the parliamentary trustees, executed a disposition and deed of tailzie of those parts of Coilsfield which had been purchased. The deed proceeds upon a recital of the Act of Parliament; and the destination is,

"to and in favours of the said Lillias Montgomerie, my wife, who is the eldest heir-female of the body of the said deceased Sir Robert Montgomerie of Skelmorly, Baronet, and grand-niece of the said deceased Sir Hugh Montgomerie of Skelmorly, Baronet, and to the heirs-male procreated or to be procreated of her marriage with me, the said Alexander Montgomerie; whom failing, to the heirs-male of the said Lillias Montgomerie's body in any subsequent marriage; whom failing, to the next heir-female successively of the body of the said deceased Sir Robert Montgomerie, and the heirs-male of the body of the next

heir-female successively; whom failing, to any other heirs of tailzie (if any be,) nominated and appointed by the said deceased Sir Hugh Montgomerie by a writing under his hand at any time of his life in *liege pousie*; whom also failing, to the said deceased Sir Hugh Montgomerie, his own nearest lawful heirs and assignees whatsoever, the eldest heir-female always excluding all other heirs-portioners, and succeeding without division."

At the date of the deed, the descendants of Christian Montgomerie and Alexander Clark, included in the original entail, had failed.

The estates of Skelmorlie and Coilsfield, though in the same county, are at some distance from each other, and were possessed under separate titles till 1774, when Mrs Lillias Montgomerie, on the occasion of the marriage of her eldest son, Captain Hugh Montgomerie, afterwards Earl of Eglinton, and with the consent of her husband,

"for certain good and weighty causes and considerations," "with and under the reservations after written, conceived in favours of me the said Lillias Montgomerie and my said husband; and also with and under the express reservations, provisions, conditions, declarations, restrictions, limitations, and clauses irritant and resolute after specified, allenarly, and no otherwise, which are hereby appointed to be inserted and contained in the instruments of resignation, retours, charters, infeftments, precepts, and sasines, and others to follow hereupon, give, grant, annulzie and dispone, to and in favours of Hugh Montgomerie, Esquire, my eldest son and heir of tailzie, captain in the 1st regiment of foot, and the heirs-male of his body; whom failing, to the other heirs-male of my body; whom failing, to the next heir-female successive of the body of the said deceased Sir Robert Montgomerie, my father, and the heirs-male of the body of the said next heir-female successive; whom failing, to any other heirs of tailzie (if any be,) nominated and appointed by the deceased Sir Hugh Montgomerie of Skelmurelie, Baronet, by a write under his hand at any time in his life, in *liege pousie*; whom also failing, to the said Sir Hugh Montgomerie's own nearest lawful heirs and assignees whomsoever, the eldest heir-female always excluding all other heirs-portioners, and succeeding without division, in fee heritably.—All and sundry, the lands and others under written; viz., all and whole" the lands of Skelmorlie and others, "as also all and whole these parts and portions after mentioned of the lands and estate of Coilsfield, which were sold and disposed by the said Alexander Montgomerie, my husband, to me and my heirs of tailzie before mentioned, conform to disposition by him, with consent therein mentioned, dated the 1st, 2d, and 4th days of November 1757, and recorded in the Register of Tailzies the 4th day of January 1758, and that in lieu and place of the lands of Lochliboside and Hartfield, part of the said entailed estate of Skelmurelie, which were sold and disposed by me, with consent of my said husband, in virtue of an Act of Parliament obtained by me for that purpose in the 30th year of his late Majesty's reign; viz. the forty-shilling land of old extent of Coilsfield," &c.

The conditions of the entail of 1728 are as follows:

"Declaring, likewise it is hereby expressly provided and declared, that the said Sir Robert Montgomerie, my nephew, and his heirs and successors, shall be obliged to brook and possess the lands and others before mentioned, and establish the rights thereof in their persons, by virtue of these presents, and to take the rights, securities, and infeftments of the samen, with the burden of the reservations and irritancies and provisions herein contained, to and in favours of such heirs of tailzie as I have hereby nominated, or as I shall hereafter nominat and appoint in manner foresaid; as also providing, likewise it is hereby expressly provided and declared, and appointed to be inserted in and provided and declared by the instruments of resignation, charters, infeftments, sasines, services, retours, precepts, and others to follow hereupon, that the hail heirs of tailzie before mentioned, als well male as female, and the descendants of their bodies who shall succeed according to the foresaid destination, shall be obliged to assume, use, and bear the surname, arms,

and designation of Montgomerie of Skelmurelie as their proper arms, surname, and designation in all time thereafter; and if any of the saids heirs of tailzie before mentioned, or the descendants of their bodies who shall happen at any time hereafter to succeed to the saids lands and others foresaid, shall doe in the contrary hereof, then and in that cause the heirs of tailzie before mentioned, male or female, and the descendants of his or her body so contraveining, shall *ipso facto* amit, lose, and tyne their right, title, and succession above specified to the saids lands and others before mentioned, and the samen shall in the cause foresaid *ipso facto* fall, accresce, and pertain to the next heir of tailzie, who would succeed if the contraveiner and the descendants of his or her body were naturally dead; and it shall be leisum to the next heir of tailzie to establish the right thereof in his or her persone, either by adjudicatione, declarator, or serving heir to the person who died last vest and seized therein preceding the contraveiner, and that without being liable to the said contraveiner, his or her debts or deeds, or by any other manner of way, consisting with the lawes of this kingdome; and the person so succeeding upon the contravention, and the descendants of their bodies, shall be obliged to assume, bear, and wear the said surname, armes, and designation, under the like irritancy to which the hail heirs of tailzie before mentioned, and the descendants of their bodies that shall happen to succeed to the saids lands and others foresaid, are to be subject and lyable through all the succession in time coming; and also providing, likewise it is hereby specially provided and declared and appointed, to be contained in and specially provided and declared by the instruments of resignation, charters, infeftments, sasines, services, precepts, retours, and others to follow hereupon, that it shall not be leisum nor lawfull to the said Sir Robert Montgomerie, who has only a right of liferent, nor to the heirs-male of his body, nor to any others the members of tailzie before mentioned, to alter, innovat, or change the foresaid tailzie and order of succession before express, or to doe any other deed, directly or indirectly, in any sort, whereby the samen may be any wayes altered, innovated, or changed, or to possess by any other title than this present right; and also that it shall not be leisum nor lawfull to the said Sir Robert Montgomerie, who is only provided to a liferent right, nor to the heirs-male of his body, nor to any others the members or heirs of tailzie before mentioned, to sell, dispoise, wadsett, or impignorate the saids lands and others foresaid, or any part or portion thereof, or to grant infeftments of annualrent out of the same, or any other right or security, either irredeemably or under reversion of the saids lands and others foresaid, or any part thereof, nor to contract any debts nor grant bonds, nor do any other deed of commission or omission, either civil or criminal, whereby the saids lands and others foresaid, or any part of the same, may be apprysed, adjudged, evicted, or become caducuary, escheat, or confiscated: Declaring always, that if the said Sir Robert Montgomerie, or the heirs-male of his body, or any other the members or heirs of tailzie before mentioned, shall doe in the contrair hereof, then and in that cause, all and every one of such acts and deeds, with all that shall happen to follow or may follow thereupon, shall be *ipso facto* void and null, and of no force, strength or effect, sicklike and in the same manner as if the said acts and deeds had not been done, acted, committed, or granted; and also declaring, that the person so contraveining, and the descendants of his or her body, shall immediately upon the said contravention amit, lose, and tyne all right and title they have or can pretend to the said lands and others foresaid, with the pertinents; and the samen shall, in the cause foresaid, *ipso facto* fall, accresce, and pertain to the next heir and member of tailzie hereby appointed to succeed thereto, sicklike and in the same manner as if the persone so contraveining, and the descendants of his or her body, were naturally dead."

These conditions were embodied in the entail of 1757, but were made applicable only to the lands of Coilsfield purchased under the Act of Parliament, and they were also embodied in the deed of 1774, in which they were of course made applicable to the whole lands entailed, including both Skelmorlie and Coilsfield. The deeds of 1728 and 1757 were duly registered in the Register

of Tailzies, but the deed of 1774 was never so registered, and it was alleged that the sasine on the deed of 1728 was never recorded.

The deed of 1774 contained an obligation to infest by a double manner of holding, *a me vel de me*; and on the precept of this deed Captain Hugh Montgomerie was infest. Mrs Lillias Montgomerie died in 1783, leaving five sons and three daughters; and in 1784, Hugh Montgomerie, now Earl of Eglinton, in order to complete his titles to the entailed parts of Coilsfield which was held of a subject-superior, obtained a charter of confirmation. This charter confirmed the disposition and deed of entail of 1757, and sasine thereon in favour of Mrs Lillias Montgomerie, and also the disposition and sasine on the deed of 1774. It narrated the former deed fully, and contained *verbatim* the whole fetters and restrictions of the entails 1728 and 1757, but it narrated more briefly the deed of 1774—not inserting the irritant and resolutive clauses expressly contained in that deed, but only referring to them as “particularly above specified” (that is, in the deed 1757), “allenary and no otherways.” Hugh Earl of Eglinton possessed the estates of Skelmorlie and Coilsfield on these titles till his death in 1819. His eldest son, Archibald Lord Montgomerie, had predeceased him leaving issue, the present Earl of Eglinton, who having accordingly succeeded to the estates on his grandfather's death, expedite a special service as nearest and lawful heir-male of the body, and of tailzie and provision to his grandfather, and completed his titles to Skelmorlie and Coilsfield by a charter of confirmation and precept of *clare constat* from the trustees of the late Earl, who had become the superiors. The pursuer took infestment on this charter in 1836, and in 1838 sold the whole estate of Coilsfield, including, of course, the parts which had been entailed, to the trustees of the late William Paterson of Jamaica. About the same period he also sold the estate of Skelmorlie to Mr Stewart Hay. To remove doubts as to Lord Eglinton's powers to sell, Mr Paterson's trustees raised a suspension as of a threatened charge for the payment of the price, and Lord Eglinton brought a declarator against the substitute heirs of entail—Mr Hay, the purchaser of Skelmorlie, agreeing to rest satisfied with the decision to be pronounced in these conjoined actions. The summons of declarator, after narrating the state of the titles and the two transactions of sale, subsumes,

“That the aforesaid disposition and deed of entail of 1774, as well as certain earlier deeds of entail executed in 1728 and 1757, which may be alleged by the defenders to affect the aforesaid lands, are defective in the clauses required by statutory law and practice for the constitution of valid and complete entails, and that the aforesaid disposition and deed of entail of 1774 has never been recorded in the Register of Tailzies, and that, in consequence thereof, in so far as regards the acts and deeds of the pursuer, and in so far as regards dispositions, conveyances, or other deeds of alienation, the said deeds of entail are inept and inoperative, and do not fall under the declarations and provisions contained in the Statute 1685, c. 22, and the pursuer, notwithstanding the said disposition and deed of entail, is entitled effectually to sell the said several lands and others, as freely in all respects as if he were proprietor thereof in fee-simple, and to grant dispositions, procuratories of resignation, precepts of sasine, or other deeds of alienation of the said several lands and others, in favour of the purchaser or purchasers thereof;”

and concludes to have it found and declared,

“that the pursuer has full and undoubted right and power to sell, analzie and dispoine, in whole or in part, the several lands and estates specially above described, in any way he may think proper, for a price or other onerous consideration, and to grant and execute all dispositions, conveyances, deeds and writings whatsoever, which may be requisite or necessary for effectually conveying the whole or any part or parts of the said lands and others, which may be sold and alienated; and that upon selling or alienating the whole or any part or parts of the said several lands and others, the pursuer has the sole and exclusive right to the price or prices, or other consideration as his absolute property, and that he has full power to use and dispose of the same at pleasure, and that the pursuer does not lie under any obligation to invest, employ, or lay out the same or any part thereof, in the purchase or on the security of any other land or estate, or otherwise, for the benefit of the defenders or any of them, and that they have no right or title to interfere with or control the pursuer in the use or disposal of the said price or prices, or other consideration, in any manner of way; and also that the defenders, or any of them, have no claim or demand of any description against the pursuer, or against his heirs and representatives, in the event of his death, for or in respect of the sales or alienations which may be made, or dispositions or other writings which may be granted or executed by the pursuer, for or in respect of the pursuer using or disposing at his pleasure of the said price or prices, or other considerations: And farther, it ought and should be found and declared, by decree foresaid, that the pursuer has full and undoubted right and power, gratuitously to alienate and dispose of the foresaid several lands and others, contained in the aforesaid deeds of entail, in any manner of way he may think proper, and to grant and execute all dispositions, conveyances, deeds and writings whatsoever, which may be requisite and necessary for effectually conveying the whole or any part or parts of the said lands and others, to any person or persons whatsoever, and in any manner that he may think proper, and that the defenders, or any of them, have no claim or demand of any description against the pursuer, or against his heirs and representatives in the event of his death, for or in respect of such alienation or disposal of the said lands and others, or dispositions or other writings which may be granted or executed by the pursuer.”

Defences were given in by William Montgomerie of Annick Lodge and others, the substitute heirs of entail, and the Lord Ordinary made avizandum with the record and cases to the First Division of the Court. His Lordship issued the following note:

“The Lord Ordinary takes these cases to report, as it appears that the completion of a transaction of considerable magnitude depends on the judgment of the Court, which it is therefore desirable to obtain as speedily as possible.

“The Earl of Eglinton has sold the estate of Coilsfield to the trustees of the deceased Mr Paterson. The purchasers, on examining the title, entertain great doubts as to the seller's power to alienate the estate, and they present a suspension, on the ground that he holds it under a strict entail. Whereupon the noble Earl raises this declarator to have the extent of his powers judicially ascertained.

“The pursuer maintains that he has power to sell, 1st, because he holds the estate solely upon a *new* entail, said to have been executed in 1774, which is still *unrecorded*; and 2d, because the *resolutive clauses* in all the deeds of tailzie, to which his possession can in any view be ascribed, are inapplicable to sales. These pleas are contested, both by the substitute heirs and by the trustees of Mr Paterson, as purchasers; as the case appears to the Lord Ordinary to present questions of considerable importance and difficulty for the judgment of the Court, he shall briefly state the views which have occurred to him, on a consideration of the revised cases.

“I. It appears from the narrative of both parties, and from the titles produced, that the pursuer's predecessors, prior to 1757, held the estates of Skelmorlie and Lochlibonide under one deed of entail, executed in 1728, and duly recorded in the Register of Tailzies. Thereafter, in 1757, Mrs Lillias Montgomerie, then the heiress of entail, got an *Act of Parliament*

for selling Lochliboside, and Coilsfield was purchased with the price. A deed of entail was executed as to that estate, intended to be in strict conformity with the original entail, the destination being only varied to adapt it, as was supposed, to the altered state of the family, by the failure of certain of the substitutes without children. That entail also was recorded in the Register of Tailzies.

"Thereafter, in 1774, Mrs Lillias Montgomerie being still alive, and in possession of both estates as heiress of entail, she, on occasion of the marriage of her eldest son, Colonel Hugh Montgomerie (last Earl of Eglinton), conveyed them to him by disposition under the very same prohibitory, irritant and resolutive clauses, and under a destination manifestly intended and understood both by granter and grantees, to carry the estates to the same series of heirs as the original tailzie. That deed was not recorded in the Register of Tailzies; and the first point to be determined is, if it required to be so recorded?

"It is notoriously a competent and not an unusual practice in conveyancing, for one heir of tailzie to dispose the estate to his successor; particularly for a father to settle the estate on his son and apparent heir on the occasion of his marriage, restricting himself to a liferent, and conveying the fee to his son by procuratory of resignation or disposition, under all the limitations and fetters of the tailzie. When the whole clauses of the tailzie are fairly engrossed in the disposition, no second registration in the Record of Tailzies has ever been considered requisite,—it is viewed as the ordinary vesting title of an heir; but when essential variations have been unintentionally inserted in the last disposition, it is held as a *new entail*, extinguishing the prior titles, and of course requires registration. On this point reference may be made to the late case of Mr Hay Newton, 29th June 1836 (14 Shaw, p. 1031), in which the Second Division of the Court found that the disposition of an entailed estate by a father to his eldest son, on occasion of his marriage, though different in one important point (apparently by mistake) from the original entail (by not making the fetters applicable to the donee), was nevertheless not to be considered as a new entail requiring registration in the Record of Tailzies. In that case also, Lord Jeffrey gave a very clear and useful analysis of the prior case of Broomfield in 1786, in which a similar question was discussed twice, both in this Court and in the House of Lords, when a second disposition, executed by the maker of a previous entail, which was registered, was found to be a *new tailzie*, ineffectual against creditors for want of registration. A much better analysis of that case will be found in Lord Jeffrey's note than in any other report, and it deserves particular attention in the present discussion.

"The noble pursuer seems to maintain that the deed of 1774 constituted a new tailzie, chiefly on two grounds.

"1st, It is alleged that Mrs Lillias Montgomerie, by that disposition, *changed the destination*, by substituting, on the failure of her own heirs-male, 'the next *heir-female* successive of the body of the said deceased Sir Robert Montgomerie.' The pursuer argues, that if his own heirs-male failed, and if he left an only daughter, she would be deprived of the succession under the deed of 1774, which she would have enjoyed under the tailzie of 1728. But the Lord Ordinary is humbly of opinion, that the destinations in all the tailzies lead to the same result. The argument of the substitute heirs on this point appears to be quite unanswerable: See revised case for William Montgomerie, Esq., pp. 15, 20.

"2d, The deed of 1774 is maintained to be a *new entail*, because it is alleged that the *irritant* clauses as to Coilsfield were increased to a severer extent, by its being thereby provided that any contravention should infer a forfeiture, not merely of Coilsfield but of Skelmorlie; while it is assumed that, according to the entail of 1757, Coilsfield alone would have been forfeited in case of any contravention of that entail. On this point, the main authority appealed to by the defenders, is the decision of the whole Court in the late case of Graham and Bontine, 12th June 1835 (13 Shaw, p. 905), in which it was found that a conveyance of two estates previously held under separate tailzies, did not require registration in the Record of Tailzies. The pursuer contends that the case of Graham is inapplicable, because in that instance there was the most express reference in the new deed to the two prior entails, so that the clauses in each

tailzie, *applicando singula singulis*, might be held as fairly set forth in the last disposition, while no such construction is admissible here.

"The Lord Ordinary, however, doubts, on several grounds, if the pursuer's objection be well founded in the present instance. In the first place, upon examining the disposition of 1774, it will be found (see appendix, p. 32, C), not only that it was granted by Mrs Montgomerie specially as *heiress of tailzie*, but the most express reference was made in the disposition to the deed of entail of Coilsfield, as executed in 1757, and recorded in the Register of Tailzies in 1758. And also to the *Act of Parliament* obtained for the sale of Lochliboside, and the purchase of equivalent land, 'in the 30th year of his late Majesty's reign.' Farther, it is set forth in the disposition, that the lands of Coilsfield were purchased '*in lieu and place of the lands of Lochliboside and Hartfield, part of the said entailed estate of Skelmorlie.*' Thus both the original tailzie and the second or substitute tailzie were brought into view in that disposition.

"In the second place, it deserves consideration, if there really was any erroneous aggravation or addition to the irritancies imposed on the heirs of the two estates by the deed of 1774, supposing the forfeitures were thereby extended to both estates. The Lord Ordinary has very great doubt if the conveyance of 1774 could have been framed in any other terms than it was. No doubt, if the entail of Coilsfield in 1757 were taken *per se*, it would appear that while the prohibitions were *verbatim* the same as those in the entail of 1728, the irritancies thereby imposed were applied only to the lands 'hereby disposed,' and not to Skelmorlie; but though the lands of Coilsfield only might have been forfeited under the deed of 1757, taken *per se*, it by no means followed that the substitute heirs might not have also pursued for a forfeiture and resolution of the contravener's right under the *Skelmorlie entail*. That deed was not done away with or altered, but specially confirmed by all the titles made up both in 1757 and 1774, and afterwards. Thence, if an heir had attempted to violate the prohibitions as to Coilsfield, it would have been competent to the substitute heirs to maintain, that as Coilsfield came by Statute in *lieu and place* of Lochliboside, therefore a contravention as to Coilsfield would necessarily infer a contravention of Skelmorlie, which might be pursued *under that entail* without the aid of the Coilsfield entail.

"Still farther, even if these strong specialties had not occurred to support the disposition of 1774, the Lord Ordinary, with deference, would have submitted it as a point on title deserving very mature consideration, if any mistake on the part of an heir of entail executing a conveyance or settlement of the estate *ultra vires* in any point, as, for example, by providing that the forfeiture, in case of contravention, shall be somewhat greater than the original tailzie allowed, could have any other effect than to entitle the heirs to reduce or disregard it *quoad excessum*. It seems hardly consistent to hold a deed as a new entail, or as an extinction of the prior tailzied investiture, when the granter sets forth the most anxious desire to respect and give effect to the tailzie. It is assumed, in the present argument, that the majority of the Judges held an opposite doctrine in the late case of Graham and Bontine. But the Lord Ordinary apprehends that the Court hardly found it necessary to enter into the point now suggested; and at all events, he must submit his own impression, that as the deed of 1774 was in no respect broader or more stringent against the heirs of entail than a fair and just view of the previous entails duly recorded required, it cannot be viewed as a new and separate tailzie requiring registration.

"Finally, under this head, if the want of registration were the only objection that lay to the disposition of 1774, it is questionable if the noble pursuer would be entitled to decree on *that ground*, in terms of the declarator here brought. This is to have it found and declared that the pursuer has *right* to sell the estate of Coilsfield. But though an heir may have *power* to sell the estate in consequence of the non-registration of an entail, the Court has never found that he has a legitimate *right* to do so. On the contrary, it is his duty to record the entail if it requires registration; and though the sale to an onerous third party may be good, the seller is bound to invest the price.

This was found in the case of *Queensberry* in 1825, in conformity with a series of prior decisions (4 Shaw, p. 320), and more recently in the case of *Tod*, 1833 (11 Shaw, p. 933). No doubt, in this last view, the sale to the aspenders would be effectual; but if the case were decided solely on the non-registration of the deed of 1774, the judgment in the declarator would require to be carefully guarded, so as not to allow it to be inferred that the heir had any legal right which has not been recognised in prior cases as belonging to heirs possessing on similar titles.

"II. The next plea of the noble pursuer appears to be attended with more difficulty; but if well founded, it would supersede all question as to the non-registration of the deed of 1774. It depends on an objection to the efficacy of the *resolutive* clause in both of the original tailzies as recorded. The clauses prohibitory, irritant and resolutive, being the same, or meant to be the same in all the tailzies, it is contended by the noble pursuer, that the resolutive clause contained in them does not apply to sales made by an heir of entail in possession. That clause appears to be expressed in the same words in all the deeds (see 1st entail, appendix, p. 8, D E, 2d entail, p. 22, F G, and conveyance of 1774, p. 36, F G), from which it will be observed, that the general clause resolving the right of contraveners is followed by this addition or explanation, that the next heir, upon the forfeiture of the contravener, shall succeed, 'without respect to any innovation, alteration or change foresaid, to be made by the person so contravening, and without the burden of any debts contracted by the said contravener, or of any acts or deeds of commission or omission, or any other act or deed whatsoever, which, according to the law, may be interpreted to import any contravention of the before-written clause irritant.'

"In considering the legal effect of this clause, it will be observed that there *precedes* it in each deed a complete prohibitory clause, applicable to the three forms of alienation struck at by the Act 1685, of altering the order of succession, contracting debt and selling, and there is a general irritant clause, and a general resolutive clause, which *per se* would be incontestably sufficient to fence the prohibitions. The question which arises here then is, whether the words last quoted, specifying the effect of the resolutive clause, and the manner or effect in which the next heirs, after contraveners, shall be entitled to take up the estate, amount to a restriction or qualification of the resolutive clause.

"The precedent most nearly applicable to the present is the late case of the *Ballilisk* entail (*Horne v. Rennie*), decided in this Court in 1837 (15 Shaw, p. 372), and reversed in the House of Lords in 1838 (Shaw and M'Lean, Vol. III. p. 142). In that case the branches of the resolutive clause were certainly collocated with each other in a manner different from the present, but so far they agree, that there was in the *Ballilisk* case the most express resolution of the contravener's right, 'in case of failure in any part of the premises,'—and there was subsequently an enumeration of particulars, among which selling was omitted, but there was also at the end of the enumeration, as well as at the commencement, a repetition of the general resolutive provision in these words, 'or shall fail or contravene in any part of the premises';—Yet the House of Lords (reversing the judgment of this Court) held the resolutive clause in *Rennie's* case to be ineffectual.

"It would be difficult to express the argument competent to the substitute heirs in favour of the present entail, more clearly or concisely than in the words of Lord Glenlee in the *Ballilisk* case. His Lordship, referring to the *Tillicoultry* case, said, that in that case 'a great part of the argument was, that the general clause applied to the prohibition omitted in the special enumeration; on that point the Court had differed. But here the case is perfectly different, as there is a general clause irritating the right by doing this or that. A general declaration in the resolutive clause annexed to particulars will not apply to others of a different kind; but when it *precedes* them, then it bears, in case the heirs of tailzie shall contravene in any part of the premises, and without prejudice to the generality, certain things are afterwards specified. So here, according to the strict meaning of the words, I cannot doubt that the entailment meant to irritate and resolve the heir's right, if any one thing before

prohibited was done. I incline, therefore, to alter the interlocutor; but in so doing, I think I confirm the case of *Tillicoultry*.'

"That doctrine, however, was not sanctioned by the House of Lords; and if not successful in a case so lately discussed, it can hardly prevail here. Indeed, the fundamental principle on which the decision in the case of *Tillicoultry*, *Bonnington* and others proceeded, was, that general words, which, if standing alone, would have been amply sufficient to fence the entail, were held qualified, or restricted by an enumeration of particulars, omitting some of those first expressed.

"At the same time, it is obvious that the resolutive clause in the present tailzie is somewhat more comprehensive and absolute than even in the *Ballilisk* case. But still, as the entailment's true meaning, in the one case, was as clear in that case as in the present, and as general words, when followed by particulars, were disregarded in the last case which occurred in the Court of last resort, it is for the Court to determine if a different construction can be given to the resolutive clause in the present instance. The Lord Ordinary thinks this a question well worthy of the deliberate consideration of the Court."

After parties had been fully heard, the Court ordered new cases on the whole cause, "in order to have the opinion of the whole Court."

The pursuer pleaded—

I. The pursuer, Lord Eglinton, and his predecessors, having possessed the estates for upwards of forty years under the entail of 1774, which was not recorded in the Register of Tailzies, and was essentially different from the previous entails, it became the basis of a new prescriptive investiture, under which he is entitled to sell and dispose of the lands, without being bound by the conditions and provisions in the previous entails. (1.) An entail not registered is, in the words of Lord Mackenzie in the case of *Munro v. Drummond*, "equal to an entail not yet existent in reference to any third party contracting with any heir who is in possession of the entailed estate." If, therefore, Lord Eglinton's possession is not founded on the original entails of 1728 and 1757, but on the subsequent entail of 1774, there can be no doubt that the estates may be effectually sold or attached by the diligence of creditors. (2.) Where an heir of entail completes his titles under an investiture differing in any of its important clauses or provisions from the original entail, such an investiture must be dealt with as a new deed of entail, and is not effectual until recorded in the Register of Tailzies. This was fixed by the case of *Broomfield*. Now, the deed 1774 was not intended merely to propel the fee of the estates to the next substitute. Its sole or leading object was to combine the separate properties of *Coilsfield* and *Skelmorlie* into one estate, and unite them under the fetters of one entail. Such, accordingly, is the result. They are included in one dispositive clause, with one destination—one set of prohibitory, irritant and resolutive clauses,—and one set of provisions as to widows and children. An irritancy, with regard to any single portion of the combined estate, is declared to draw after it a forfeiture of the whole, and all the clauses seem framed—not as if to preserve, but to obliterate the distinction previously existing between the two estates. Accordingly, the deed of 1774 makes no distinct allusion to the deed of 1728; and though there is a reference to the entail of 1757, it occurs only in a part of the deed descriptive of the lands, where the object was merely to distinguish the entailed portions of *Coilsfield* from the unentailed. It is argued that the mere fact of the deed of 1774 being granted by *Lillias Montgomerie* in favour of her eldest son, is in itself a conclusive proof that nothing more was meant than to propel the fee. On the contrary, the pursuer maintains, that if this had been the intention, it ought to have been expressly narrated—a distinct reference ought to have been made to the original entail, accompanied with a recital of all its fettering clauses and other provisions. This is fully illustrated by the case of *Hay Newton*. Had Mrs *Lillias Montgomerie* intended nothing more than to propel the fee, the proper mode would have been to propel both estates under their separate investitures. At all events, a distinct and separate set of fencing clauses should have been applied to each.

Apart from this argument, founded on the general scope and structure of the deed, there are two distinct grounds on which the pursuer maintains that the deed of 1774 constituted a new entail: *First*, There is a most important discrepancy in the destination. Under the destination of 1774—to Hugh Earl of Eglinton, “and the heirs-male of his body; whom failing, to the other heirs-male of my body; whom failing, to the next heir-female successive of the body of Sir Robert Montgomerie,” &c.,—the parties called are, 1st, the heirs-male of the body of Hugh Earl of Eglinton; 2d, the heirs-male of the body of Mrs Lillias Montgomerie; and, 3d, the heirs-female of Sir Robert Montgomerie. The practical effect of this destination is, that if the pursuer were to leave only daughters, these daughters, with their descendants, would be postponed to the whole heirs-male of the body of Mrs Lillias Montgomerie; whereas, under the destination of 1728—failing the heirs-male or female of the body of the entailor, and the heirs-male of the body of Sir Robert Montgomerie, “to the eldest heir-female of the body of the said Sir Robert Montgomerie, and the heirs-male of the body of the eldest heir-female;” whilst failing, the next heir-female successive of the body of the said Sir Robert Montgomerie,” &c.,—the pursuer’s heir of line, whether male or female, would always be preferred. Had this destination stopped, after giving the estates “to the eldest heir-female of the body of the said Sir Robert Montgomerie,” without adding, “and the heirs-male of the body of the eldest heir-female,” there could have been no question that this was the true construction. The pursuer apprehends that the addition is immaterial, and makes no real change upon the destination—being merely a kind of surplussage introduced by the conveyancer in his anxiety to make clear what was perfectly clear without it. The “heirs-male of the body of an heir-female” are, in strict legal language, just “heirs-female.” The omission of the family of the Clarks in the deed of 1774, is a second important discrepancy in the clauses of destination. It has been argued that the deed of 1774 is not different from, or inconsistent with the entail of 1728, because Coilsfield came in place of Lochliboside and Hartfield, in virtue of an Act of Parliament, against which a prescriptive right cannot be acquired. But, *first*, the Act, while it authorises the sale of Lochliboside, and directs the sums to be invested in other lands, makes no mention whatever of Coilsfield, and therefore a prescriptive right to Coilsfield is not, strictly speaking, contrary to the Statute; and, *secondly*, even if the Act had referred to Coilsfield, and expressly directed it to be strictly entailed, it would not have been effectual to bar prescription. It has been repeatedly decided, that if an estate has been possessed for upwards of forty years, a mere reference in the title to a Statute which shows a defect in the original right, will not deprive the possessor of the benefit of prescription. *II.* All the entails are ineffectual and defective in the fencing clauses, and more particularly in the resolutive clause; because, while it purports to resolve the right of the contravening heir, and declares that the next heir shall be entitled to complete his right to the estate without respect to the acts of the contravener, it omits, in an especial enumeration of such acts, all reference to deeds of sale and alienation. The irritant clause is expressed in very unusual terms. Its whole efficacy is made to depend on the words, “shall do in the contrair hereof,”—a phrase very far from being definite and precise, and leaving it very doubtful what extent of meaning is to be given to the word “hereof.” Again, the words “such acts and deeds,” in the irritant clause, may be held to have a limited signification so as to apply only to the antecedent clause against feudal and criminal delinquencies. For the word “deeds” is used in this sense in the immediately preceding prohibition, and the words “acts or deeds” are used in the same sense in the subsequent resolutive clause, where it is declared that the next heir shall take up the estate free from the burden of any debts contracted, “or of any acts or deeds of commission or omission, or any other act or deed whatsoever, which, according to the law, may be interpreted to import any contravention of the before-written clause irritant.” In this respect the case bears a very strong resemblance to the case of Lang. But the main defect in all the entails lies in the general resolutive clause. It commences with resolving the contravener’s right in general terms; but in empowering the next heir to make up

titles, it enumerates the particular acts of the contravener which he was to disregard. In this enumeration, sales or alienations of the property are omitted. The effect of this is, that if an heir in possession were to sell a portion of the lands, and the next substitute were thereupon to bring a declarator, concluding for forfeiture against the seller, and irritancy against the purchaser, it might be maintained that the sale could not be irritated; because, by the very terms of the deed founded on, the substitute heir was entitled to disregard debts and deeds of alteration, but was not entitled to disregard sales or alienations. In this view, the omission is fatal to the entail. *III.* In any question *inter hæredes*, the pursuer is not bound to reinvest the price of the subjects for the benefit of the substitute heirs of entail. The general point involved in this plea was settled in the case of Ascoig, and has been repeated in many subsequent decisions.

Pleaded by the defenders—

The deed of 1774 did not constitute a new and different entail, but was merely the instrument by which the union of the two estates, sanctioned and contemplated by the Act of Parliament, was effected, and by which the united fee was propelled to the next substitute, in conformity with the principles of entail law. The destination in the two entails is perfectly identical. Under that of 1757 and 1774, the whole heirs-male of the body of Lillias Montgomerie are called to the succession in preference to any female descendants of her body, or males descended from such female; and hence a daughter of an eldest son of Lillias would be postponed to a second son. But this is exactly what would take place under the destination of 1728. This destination called “the eldest heir-female of the body of the said Sir Robert Montgomerie, and the heirs-male of the body of the said eldest heir-female;” whilst failing, the next heir-female successive of the body of the said Sir Robert Montgomerie, and the heirs-male of the said next heir-female successive.” In the event which occurred, it cannot be disputed that the eldest heir-female of the body of the said Sir Robert Montgomerie was Lillias Montgomerie, his eldest daughter. *She* then, and the heirs-male of her body, were called by the destination of 1728 in preference to any other heirs-female of Sir Robert’s body, or of her own body—in preference, for instance, to her daughter, or the daughter of her eldest son. In fact, the heirs-female generally of Lillias Montgomerie are not called by the destination at all. The pursuer holds, that “the eldest heir-female of the body of the said Sir Robert Montgomerie” designates not only Lillias Montgomerie, who was his eldest daughter, but all the heirs of the body of the said Sir Robert, and consequently all the heirs of the body of Lillias Montgomerie, whether male or female; and he follows out this view by holding that the words, “and the heirs-male of the body of the said heir-female” are mere surplussage. Nor can he stop here; for according to the same view, the next branch of the destination is equally useless; for if all Sir Robert’s heirs-female were included under the terms “the eldest heir-female,” there could be no room for afterwards calling his heirs-female successive. It is plain, that failing Sir Robert Montgomerie and the heirs-male of his body, it was the intention of the entailor to bring in several successive classes of heirs-male, while several classes were to be descended successively of the eldest heir-female of Sir Robert’s body, the next heir-female of Sir Robert’s body, &c. The ruling character of the destination is, that there was to be as little departure as possible from the line of heirs-male. One female was to be admitted as introducing each new class of male descendants. The defenders do not maintain that the eldest heir-female of the body of Sir Robert Montgomerie must have been his daughter. On the contrary, the eldest heir-female might have been a granddaughter, or a grandson by a daughter. But in the event which actually happened, Lillias Montgomerie proved to be the eldest heir-female of her father; and these words in the destination designated her, and no one else. Having taken as the individual specifically called, the next in succession were the heirs-male of her body. Under this destination, her second son must have taken in preference to the daughter of her eldest son, just as he would have done under the deed of 1774; and therefore, the alleged discrepancy in the destination of the entails does not exist. As to the discrepancy said to be caused by the omission of Alexander Clark

and his descendants, it is altogether immaterial. The Act of Parliament, 1757, distinctly sets forth that Alexander Clark had died without issue. If so, it is impossible to doubt that he and his heirs were properly omitted. But then the pursuer pleads, that the deed of 1774 constituted a new entail, because one set of fetters was made applicable to both estates, whereas, previously, there was a separate set for each. In considering this plea, it is necessary to attend to the object and intention of the Act under which Lochliboside and Hartfield were sold, and Coilsfield purchased. It is clear, that by the express provisions of the Act, the lands purchased were to be substituted in all respects in place of the lands to be sold, and were to bear the same relation to the remainder of the entailed estate. They were to give rise to the same forfeitures, on the one hand, and they were to be subject to the same forfeitures, on the other. Nothing short of this could fulfil the Statute. Till this was fully effected, the Statute itself was not carried into full execution. Nothing is more common than the exchange of a part of an entailed estate, under an Act of Parliament, for other lands more convenient. In this way, though there come to be two deeds of tailzie (the one properly supplementary to the other), they are inseparably bound together by the intentions, provisions and enactments of the Statute, and constitute one joint entail, the fetters and restrictions of which extend over the whole conjoined entailed estate. If it could be supposed that the trustees under the Statute of 1757 had failed to give full effect to it, the result would be, that the statutory trust is still unfulfilled, and the title of the lands depending on it, void and null. This however is not the case. After infeftment was taken on the statutory entail, and the entail itself registered, the object of the Statute was fulfilled. The estate of Coilsfield was annexed to the entailed estate of Skelmorlie, and effectually brought within the same fetters. The two estates were inseparably connected, and nothing short of the statutory authority by which they had been united, could disunite them. In this view, the conveyance of 1774 constituted merely a continuance of the joint entail already established, and cannot, with or without prescription, be the basis of an investiture hostile to it. According to the pursuer's view, the deed of 1774 was a contravention of the entails of 1728 and 1757. To see how untenable this view is, it is necessary only to look at the charter of confirmation of 1784. That charter, so far from treating the deed of 1774 as a new entail in contravention of the former, grants confirmation to the heirs of the deed 1757, under the fetters contained in that deed, and no otherwise. The fetters contained in that deed are specially set forth; whereas those of the deed 1774, when alluded to at all, are merely mentioned generally, as being the same with those of the previous deed. The only intention of the deed 1774 obviously was, to carry the purposes of the Act of Parliament into full effect, and at the same time propel the fee by conveying it to the heir *alioqui successurus* in the subsisting entails. But the pursuer pleads, that even assuming the deed of 1774 is to be dealt with as a mere propelling of the fee, a common defect attaches to the fetters of all the entails, as regards deeds of sale and alienation. He admits that there is a good and effectual prohibitory clause. The irritant clause also is perfectly sufficient and effectual. Nay more, the resolute clause, in so far as it is stated in general terms, is allowed to be unexceptionable; but because there is an addition to the resolute clause—an addition confessedly not essential—in which, while the deeds which an heir taking under a contravention is entitled to disregard are mentioned, there is no express mention of sales, it is argued that this additional clause must be held to vitiate the resolute clause, though in itself perfectly sufficient. The defenders demur to this doctrine. As the general resolute clause is in itself complete, the appendage to it, which is a separate provision, can have no effect in destroying its integrity. The Statute 1685 expressly requires "a resolute clause to be insert in the tailzie." But no appendage of the nature in question is required to be inserted. It might safely be dispensed with altogether, and is a mere piece of surplusage. Lastly, even if the pursuer's view, in regard to the investiture of 1774, were correct, the conclusions of the summons are unfounded, in so far as they assume that an unregistered entail is not only ineffectual against third parties, but is equally unavailing *inter hæredes*.

The following opinions were returned by the consulted Judges:

Lords Moncreiff, Meadowbank, Medwyn, Jeffrey, Cockburn, Murray and Ivory:

"In the summons of declarator it is stated, 'that the pursuer has lately entered into two several transactions, whereby he has sold to the trustees of the deceased William Paterson, Esq. of Kingston, in the island of Jamaica, the aforesaid portions of the lands and estate of Coilsfield, and to John Stewart Hay, Esq., the aforesaid lands of Skelmorlie.'

"The purchasers under these concluded contracts of sale, entertaining doubts concerning the validity of the title proposed to be given to them by Lord Eglinton, brought a suspension of the demand for payment of the prices, in order that it might be determined whether he had power, under the titles by which he held the estates, to make a sale to be effectual to the purchaser or not. And on the other hand, Lord Eglinton, in order to meet this suspension, and bring the question more formally to trial, has raised this declarator against all the substitute heirs supposed to have an eventual right of succession under the entails referred to, with conclusions for ascertaining the extent of his powers, as the heir in possession of the estates.

"Although, therefore, the conclusions of the summons go beyond what is necessary for determining the validity or invalidity of the sales, and thereby exhausting the merits of the suspension, the material question for the judgment of the Court is, whether, in the actual state of the pursuer's titles, his powers were so effectually limited by the force of an entail, correctly framed in all its clauses, and completed in terms of the Statute 1685, that the sales made by him for onerous considerations constitute no valid rights to the purchasers. It is a question raised in the same form, and to the same effect, as the question tried and determined in the case of Tillicoltry, and many other cases of the same kind. Although, therefore, it will be necessary in this opinion to advert to some other things embraced by the words of the summons, we think it proper to direct our attention mainly to the essential point involved in the conjoined processes.

"The summons represents the title of the pursuer in the two separate estates of Skelmorlie and others, and Coilsfield and others, as standing on a deed of entail, dated 27th June 1774, with the investiture upon that title, and the subsequent progress, till they came into the person of the pursuer, and his titles were completed thereon by seisin duly recorded in the year 1836. And the pursuer, alleging that this title, by regular investitures standing far beyond the years of prescription, is the title by which the nature and extent of his powers must be determined, maintains substantially two points for establishing that he had power to make the sales in question effectually: 1. That that entail of 1774 must be considered as a substantive and independent entail, for the settlement of both the estates as one estate in fee, subject to the conditions therein expressed, and the effect of the statutory law applicable to it; and that that deed never having been recorded in the Register of Tailzies, cannot militate against purchasers or creditors transacting onerously with him as the heir in the fee: and, 2. That the irritant and resolute clauses of this entail, as well as those in the entails founded on by the defenders, are not so expressed as to render the act of sale ineffectual, even though the original entail constituting the proper title had been duly entered in the Register of Tailzies.

"The defenders, on the other hand, state, that the lands of Skelmorlie and others were effectually entailed by a deed executed in 1728, which deed was duly recorded in the Register of Tailzies; and that the lands of Coilsfield and others were also effectually entailed by a deed executed in 1757, and duly entered in the register. And then they maintain, that the deed of 1774, having been only intended to put forward the succession, according to a well-established principle, and being substantially the same, both in the destination and in the restricting clauses, with those entails of 1728 and 1757, cannot be held to have superseded those entails, or to constitute in itself a substantive and independent title by entail requiring registration. They farther say, that the irritant and resolute clauses in all the deeds are sufficient.

" I. If the powers of the pursuer, and the validity of the sales are to be determined exclusively under the deed 1774 as the substantive regulating title, there cannot, we comprehend, be any doubt, that as that entail had not been recorded in the Register of Tailzies at the dates of the contract of sale in question, no matter from what cause, it cannot, however complete otherwise, be effectual to annul the rights of the purchasers. The Statute 1685 must be conclusive on this point. The rule held in the case of Smollet and many other cases is, that an entail not recorded is, in all questions with creditors and purchasers, to be regarded as no entail at all.

" The material question, therefore is, whether the entail 1774, on which the subsequent investitures were completed, is to be regarded as a substantive original entail, which it was necessary to enter in the Register of Tailzies, in order to secure its efficacy against creditors and purchasers.

" In arguing this question, the pursuer endeavours to make out, that there is a change in the *destination* expressed in that entail from the destinations contained in the entails 1728 and 1757. We are not at present in a situation to hold that there is any such change. There is a difference in the form of words employed in that destination; and it is perhaps conceivable that circumstances might have occurred to raise a question on the form of expression. But, in the actual state of the case, the destinations in all the deeds are the same in substance and effect. The omission of the descendants of Alexander Clark is altogether immaterial, seeing that it is ascertained by the Act of Parliament of 1757, that he and his wife had died without issue before that time; and it is a well-established rule, that it is quite competent, in renewing the investitures, to omit those branches of the destination which have previously failed. We cannot think, therefore, that there is in the deed 1774 any change in the destination of the previous entails, which would be sufficient to supersede them, if the question depended on this point.

" But, in a more direct view of the nature and effect of that deed 1774, there seems to be much more solid ground for the pursuer's plea. The defenders say that that deed of 1774 was evidently intended to give effect to the previous entails; and that the only object of it was to put forward the fee to the immediate heir of entail, Mrs Montgomerie's son,—a thing which has often been done without its being held that the deed executed for the purpose constituted a new entail. But it is to be remembered that we are not here in a question of intention only. This deed of 1774 was carried forward into an actual investiture by seisin, which was afterwards confirmed by charter of confirmation, and on that title, independent of any other, the investitures have been formed ever since. It is a prescriptive title, which must be effectual according to its terms, and cannot be controlled by anything else, unless it shall appear that, by its nature and terms, it does in fact sustain and incorporate some other entailed title more legally stringent. We do not doubt that one purpose of the parties, in executing that deed, was to put forward the succession to Mrs Montgomerie's son. But we are not satisfied that that was the only purpose of it. For it seems scarcely to be a matter of doubt, that it was also contemplated, that such a settlement would form a much clearer and simpler title by uniting both the estates in one entail, whereby the forfeitures could be distinctly applied to the whole, in the case of contravention as to a part of either (always a matter of difficulty in separate entails), than the separate titles as they previously stood. And if it had been duly recorded, we presume that it never could have been doubted, at least after the years of prescription, that it constituted the only and the ruling title in these estates. In fact, it was probably intended to obviate a difficulty occasioned by the form of the Act of Parliament 1757, in appointing a separate entail for Coilsfield to be executed; and it was perfectly well conceived for that end, if care had been taken to complete it by registration.

" The important question, however, is, what this deed 1774 is in itself as *matter of fact*, whatever may have been intended by it? It appears to us, that *de facto* it is made distinctly in the form of an independent original entail. There is no mention in it, from beginning to end, of the entail 1728, or of the investitures upon that entail. There is an incidental reference to the disposition of entail 1757 with regard to the lands of

Coilsfield. But that is only in the description of the lands as acquired by that title. That that entail only is mentioned, shows that the reference was merely descriptive, and was not framed to affect the nature of the title given by the deed 1774 itself; for the lands of Skelmorlie and others stood altogether on different titles, and there is no reference whatever to the entail 1728, which alone applied to those lands. Then this deed 1774 goes on to lay down regular clauses prohibitory, irritant and resolute, applied *indiscriminately* to all or any part of both estates, in which there is no reference of any kind to any previous entails. They are substantive provisions made in an original form as conditions of the disposition itself, without relation to any thing else, and are made to depend exclusively on the force of the *deed itself*. And while the essential clauses are thus completed, it is expressly provided that the disponee and the heirs of entail shall possess the estates *by that title and by no other*, under pain of an irritancy applied specifically to this provision.

" On that title seisin followed; and the possession has been on the investiture so constituted ever since. The restrictive clauses in the Register of Seisins are those of the disposition 1774 itself, including the provision that the possession shall be held by it alone. There is not in the registered seisin upon that title the least allusion to the entail 1728. It is indeed a separate and very singular peculiarity, if the statement on page 45 of the pursuer's case be correct, that the seisin said to have been taken on the entail 1728 *never was recorded in the Register of Seisins at all*; a fact which, as to the lands of Skelmorlie at least, would, if the matter were not relieved by subsequent investitures (which might be doubtful), form a separate insuperable objection to the case of the defenders, in a question with third parties purchasers. But, independent of this, the whole title was completed on the deed 1774 as an independent entail, with clauses distinctly resting upon its own force; and on that title prescription has long ago run. And it is indeed apparent, that any contravention under the entails of 1728 and 1757, separately, would not at all infer the same forfeitures of both estates, which would in principle follow on a contravention of the entail 1774.

" It is impossible that the charter of confirmation afterwards obtained could in any manner control or alter the effect of this; for, besides that that was a private title, it expressly confirmed the deed 1774 itself, and the seisin upon it. And as it is an established rule of law (Ersk. II. 7, 15; M'Dowal, 19th January 1793), that confirmation draws back to the date of the seisin, the real effect of it was to render the right public from that date. Thus the prescriptive title was perfect from 1774 downwards. In itself, it contains nothing which can by possibility qualify or control it, by reference to any entail of the lands of Skelmorlie other than this title itself; and the only reference to the disposition 1757 as to the lands of Coilsfield, is not, in our opinion, of such a nature that it can be held to qualify the nature and character of the entail 1774 as a substantive entail of *both estates together*.

" Reference has been made to the case of *Turnbull v. Hay Newton*, 29th June 1836. It does not appear to us that there is any thing in that case which ought to lead to a decision different from that implied in the opinion which we have now expressed. In that case the disposition by William Hay Newton, the heir in possession, in favour of himself in life, and his son in fee, was in *express terms made under all the limitations, conditions and irritancies specified in an entail 1724*, 'and hereinafter expressed'; and it provided that the heirs should all possess *by the title of that entail 1724*, and by no other right or title whatsoever.' It was impossible to hold that such a deed could have the effect of superseding an entail which it in express words confirmed; or that it could be considered as an original entail, when it merely put forward the fee expressly as it was held by the title of the only original entail. The only question which was agitated arose out of two variations in expression in repeating the clauses; upon which there was an attempt to liken the case to that of *Broomfield v. Paterson*. But the Lord Ordinary and the Court, looking to the manner in which the entail of 1724 was in express terms referred to and confirmed, sustained the defences and assoilzied from the action; thus holding the heir to be effectually restrained from contract-

ing debts. There can be no doubt that that decision was right. But it does not appear to us that it has any application to a case like the present.

"We are, therefore, on the whole, of opinion, that the deed of entail 1774 being the ruling title, must be considered as an original substantive entail, and that, not having been recorded in the Register of Tailzies, it is not effectual against creditors or purchasers, and therefore cannot affect the validity of the contracts of sale concluded between the Earl of Eglinton and the purchasers suspenders.

"II. If the deed of 1774 had been duly recorded, or if the objection that it was not recorded could be in any way overcome, we do not think that there is any defect either in the irritant clause or in the resolutive clause sufficient to prevent their efficacy to annul acts of sale.

"We certainly hold, that, in the question whether there is such a defect or not, the pursuer, or rather the purchasers, are entitled to a strict construction. But, on any construction, the clause appears to us to be sufficient.

"With regard to the irritant clause, it is entirely of a sweeping general nature, not professing to make any enumeration of the particular acts prohibited; and it is impossible to maintain that an irritant clause in this form may not be effectual, if the words used are in themselves sufficient to cover the act of contravention attempted. The defect in the case of Tillicoultry lay altogether in this, that in the resolutive clause there was a particular enumeration in which the case of *selling* was omitted; and it was therefore held, that in such a case the omission could not be supplied by mere general words *added* to the enumeration, which might be applied to many other things, and equally to those which *were* specially enumerated. The same thing substantially occurred in the late case of *Rennie*. There was a special enumeration of particulars in the irritant clause; and the act of sale was omitted. A majority of the Court here held the entail effectual, on the ground that the particularisation did not qualify or limit the effect of the general words which *preceded* it, and which by themselves would have been sufficient. The House of Lords would not adopt that distinction, and held the entail not good,—not because the general words used might not have been sufficient in other circumstances, but simply because the entail, professing, in the irritant and resolutive clauses, to enumerate the particular matters comprehended in the substantive prohibitions to which the irritancy should apply, had omitted the case of sales. But in the case before the Court, there is not in the irritant clause any specification or attempt to specify the acts of contravention. It is quite general, and in reality in the safest and best form for that reason. After the prohibitions against *altering, selling or contracting debt*—with the usual general words of other deeds, civil or criminal, leading to eviction—the irritant clause declares, that if the said Hugh Montgomerie, &c., 'shall do in the contrair *hereof*, then and in that case, all and every one of such acts and deeds, with all that shall happen to follow, or may follow thereupon, shall be ipso facto void and null, and of no force, strength or effect, siclike and in the same manner as if the said acts and deeds had not been done, acted, committed or granted.' It is impossible to deny that an act of sale, or a deed of conveyance or alienation, is a thing done, and a deed granted 'in the contrary *hereof*;' and if this be clearly so on every construction, it is impossible to avoid the conclusion that it must be effectual, without just saying that there can be no good irritant clause, unless it does specifically enumerate all the particular matters in the prohibitory clause. But this cannot be said; because there are many entails which have stood the closest scrutiny, in which the terms of the irritant clause are equally general. The words of the clause in the Roxburgh entail, after the prohibitions which were held to be effectual, were simply—'all which deeds so to be done by them are declared to be null, and of none avail, strength nor effect.' Cases have occurred where, from the particular collocation of the words, an ambiguity has seemed to be left as to the application of the term 'which deeds,' as being by possible construction limited to the immediately preceding words of amplification concerning deeds other than deeds of alteration, sale, or contraction of debts. But every such ambiguity is excluded here by the precise form of the clause; the case is, 'if the heir shall do in

the contrair *hereof*,' all such acts and deeds shall be null and void. No construction can so limit the effect of these words as to exclude deeds of sale from its operation. Neither can it affect this conclusion, that in the case of *Rennie* there were also general words which might seem to comprehend sales. The difference is, that there the entail specified the cases of the heirs failing to assume the name and arms—failing to engross the clauses in the infeftments—*altering the order of succession*—or *contracting debts*—and had not specified the case of *selling or alienating*, whereby, consistently with the case of *Tillicoultry*, there was left a fair possibility that it was left out *ex proposito*, or at least ground for holding that there was an actual omission of that special case.

"The separate objection to the resolutive clause is very special, but it does not appear to be well founded. The material part of the clause, by which the right of the contravener is resolved or forfeited, is admitted to be clear and sufficient. But in declaring the mode in which the next heir is to 'make up his title, the maker resumes the special cases of supposed contravention, and in doing so has omitted to specify particularly the case of sales. We do not know that it ever was held or decided, that such an omission in this part of the clause would render an entail ineffectual, which was otherwise complete in the essential clauses. It might occasion practical inconvenience in the formation of the title, on such a contravention, if there were no words which would be held sufficient to comprehend the case to such an effect. But it never could prevent the actual forfeiture or irritancy, otherwise clearly declared; and the contravening heir being once forfeited, and having ceased to have any right in the estate, could not be heard to object to any proceeding whereby the right of the next heir might be legally established in his person. The words of the clause, however, as they stand, though probably they would not reach the act of sale, if the declaration of forfeiture had been made in the same form, might possibly be held sufficient for merely laying down the nature of the title to be made up by the next heir.

"The summons contains some other propositions, to which it may be proper to advert.

"1. Though we are of opinion, that in consequence of the non-registration of the entail 1774, the pursuer was not effectually debarred from making a sale which would give a good right to the purchaser, we do not think that it can be declared by this Court that he has a right to sell the estate which he holds in virtue of that title. Being in the fee, he has power to do such an act; and by the force of the Statute, the purchaser will get a good title which cannot be set aside as in contravention of the entail. But the Court cannot be called on to declare that he had a right to do so.

"2. The summons concludes to have it found, that the pursuer has 'full right and power *gratuitously* to alienate and dispose of the said several lands,' &c. We do not know on what ground a judgment to this effect could be contemplated. But as we consider it to be clear law, that the prohibitory clause alone, standing in the body of the pursuer's title, would be sufficient to prevent all gratuitous alienations, and that it would be effectual to this purpose in all questions *inter heredes*, notwithstanding that the entail had not been recorded, we are of opinion that such a declaratory judgment cannot be granted.

"3. The summons asks the Court to declare, that upon the sales taking effect, the price or consideration which the pursuer may receive will be at his absolute disposal, and that he is under no obligation to employ or lay out the same in the purchase of other land, or otherwise, for the benefit of the heirs of entail. We understand this to mean, that the Court should find that this case will fall within the principle of the judgment of the House of Lords in the case of *Ascog*. But though we may not at present see any ground for supposing that a different result should take place in this case, it rather appears to us to be premature to pronounce any specific judgment on such a question, until a claim of that kind shall have been actually made."

Lord Cuninghame :

"Upon reconsidering the state of the titles in the present case, with the views of Lord Moncreiff upon them, explained in his opinion, I have come to be satisfied that the settlement

and conveyance by Mrs Lillias Montgomerie in 1774, of the estates of Skelmorlie and Coilsfield, must be viewed as a new entail, which required registration in the Record of Tailzies to bar onerous creditors and purchasers from attaching them; and as no such registration took place, I am of opinion that onerous purchasers of these estates are entitled to acquire them. This now appears to me to follow from the peculiar structure and provision of the Act of Parliament, which allowed the sale of Lochliboside and the other lands in Renfrewshire belonging to the heirs of entail in 1757, but did not provide in apt and sufficient terms for such a title to be thereafter made up to the two estates in a combined entail, composed in part of the old estate of Skelmorlie, and in part of the new or substituted estate of Coilsfield, as was necessary to settle the whole of these lands in one effectual tailzie. At least this appears to be a legitimate inference upon a strict construction of the titles expedite under the Act of Parliament in 1757, which were neither reduced, nor in any respect explained or qualified by declarator subsequent to their completion.

"When the Act of Parliament in 1757 allowed Lochliboside to be sold, it left Skelmorlie only under the fetters of the old entail; and consequently, if a contravention had been committed as to these lands, those interested in the tailzie could only pursue a forfeiture under that tailzie, of such parts of the old estate as were left unsold. In like manner, when the Statute provided with respect to the new lands to be purchased (Coilsfield), that these should be settled, disposed, and provided to and for the use, benefit and behoof of the said Lillias Montgomerie, and the said other heirs of entail, according to the different rights and interests, and in the same order and course of succession as the same premises are secured to and for them, and their benefit respectively, in and by the same deed of entail, and subject to the restrictions and limitations, clauses irritant and resolute therein contained, and shall immediately after record the said settlements and dispositions so to be made in the Register of Tailzies, &c.; and when the learned and eminent persons who executed the new tailzie under that Statute as to Coilsfield, made the fetters and forfeitures to apply to that estate only, without any provision as to the forfeiture of Skelmorlie, I apprehend that, upon the strict rules of construction adopted in other cases of tailzie, a contravention as to Coilsfield could not, under such a title, have inferred a forfeiture of Skelmorlie.

"It should have been provided by the Statute, either that a new entail of both estates should be made and recorded,—or that the entail of the new lands should be so expressed as to make the irritant and resolute clauses take effect in case of any breach either of the old or of the new entail. But the deed was not so framed, and therefore, between 1757 and 1774, the estates of Coilsfield and Skelmorlie stood on separate entails, which were completed and registered, each containing its own prohibitions, restrictions, and forfeitures, which, in strict law, could not be extended and applied to both estates indiscriminately.

"It is quite possible that the Court, on an action at the instance of the substitute heirs, might have directed the titles, as expedite in 1757, to be corrected, and a new entail of both estates to be executed and recorded conformable to the original rights of parties, and to the probable meaning of the Legislature in authorising a part of the old estate to be sold. But that course was not taken. Mrs Lillias Montgomerie, after a possession of seventeen years on the separate entails, attempted at her own hand, and of her own authority, to combine them by a new settlement essentially different from the separate tailzies on record; and the last deed has never yet been recorded in the proper register.

"On mature consideration of the change which that deed made upon the titles on record, and under which Mrs Montgomerie was possessing, I am now satisfied that the settlement of 1774 must be considered as a new entail, which was ineffectual against onerous third parties without registration in the Record of Tailzies; and therefore I concur with Lord Moncreiff in his opinion, that the sales to Mr Paterson's trustees must be sustained.

"Farther, I am of opinion that his Lordship's exposition of the resolute clause is well founded, and that the plea of the heir on that point is not maintainable."

The Lord Justice-Clerk (Boyle) declined judging in the case.

At advising on 16th July 1841,

Lord President.—In this case the opinions of the consulted Judges are in favour of the action brought by Lord Eglinton, maintaining that he has power to sell, and I am of the same opinion.

Lord Gillies.—I also concur with the consulted Judges, and for the same reasons, which it is therefore unnecessary for me to recapitulate.

Lord Mackenzie.—I agree in opinion with the consulted Judges; but I think it right to say, that in regard to Skelmorlie I do so on the view that the new entail uniting the estates was not sanctioned by the Statute. For if I thought it was authorised by the Statute, I should have much difficulty in thinking that the estate of Skelmorlie could be disentailed, i. e. taken out of the old entail, or that the making of a new entail, authorised by the Statute, could supersede the old one, until that new entail was fully completed by registration in terms of the Statute. In this view the new entail was no contravention. It was not reducible at all. It was equally valid without as with prescription. If it could have the effect of taking the estate of Skelmorlie out of the old entail at all, before it was itself registered, it must have done so instantly on infestment being taken upon it: Nor should I think it very hazardous to hold, that infestment on a new entail authorised by a Statute of this kind, could supersede the old entail before it was recorded. It is said it produced the effect by prescription. But if it was valid without prescription, what better could prescription make it? Prescription may make an invalid deed, made in contravention, valid, and so extinguish an entail. But when a deed is valid in itself, I don't see how prescription can make it better. I rather conceive, therefore, that if the Statute authorised the making of the new entail of Skelmorlie, it must either have the effect, that as soon as this new entail was constituted by infestment, the old one was gone, or that, by the Statute, the old one stood valid until the new one was completed by registration.

Lord Fullerton.—I concur in the opinion of the consulted Judges, and on the ground there stated, that the deed 1774 must be considered as an original substantive entail, and that that deed, which was never entered in the Register of Tailzies, "is not effectual against creditors or purchasers, and therefore cannot affect the validity of the contracts of sale between the Earl of Eglinton and the purchasers and suspenders." According to this view, it is a matter of indifference whether the union of the new and old estates in one entail was authorised by the Statute or not. For even if it had, still, if the effect of such union, with the appropriate clauses, was to create a new entail, the registration of that deed must have been necessary to give it effect against creditors, unless the Statute had contained an express dispensation from that form, which it certainly does not.

The consulted Judges not having decided the declaratory conclusions of the summons, to the effect that the pursuer "has the sole and exclusive right to the price or prices, or other consideration, as his absolute property, and that he has full power to use and dispose of the same at pleasure," the Court ordered additional cases on this "reserved question," to be boxed to the whole Judges for their opinions.

Pleaded by the pursuer—

An heir of entail, so far as he remains unfettered, is entitled to exercise all the rights of a fee-simple proprietor. In the present instance, it has been found that he is entitled to sell, while there is no express clause in the entail declaring that he shall be bound to reinvest the price in other lands. The conclusion seems inevitable, that he is under no obligation so to reinvest it. A prohibition against selling does not create a full and perfect obligation *inter hæredes*. If it did, the substitutes would be entitled to enforce it by interdict or inhibition. It was once thought that this could be done; but the contrary has been long settled. This shows that the law does not consider a prohibition as equivalent to a full obligation, but regards the substi-

tutes as creditors, only to the limited effect of preventing gratuitous alienations to their prejudice. The rights of all parties interested in an entail, and the remedies competent in case of contravention, can only be ascertained by the provisions of the entail itself. There is no room for implication; and therefore, without an express provision for reinvestment, it is incompetent to insist for it. Besides, it is impossible to say what the intention of the entailor would have been in the event which has happened. His intention undoubtedly was, that the estate should not be sold; but now that it has been sold, it is impossible to say what he would have wished to have been done with the price. For any thing that appears to the contrary, he might have wished the heir in possession to keep it to himself. It is argued, that it was the duty of the pursuer to have completed the entail of 1774 by recording it. A similar argument proved unsuccessful in the Queensberry case; and it is sufficient to observe, that there is nothing in the deed imposing it as a duty on the heir in possession to record it. He is merely enjoined to make up his title under the entail, and possess on no other. This injunction he has strictly complied with. A distinction has been attempted to be drawn between the *right* and the *power* of the pursuer to sell, but this appears to be a mere verbal subtlety arising from the double meaning of the word *right*. In the strict legal sense in which it is used in the present summons, it means nothing more than the *jus disponendi*. To adjudicate upon moral rights as distinguished from legal, is not the province of a civil court. Besides, the point now under discussion is no longer open, having been settled in the pursuer's favour by a series of decisions, particularly those of Ascog and the Marquis of Queensberry's Executors.

Pleaded by the defenders—

The question here is, whether, when an entail is perfect in all its clauses, but is unrecorded, the heir in possession not only has the power to make an effectual sale, but is freed from all obligations whatever to the substitute heirs in regard to the price. Should this question be determined affirmatively, it will be in strong opposition to what has hitherto been considered the law, and to many former decisions. There is this very important distinction between the present case and that of Ascog—that the latter entail laboured under a defect which there was no means of curing. The entail necessarily remained such as the entailor had made it; and the consequence was, that any reinvestment of the price must have been nugatory, as the lands purchased with it must have been entailed in the same defective form as before. This legal inconvenience or absurdity plainly modified the whole argument. Here, however, there is no defective entail which cannot be rendered perfectly efficacious. The omission to register may be supplied at any time, and the entailed estate thus secured from further alienation. It is true the case of the Queensberry Executors related to an unrecorded entail; but there were specialties in it sufficient to restrict the decision, and deprive it of a general character. It seems impossible to deny that the fetters of an unrecorded entail are sufficient to constitute a personal obligation upon the heir in possession. 1. An unrecorded entail, though ineffectual against onerous third parties, will operate so as to irritate the right of an heir who has contravened. 2. An unrecorded entail is effectual to set aside gratuitous deeds granted in contravention. These principles, when fairly followed out, lead to consequences inconsistent with the pursuer's conclusion to have it declared that he has not only power to sell, but is absolute master of the price.

The following opinions were returned:

Lord Moncreiff, concurred in by *Lords Meadowbank, Medwyn, Cockburn, Cuninghame and Ivory*:

"Observing that the summons of declarator contains an express conclusion to have it found, in case it shall be held that the pursuer has power to make an effectual sale of the estate, that he is at full liberty to dispose of the price, and that the heirs of entail have no good legal claim against him to reinvest it; and further observing, that both in the case of Ascog and in the case of Thomson, referred to in the joint minute, judgment was given on such a conclusion—I am satisfied that the

parties are entitled now to ask a judgment of the Court on that question.

"And I am of opinion, that, on the basis of the opinion already delivered, holding the entail 1774 to be the regulating title, and that that entail never having been recorded, the contract of sale concluded by the pursuer is effectual to the purchasers suspenders, the heirs of entail have no legal claim to compel the pursuer to reinvest the price in other lands, and that he cannot be prevented from freely disposing of it. The case in this point appears to me to be ruled by the principle on which the House of Lords decided the three cases of Ascog, Bruce and the Marquis of Queensberry.

"It is true that the case is not identical in its facts with the case of Ascog. In that case the failure of the entail, and the power to sell effectually, notwithstanding the most express prohibition, arose from a defect in the irritant and resolute clauses. And the case of Bruce was the same. But the principle of judgment was, that the object of the entailor having been solely to make an effectual entail of the specific estate under the Act 1685, if that object failed, the Court could not interpose to give the heirs a remedy not provided by the deed, or to constitute entails of other estates to which the entailor's deed had no reference. The difference in the present case is, that the entail has become ineffectual to prevent sales, in consequence of the express provision of the Statute 1685 for the registration of all such tailies not having been observed. But though there is a difference in this point, it appears to me that the principle which decided those cases distinctly applies to this case. The Court cannot give to the heirs of entail a remedy by personal action which the entail has not provided; and, according to the doctrine held in the House of Lords, the Court have no authority to order the investment of the money in any other estate to be entailed.

"But it farther appears to me, that the identity of these cases in principle has also been decided by the House of Lords. The three cases of *Stewart v. Fullerton*, *Bruce v. Bruce*, and the *Marquis of Queensberry v. the Queensberry Executors*, were all before the House of Lords at the same time, and are reported as decided on the same day, 16th July 1830; (4 W. and S., 196). And it is impossible for me to read the very careful opinions of Lord Eldon upon those cases, confirmed by the opinions of Lord Wynford and the Lord Chancellor Lyndhurst, without thinking that they were all held to depend on the same principles: They are accordingly so understood in the note of a very accurate person, Mr James Chalmer, annexed to that volume of the reports. But in the case of *Queensberry* there was no failure in the clauses of the entail. The thing objected to was a lease, so granted, that according to the previous judgments, it was in contravention of the entail. But the entail had not been recorded; and it was held, that on that account the lease was effectual to the third party, and could not be reduced. From the nature of the case, there could not be any claim for reinvestment specifically; but the heir of entail brought an action of damages against the Duke of Queensberry's Executors, on the ground of his personal obligation to observe the conditions of the entail; and a majority of this Court, on principles similar to those on which they had decided the case of *Ascog*, sustained the action. But the House of Lords, at the very same moment when they reversed the judgment in *Ascog*, reversed also that in the case of *Queensberry*. The summons in the case of *Ascog* contained a conclusion for damages as well as for reinvestment. But the important matter is, that Lord Eldon, in delivering his judgment on the case of *Queensberry*, distinctly resumes what had been done in *Ascog*, and draws from it the principle on which the case of *Queensberry* should be also determined. That principle I apprehend to be, that the entail having failed of its purpose from any particular cause, the Court cannot give a remedy which the entailor has not provided. The claim for reinvestment of the price upon a sale truly resolves into a claim of damages, to be satisfied in a specific form. And now, in the present case, the fact which occurs is, that the estate is sold, and the object of the entail at an end. The entail not recorded is no entail against third parties. And the question is just the same with that which arose in *Ascog* and *Bruce*, whether the Court can give a remedy which is not provided by the deed of entail, and whether they have

any authority to constitute an entail of a different estate. I am of opinion that the same judgment necessarily follows."

Lord Murray :

"The summons of declarator at the instance of the Earl of Eglinton sets forth, that he is entitled to sell the said lands and others 'as freely in all respects as if he were proprietor thereof in fee-simple,' and that it ought to be declared 'that he has full and undoubted power to dispose of these lands,' and 'that the defenders, or any of them, have no claim or demand against the pursuer.'

"I concurred in the opinion which I signed along with the other consulted Judges, that in consequence of the non-registration of the entail 1774, the pursuer was not effectually debarred from making a sale which would give a good right to a purchaser—but that it could not be declared by this Court that he had a right to sell the estate which he held by that title, or that he had power gratuitously to alienate or dispose of the lands.

"The question has since been argued, whether the heirs of entail can insist on his reinvesting the price in the purchase of lands. It appears to be fixed by the judgments in the House of Lords, in the cases of Ascog, Bruce, and Queensberry, according to the principles laid down in the case of Duntreath, that the rights of the parties interested in the deed, and the remedies in the case of contravention, can only be ascertained by what the deed itself contains, and that Judges are not at liberty to go out of it. The heirs are not therefore entitled, in this case, to insist that the price shall be laid out in land.

"There is a question, however, which may arise under other unrecorded entails, if not under *this*, what is the effect of an irritancy or act of contravention under a deed of entail which is complete in other respects, but not recorded? The Court, upwards of a century ago, decided, in the cases of Dorrater and Hall and Cassie (Fol. Diet. Vol. II. p. 436, M. 15,370), which have always been considered as fixing the law on that point, that an unrecorded deed of entail was effectual *inter hæredes*, though not against creditors and third parties who may make their claims good against the estate. In a subsequent judgment with regard to the estate of Dorrater (February 13, 1725, M. 15,554), the Court found that the heir of entail could not challenge rational provisions made to a wife and children before the decret or irritancy was pronounced; and in a judgment pronounced in the House of Lords (Shaw's Appeals, Vol. I., *Agnew v. Stewart and Drew*), where the question was very fully and repeatedly considered, the House of Lords decided that the estate was not affected by debts, unless in so far as they had been made real burdens prior to the infestment under the entail. It may be safely found in this case that there is no authority for vesting the price in other lands, or for entailing them, but it appears to me that the Court should abstain from using any terms in their judgment which might in any way prejudice questions which might arise after a declaration of irritancy, or after this or any other similar entail was recorded."

Lord Jeffrey absent from indisposition.

The Lord Justice-Clerk not having been on the bench at the time of the original consultation, requested leave not to give an opinion on this subsidiary point.

At the final advising, 17th December 1841,

Lord Mackenzie.—I agree with Lord Moncreiff and the other consulted Judges. The case of Queensberry seems in point. In the case of Willison, it was found that a tailzie was good against heirs without registration. But after the case of Queensberry, we must hold, either that the decision is overruled altogether, or that, under that decision, an unregistered entail can operate against heirs only in terms of its own provisions directly; that is, by forfeiture, where there is room for forfeiture. In this way it may work, when the contravention is by contracting debt, or by partial alienation, leaving in the contravener the whole or a part of the estate to be forfeited. But when the alienation is total, the entail is gone. There is nothing left in the heir to forfeit, and there is nothing which can be sued for

in terms of the entail. Damages or reinvestment of price under a similar entail cannot be sued for, because the entail says nothing of these. Such are the principles adopted by the House of Lords in the case of Queensberry; and to these I bow. Now, in this case, there is no conclusion not supported by these principles.

Lord Fullerton.—I agree in opinion with the consulted Judges, and with your Lordship. The Ascog case, and that of Bruce, differed from the present in one important particular. There were defects in the entail. The Ascog entail had neither resolute nor irritant clauses against sales, and the Balchristie entail had no resolute clause. And in the judgment delivered in those cases in the House of Lords, considerable weight is laid on the incongruity of reinvesting money on land to be entailed, when, by the very conditions of the argument, the lands so entailed might be sold the very day after. That observation does not apply to a case like the present, in which, as the entail is complete, the consequence may be prevented by registration. But, looking at the whole tenor of the judgments in those cases, it would appear that the circumstance was alluded to rather as an illustration of the principle, than as forming a condition or essential element of the principle itself. That, as clearly expressed in other parts of the judgment, was the necessary limitation of the rights or remedies sought by the heirs to the deed of entail itself, and the incompetency of raising up either the one or the other by implication, from the assumed consequences of the violation of the restrictions, on which consequences the deed was perfectly silent. Now, on this principle, I am unable to discover any essential difference between those cases and the present. In one view, it is more favourable to the application of the principle. In the cases like those of Ascog, the entail not containing in itself the means of securing the effect of the prohibition, there might be room for contending that the entail contemplated the possibility of the ordinary common-law remedies being resorted to. But here the entail is complete,—the substitutes had the means of securing the observance of it by registration. Having failed to do so, the objection, that the remedy now sought is beyond the terms of the entail, is more clearly brought out. Accordingly, I observe that distinction was taken by some of the consulted Judges in the case of the Queensberry Executors. But the authority does not rest merely on the cases of Ascog and Balchristie. We have the case of the Queensberry Executors, decided, I believe, on the same day. That was the case of an unrecorded entail, in which damages were sought for the granting of a lease contrary to the prohibitions. There were some difficulties connected with the particular point of the damages. But that difficulty clearly formed no ground of the judgment. The report is very imperfect, and not very intelligible. But it is clear, both from the terms of it, and from the summary given by Mr Chalmer—a very competent authority on such a point—that the judgment truly went on the general principle recognised in the case of Ascog, and that the remedies available to heirs for the breach of restrictions, were confined to those provided by the deed and the Statute—a principle just as applicable to the case of a perfect entail unrecorded, as to an entail in itself imperfect.

Lord Gillies.—I concur entirely with the consulted Judges.

Lord President declined from relationship.

In consequence of the birth of the pursuer's son, Lord Montgomerie, before judgment was pronounced, it became necessary to make him a party. Mr Walter Cook, W.S., was accordingly appointed his *curator ad litem*, and having taken out the process to see, lodged a minute, stating, *inter alia*,

"That looking to the important interests which Lord Montgomerie has in the questions at issue, he had felt it proper, in the discharge of his duty, to take the advice of the Dean of Faculty (who had not previously been engaged as counsel in these conjoined processes), what course he ought to pursue as *curator ad litem*. That the opinion of counsel having concurred with that which he had himself formed, viz., that the case on the part of the heirs of entail had been most fully and ably argued in the papers already before the Court, and every plea urged which could be stated on their behalf, he considered it to be unnecessary

to add to these papers any second pleading on the part of Lord Montgomerie;" "and that, adhering to the record as made up on the part of the heirs of entail, and to the pleadings lodged for them, he was willing that the cause should be disposed of whenever the Court may think proper."

The Court pronounced the following interlocutor:

"Find that the deed of entail in 1774, must be considered as an original substantive entail, and that not having been recorded in the Register of Tailzies, it is not effectual against creditors or purchasers: Find that the sale concluded between the Earl of Eglinton and the suspenders, Paterson's trustees, was valid and unchallengeable: Therefore, repel the reasons of suspension, and find the letters orderly proceeded in the process of suspension at their instance, and decern; and in the action of declarator, find that the pursuer, the Earl of Eglinton, has full power to sell the whole lands in the said deed of entail, for onerous prices or considerations, and to grant valid dispositions to the several purchasers; and farther, find and declare, that upon the sales taking effect, the purchaser is under no obligation to employ or lay out the prices or sums arising from the said sales, or any part thereof, in the purchase of other lands, or otherwise to invest the same for the benefit of the defenders, or the other heirs of entail, and that the prices or considerations which the pursuer may receive, will become his absolute and exclusive property, and that he has full power to use and dispose of the same at pleasure, free from all claims whatever at the instance of the defenders, or the heirs of entail,—all in terms of the first declaratory conclusion of the summons in the said action of declarator; and decern and declare accordingly."

Pursuer's Authorities.—*I. Munro v. Drummond*, 9th February 1836. *Broomfield v. Paterson*, Mor. 15,618. *Paterson v. Cuthbert*, Baron Hume, p. 869. *Hope Vere*, 12th February 1828. *Halket v. Craigie*, 4th December 1817. *Hay Newton*, 29th June 1836. *Ersk. III. 8. 48.* *Bargany Case*, 27th March 1739; *Craigie and Stewart's Appeal Cases*, p. 237. *Dormont Case*, 16th December 1819; *House of Lords*, 5th June 1820, *Bligh's Cases*, Vol. II. *Gartmore Case*, 12th June 1835. *Forbes v. Livingston*, 29th November 1827. *Glasfords v. Mackenzie*, 17th February 1829. *Bruce of Tillcultry*, 15th January 1779. *Horne v. Rennie*, 13th March 1838. *Thomson of Banchoory*, 27th February 1839. *II. Bryson*, 22d January 1760; *Mor. 15,511.* *Ankerville*, 8th August 1787; *Mor. 7010.* *Ersk. III. 8. 39.* *Brown*, 25th May 1808. *Henderson*, 21st November 1815; *Mor. App. Tailzie*, No. 19. *Stewart v. Lockhart*, 4 W. and S., p. 239. *Queensberry Cases*, 10th March 1824. *Ascog Case*, 23d February 1827, and 16th July 1830; 4 W. and S. *Bruce v. Bruce*, 16th July 1830; 4 W. and S. *Case of Elibank*, 2d July 1833. *Case of Campbell*, 23d November 1838. *Cuninghame*, 17th January 1804; *Mor. 13,029.* *Cuninghame v. Hathorn*, 20th December 1810. *Earl of Wemyss*, 28th February 1815.

Defenders' Authorities.—*Halket v. Craigie*, 4th December 1817. *Turnbull v. Newton and Renton*, 29th June 1836. *Craig de Feudis*, Lib. II. *Dieg. 21.* *Stewart v. Lockhart*, 4 W. and S., *Ascog Case*. *Willison v. Callender of Borator*, 26th February 1724; *Mor. 15,369.* *Hall v. Cassie*, February 1726; *Mor. 15,373.*

Lord Ordinary, *Cuninghame*.—*Act. Rutherford, Anderson, Mackenzie*; *Tod and Hill, W.S., Agents.*—*Alt. Dean of Faculty (Hope), H. Robertson, Handyside; Hope and Oliphant, W.S., Agents for Messrs Montgomerie; Orr and Martin, W.S., Agents for Paterson's Trustees.*—*B. Clerk.*—[H.B.]

22d January 1842.

SECOND DIVISION.—(J. W.)

No. 90.—**JOHN CAIRNS, Pursuer, v. JAMES MERRY and OTHERS, Defenders.**

Process—**Pursuer**.—**Bankrupt**.—**Cessio**.—**Caution for Expenses**.—**Circumstances in which a bankrupt pursuer was found not entitled to insist in an action without finding caution for the expenses of process; but in respect of caution being offered, the interlocutor of the Lord Ordinary was recalled of consent.**

In this action the following interlocutor was pronounced by the Lord Ordinary:

"14th December 1841.—The Lord Ordinary having heard parties' procurators, holds the trustees of the defender, James Merry, sisted as parties to this process, in terms of the minute given in for them; and in respect the original defender was dead at the date of the interlocutor of 9th November last, whereby the same was of non effect, and having formerly heard parties' procurators upon the second preliminary defence, and made avizandum,—In respect it is admitted by the pursuer, that, in the year 1835, he was rendered notour bankrupt, and was incarcerated by virtue of letters of caption; as also that, having thereafter instituted a process of *cessio*, he prosecuted the same, at all events, up to the point of obtaining therein a deliverance finding him entitled to the benefit of the *cessio*, and did accordingly execute a disposition *omnium bonorum* in favour of a trustee for behoof of his creditors; while, on the other hand, although it is alleged that the said disposition was never delivered to the said trustee, nor the said process of *cessio* followed out to the effect of obtaining decree of *cessio*, yet no evidence has been produced, either that the pursuer has been restored to a state of solvency, or that the said process of *cessio* has been abandoned or taken out of Court to the effect of reposing him in the full management of his affairs, or that the creditors called in said process have renounced their claims, or consented to his discharge, or in any respect departed from their right to insist that the disposition *omnium bonorum* should still be delivered for their behoof, and the process brought to a close in common form: Before further answer, and in *hac statu*, Finds that the pursuer is not entitled to insist in the present action without finding caution for the expenses of process: Allows him fourteen days for that purpose; and, in the mean while, supersedes farther consideration of the cause."

"**Note.**—The pursuer, it is thought, has not placed himself in the same position relatively to his former creditors, which obtained a favourable deliverance on the question of caution in *Young*, 19th May 1836, and *Johnston* 4th June of the same year. He may still, no doubt, be able to show that the creditors have been settled with, or have otherwise departed from their debts, or at least from all purpose of proceeding thereon against him. He has not, however, done so hitherto; and, in the absence of all evidence to that effect, and with, to say the least, a process of *cessio*, in which these creditors were regularly convened, *still in dependence*, even if the presumption be not that he has been actually divested by the disposition *omnium bonorum* executed by him, it is thought the present is just one of those cases (*See Hay* 31st May 1834) in which it has been the practice of the Court to enforce the demand of caution where insisted in on the part of the defender."

"*Taylor's case* has no bearing on the question. It is in favour of a *defender*, not a *pursuer*, that the principle laid down in the House of Lords chiefly applies. Accordingly, since that decision, there have been many cases where bankrupt pursuers have been made to find caution."

"If it shall turn out that the pursuer's creditors are still entitled to insist in the process of *cessio* for delivery of the disposition *omnium bonorum*, whether to the original disponent or to another substituted as their trustee in his stead—the objection will strike even deeper than the necessity of finding caution, as it will affect the *title to pursue*. See the different reports of *Geddes*, 11th June 1822, 18th July 1823, and 14th November 1829. This, however, is not at present insisted in, and has, accordingly, been saved for farther discussion by the terms of the interlocutor. But, to entitle the pursuer even to be heard in that question, it is thought that, in the circumstances in which he at present stands, he must, at all events, find caution in the first instance for the expense of process."

At advising a reclaiming petition, the Court, in respect that the party then offered to find caution, of consent recalled the interlocutor, and remitted to the Lord Ordinary, reserving the question of expenses.

Lord Ordinary, *Ivory*.—*Act. More*; *W. A. G. and R. Ellis, W.S., Agents.*—*Alt. Shaw; John Patterson, S.S.C., Agent.*—*T. Clerk.*—[J.W.]

22d January 1842.

SECOND DIVISION.—(J. W.)

No. 91.—*Mrs ISABELLA WATSON DUNN, Pursuer, v. WILLIAM MATTHEWS, Defender.*

Parent and Child—Aliment—*Circumstances in which a party against whom a decret of divorce had been pronounced, was found liable to aliment each of two children of the marriage at the rate of £20 per annum.*

The pursuer was married to the defender in March 1836, and continued to live with him in family until August 1838. At that time she was compelled to withdraw from his house, and to institute an action of divorce against him on the ground of adultery. On the 2d of July 1839, after a proof had been led in the usual way, decree was pronounced in favour of the pursuer.

Two daughters were born of the marriage, and the present is an action at the instance of their mother, concluding for aliment at the rate of £20 per annum for the clothing, education, and subsistence of each of the children, from the date of the decree of divorce, until they shall respectively attain the age of ten years complete, and thereafter at the rate of £25, until they shall be able to maintain themselves.

The income of the defender was not very accurately ascertained, but it was averred by the pursuer to exceed £200, while he himself estimated it at about £100, besides his house.

It was observed by the Court, that in a case of divorce, the party was not in a situation to ask his children to live in family with him; and that, in awarding aliment, they must be regulated by his income at the time, leaving it to either party to apply for an alteration of the rate on the occurrence of any material change. In the meantime, the Court awarded £20 for each of the children; *quoad ultra* superseded, and found expenses.

Act. Dean of Faculty (Wood), Johnstone; Thomas Ranken, S.S.C.; Agent.—Alt. Whigham, Stuart; Scott and Balderston, W.S., Agents.—F. Clerk.—[J.W.]

22d January 1842.

SECOND DIVISION.—(J.W.)

No. 92.—*JOHN COWDEN, Charger and Defender, v. JOHN LACHLISON, Suspendor and Pursuer.*

Trust, Latent—Reference to Oath—Construction—Process—Expenses—*Circumstances in which an assignation, alleged to have been granted in trust, was found to be onerous and valid by the deposition of the assignee, to whose oath it had been referred; but no expenses found due.*

In 1826, the suspender became bound, along with another party now deceased, in a bond of annuity for £20 to the late Andrew Bell and his wife. In 1831, Bell made over this bond to his grandson, by a deed of assignation *ex facie*, for the consideration of £100. Diligence was immediately thereafter raised upon the bond, but was not at that time proceeded in. Subsequently the cedent granted a discharge of the bond, on the ground that the assignation had been made without any consideration, and had been impetrated from him by fraud. The cedent died in 1837, and had been predeceased by his wife; whereupon the charger renewed his claim, and demanded payment of the annuity from Martinmas 1826 to Whitsunday 1837, with periodical interest thereon half yearly, amounting toge-

ther to about £300. The present is a suspension of the charge given in 1831.

Pleaded for the suspender—1. The assignment in question having been obtained under false pretences, and on the understanding of a latent trust for the cedent, could not authorise the present charge. It is at all events, as having been fraudulently impetrated, reducible on the head of fraud. 2. Supposing the assignation valid in itself, yet as having the beneficial interest in it, Andrew Bell was entitled to discharge the bond of annuity, and did so effectually.

Pleaded for the charger—1. Andrew Bell having, by the assignation of the bond of annuity in favour of the charger, duly intimated to the debtors, been divested of all claim to the said annuity, had no right or title to execute a subsequent assignation or discharge of the said bond in favour of the suspender and William Bell. 2. No relevant statement of facts having been set forth by the respondent, and the facts which have been alleged as to the assignation having been improperly obtained, being untrue, and denied, that deed must be sustained as valid and effectual. 3. The said assignation being conceived in favour of the charger in absolute terms, and not as trustee for behoof of any party, it is not competent to establish the existence of any alleged trust, except by the writ or oath of the charger himself.

A relative action of reduction of the assignation having been brought, was conjoined with the suspension, and the following minute of reference to the oath of the charger and defender was sustained:

“It being admitted, that in the year 1826, the pursuer (and suspender) and the late William Bell, turner in Dumfries, granted a bond of annuity to the late Andrew Bell at Blackacre, Whether the writing, of which No. 29 of process is an extract, bearing to be an assignation to the defender (and charger) of the said bond of annuity, is not the deed of the said Andrew Bell?”

“The pursuer offers to prove by the oath of the defender, that the writing described in the issue, is not the deed of the said Andrew Bell. And the pursuer accordingly craves your Lordship to sustain the reference, and to ordain the defender to appear and depone thereon, and to answer all pertinent interrogatories.”

The charger and defender accordingly compeared before the Sheriff of Edinburgh on the 6th of December 1841, and deponed, That he was thirty-eight years of age; that he was a mason, and that, after the expiry of his apprenticeship in 1823, he had wrought as a journeyman, and occasionally on his own account: That in 1831 he had saved more than £40, but could not say whether he had £50: That he had gone on saving money, but could not say how much he had at the time of the assignation in 1831: That his grandfather did not mean to make him a present of the bond of annuity, but that he paid a price for it: That the deed of assignation was written by his instructions alone, and that on the day on which it was signed, he carried with him to his grandfather's the sum of £100: That the best part of that sum was his own: That he had more than £30 of his own, but could not say how much more: That he had more than £50, but could not say how much “for a few pounds:” That he got the rest of the £100 from a friend, but did not grant any bill or voucher of any kind for the money advanced to him, and he repaid it a few months afterwards out

of his earnings: That during these months he was working as a journeyman, and his wages were 18s. a-week: That he cannot say within what time he repaid the money—whether it was two years, twelve months, six months, three months, or one month: That his grandfather never told him he had granted a discharge of the bond; and that the reason why the diligence was not proceeded with in 1831 was, that he did not require the money at the time, and had left the place.

The Court pronounced the following interlocutor:

"Find the oath negative of the reference; and in the suspension find the letters orderly proceeded; and in the reduction as-soilzie the defender from the conclusions of the libel, and find no expenses due to either party."

Lord Ordinary, Ivory.—*Act.* E. S. Gordon; Roy and Wood, W.S., and Wm. Mason, S.S.C., *Agents.*—*Alt.* Dean of Faculty (Wood), Brodie; Cunningham and Walker, W.S., *Agents.*—*Jury Clerk.*—[J.W.]

22d January 1842.

FIRST DIVISION.—(H. B.)

No. 93.—ALEXANDER SHERIFF, *Petitioner, v. JOHN BALMER and MANDATORY, Respondents.*

Inhibition, Recal of.—Expenses.—Circumstances in which an inhibition was recalled, with expenses, except those applicable to a correspondence on the subject, which was deemed unnecessary.

The respondent brought an action against the petitioner, and used inhibition on the dependence. The action was dismissed on the ground of informality; and while the respondent was preparing to raise a new action, the petitioner called upon him to discharge the inhibition, and in about a week after, presented the present petition, praying the Court to recal the inhibition, and find the respondent liable in expenses.

The respondent admitted that he could not keep up the inhibition, since the action on the dependence of which it was raised had fallen; but he maintained that the present application was altogether uncalled for, as the petitioner's object might have easily been obtained in a different manner, unless, indeed, it were his object merely to accumulate expenses. He might have extracted the decree dismissing the action, and this would just have been a judicial discharge of the inhibition; or he might simply have enrolled the cause before the Lord Ordinary, and obtained his authority to have the inhibition scored in the register. This had accordingly been done by the respondent himself a few days after the petition had been served upon him, and the Lord Ordinary had actually pronounced an interlocutor, of consent of parties, holding the inhibition as discharged, and authorising the Keeper of the Register to mark it accordingly. In these circumstances, the respondent contended that the petition was unnecessary, and that he was entitled to his expenses.

The Court *recalled* the inhibition, and allowed the expenses of the application, with the exception of the expenses of a correspondence, which appeared unnecessary.

Act. E. S. Gordon; George Monro, S.S.C., *Agent.*—*Alt.* A. McNeill; John Davidson, S.S.C., *Agent.*—*N. Clerk.*—[H.B.]

TEIND COURT.

26th January 1842.

No. 94.

The following augmentations were awarded:

Lesmahagow (collegiate charge)—Presbytery of Lanark—Old Stipend, 8th February 1815, 16 chalders, and £10 for communion elements to each minister.—Stipend modified of this date, 17½ chalders, and £10 for communion elements to each minister,—being an augmentation of 1½ chalders.

26th January 1842.

FIRST DIVISION.—(H. B.)

No. 95.—JAMES W. MACKENZIE, *Petitioner.*

Entail.—Factor loco tutoris.—Lease.—Authority granted to the factor loco tutoris of a minor in possession of an entailed estate, to grant leases to endure for nineteen years—the next heir being abroad, and his agents declining in any way to interfere.

The petitioner, as *factor loco tutoris* to a minor who was the proprietor of an entailed estate, prayed for authority to let certain farms upon the estate for a period of nineteen years, instead of limiting the duration of the leases to the existence of the minority, on the ground that a full rent could not otherwise be obtained. Alongst with the petition was produced the report of a land-surveyor, who stated, that expensive improvements would require to be made by draining and otherwise, and that tenants possessed of the requisite capital would not undertake these under the risk of possessing for a shorter period than nineteen years. The next heir of entail was abroad, and his agents declined to interfere in any way as to the duration of the leases to be granted. In these circumstances the case was reported by Lord Ivory.

Lord Gillies.—I know a little of these matters, and am convinced that the surveyor's report is fair and accurate. If so, the interest of the next heir, and the minor now in possession, are perfectly identified. What is good for the one, is good for the other, and *vice versa*. If it is for the interest of the pupil that the leases be granted for nineteen years, it would be a very hard case if the next substitute, by merely declining to interfere, should have it in his power to prevent it. Before he could do so, I should think he would be bound to give reasons, and show that he was not declining from mere whim or caprice. It is true the pupil may die the next year, but what then? If the lands have been well let for nineteen years (and it appears they cannot be well let for a shorter period), the transaction will just prove as beneficial to him as it would have done to the pupil if he had survived. Still, if the next heir will give reasons, we will listen to them, and if good, give effect to them; but I think we cannot listen to mere opposition or declinature unaccompanied with reasons.

Lord Mackenzie.—There are here two distinct points. The one is, that the proprietor being a minor, the factor cannot let the lands on a lease to endure beyond the minority. The law unfortunately is, that the factor's powers do not authorise him to let such leases; but there can be no doubt whatever that we can give him the necessary authority. The other point is the heir's right to interfere. I don't think that the fact of his being an heir of entail makes any difference, unless, indeed, there were some clause in the entail itself preventing such leases from being granted. In that case, we would be obliged to give effect to it; but there does not appear to be any thing of the kind; and I am therefore clear that we ought to grant the prayer of the petition.

The Lord President and Lord Fullerton concurred.

The Court granted the petition.

Lord Ivory, Reporter.—*Act.* A. McNeill.—[H.B.]

26th January 1842.

FIRST DIVISION.—(H. B.)

No. 96.—JOHN GRAHAM CAMPBELL, *Petitioner, v. The PARLIAMENTARY TRUSTEES for the HEIRS of ENTAIL of SHIRVAN, Respondents.*

Entail—Act of Parliament, Sale of Entailed Lands, and Application of the Price, under—*Clauses in a private Act of Parliament held to import, that the heir of entail in possession was not entitled to receive the interest of the money arising from the sale of certain parts of the entailed estate as a surrogatum for the rents, until the prices of the lands purchased equalled those of the lands sold, exclusive of the expenses.*

In 1813, the late Archibald Graham Campbell, the petitioner's father, obtained an Act of Parliament, entitled, "An Act for vesting certain parts of the lands and hereditaments comprised in a deed of entail made by Archibald Campbell, late of Shirvan, deceased, in trustees, to sell the same, and invest the money arising by such sale in the purchase of other lands or hereditaments, to be settled and secured to the same series of heirs, and under the same conditions and limitations as are contained in the said deed of entail." The preamble states, that "it would be greatly for the benefit and advantage of the said Archibald Graham Campbell, the heir of entail in possession, as well as the other heirs of entail who may hereafter become entitled to the possession," that certain parts of the estate should be sold for the best prices that can be gotten for them, and "that the money arising from such sale or sales should be laid out and invested in the purchase of other lands and estates, as near to the other parts of the estate of Shirvan," and settled under the same fetters; and in the body of the Act, power is given to trustees to complete the sales, and execute the necessary dispositions, on the prices being paid by the purchasers at the Bank of Scotland, under the direction, and by the authority of the Court of Session, and in names of the trustees,

"to yield and carry the highest rate of interest that can be obtained for the same; and the interest arising from the money so paid in, shall be laid out in the names of the said trustees, and shall annually accumulate and be added to the principal sum itself, to carry interest together, until a proper purchase or purchases can be found and approved of, wherein to reinvest the same in manner hereinafter mentioned."

It is also enacted, that the Court of Session shall, on the summary application of the trustees, order the treasurer of the bank,

"in the first place, out of the monies so paid," "to pay all the costs, charges and expenses which have been or shall be incurred in and about the applying for, obtaining and passing this Act, and in making the sales hereby authorised, and in all proceedings and management in order or relative thereto, and in making and completing the purchases hereinafter directed and authorised to be made, and in the execution of all and every the trusts and purposes of this Act;" and that the trustees "may and shall, as occasion may arise, contract for the purchase of other lands, tenements and hereditaments, as near to the bulk of the said estate of Shirvan as can be procured to the extent of the free fund arising from the prices received upon the aforesaid sales, or as near the same as may be; and after the purchase or purchases thereof, the same shall be, with the approbation of the said Court of Session, disposed and conveyed to the same series of heirs of entail, and under the same conditions," &c.

The price of the purchases so made and approved are to be paid

SCOTTISH JURIST.

"out of the monies to be invested as aforesaid;" "and if the money arising by the principal and accumulated interest of the monies so invested shall then exceed the amount of the original money so invested as aforesaid, then and in that case only the said surplus which shall remain after discharging the expense of the application to the Court shall be paid to the person or persons respectively, who would have been entitled to receive the rents and profits of the lands so directed to be purchased in case the same had been purchased pursuant to this Act, or to the representatives of such person or persons."

It is farther enacted, that in the meantime, until the sales of the lands vested in the trustees in fee-simple for that purpose are completed, these lands shall

"be held, possessed and enjoyed with all and sundry the same powers, liberties, privileges and faculties which, by the deed of entail before recited, are permitted and allowed, and the rents, duties, issues and profits thereof, to be received and taken by and for the use and benefit of the said Archibald Graham Campbell, and the person who is heir of entail in possession for the time, and who would have been entitled to the said rents, duties, issues and profits, in case this Act had not been passed."

The trustees under the Act, in 1815, sold lands to the amount of £31,400, and in 1819, feu-duties to the amount of £1700,—thus realising for the whole subjects authorised to be sold the sum of £33,100. In 1815 they made two purchases—one for £10,821. 8s. 4d., and another for £12,962. 4. 9. In 1818, they made a purchase for £6448. 2. 8., and in 1829, another for £626. 3. 9.,—making the total amount of purchases £30,857. 18. 6. The price of the lands sold thus exceeded that of the lands purchased by £2242. 1. 6. The expenses of obtaining the Act, and of subsequent management, amounted to £2020. 10s. 1d., which, if deducted from the lands sold, reduced the surplus to £221. 10. 5. But in addition to this surplus, there had been an accumulation of interest on the prices obtained for the lands sold to the amount of £2358. 17. 6. This sum, together with the above surplus, still remained in bank in the names of the trustees. In these circumstances, this petition was presented by John Graham Campbell, the heir of entail in possession, praying the Court

"to appoint the said trustees to pay over to the petitioner the balance in their hands, or at their credit in their account with the Bank of Scotland, consisting of the accumulated interest upon the prices of the lands and others sold under the authority of the Act of Parliament; and further, to ordain them to make payment of the expense of this application out of the balance of the capital of said prices still remaining undisposed of, and to decern accordingly."

In support of the petition he *pleaded*—That in the provisions above quoted, there was nothing contrary to its prayer, and that to apply the interest in question to the purchase of lands and payment of costs, would just be to carry off part of the profits properly belonging to him as the heir in possession, and of which the Act itself expressly declared that it was not its intention to deprive him. As an authority *a fortiori* in support of his claim, he referred to the case of the Earl of Stair, 19th June 1827; 2 Wilson and Shaw, and also to the case of Wilson v. Wilson, Paul and others, 11th July 1833.

Answers were lodged by the trustees, who stated, that though they had no wish to oppose the petition, they were unable to adopt the petitioner's interpretation of the Act. On the contrary, the meaning appeared to them to be, that the heir in possession was

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only to receive the difference between the money originally deposited in Bank, and the ultimate accumulation of principal and interest, as the same should be ascertained at the final winding up of the proceeding. If, after paying the prices of the lands purchased and all the expenses, "the money arising by the principal and accumulated interest of the monies so invested, shall exceed the amount of the original money so invested, then, and in that case only," the surplus should go to the heir; but, on the other hand, if the principal and accumulated interest, after deducting the expenses, did not exceed the price of the original sales, the heir in possession should have no claim. The case of the Earl of Stair was an authority adverse to the petitioner. The decision of that case turned upon the want of any provision for accumulation; whereas here the provision is full and explicit.

At advising,

Lord Gillies.—I think the matter is decided by the clause of the Act—"if the money arising by the principal and accumulated interest of the monies so invested shall exceed the original money so invested as aforesaid, then and in that case only" the surplus shall be paid to the heir in possession. I can't get over this clause; and unless the petitioner can show that the prayer of his petition falls under it (and this I think he cannot do), it must be refused.

Lord President.—I am afraid that is the only result which we can come to. It is clear that if the price of the lands purchased had just amounted to the definite sum obtained for the lands sold, with a deduction merely sufficient to cover the expenses, the purpose of the Act would have been accomplished, and the trust would have come to an end. But what happens? Certain purchases are made, and then in 1826 there is a payment of £1389. 5. 6. to account of expenses. At this time the trustees had not fulfilled their duty, for a sum of money still remained in their hands, which they were bound to lay out in farther purchases, and accordingly another purchase is made so late as 1829, to the amount of £626. The trust was thus going on—I don't say in violation of the Act, but in a manner which led to a considerable accumulation. Now there is a clause expressly providing for the mode in which this accumulation is to be dealt with. Certain lands are authorised to be sold, and others are to be purchased to the extent of the price obtained. These purchases are still short of that price, and I agree with Lord Gillies, that the section which he has quoted is fatal to the petitioner's claim. It is quite clear, both from that clause and from the whole scope of the Act, that the only case in which the heir can claim is, where there is a surplus remaining after lands have been purchased, at a price equal to that for which the other lands had been sold.

Lord Mackenzie.—I have the same opinion, though I would very willingly have a different one. It is hard for the heir in possession to lose the rents in this way. But the Act expressly provides that the price obtained for the lands should be lodged in the bank, and that the interest arising from it should "annually accumulate, and be added to the principal sum itself, to carry interest together," until a proper purchase could be found "wherein to reinvest the same." It is obvious that on the petitioner's assumption—that the heir in possession was to draw the interest as a *surrogatum* for the rents of the lands sold,—this provision would be without an object, since in that case there could be no accumulation. The clause relating to reinvestment may have two meanings, but it does not seem to admit of three. It may mean, either that the whole principal and interest were to be vested in new purchases, or it may mean that the principal only was to be so vested; but this last is certainly the very least that it can mean. Whatever should happen, the plain intention of the Act was, that the sum expended on new purchases should not be less than that obtained for the lands sold. Then what does the Act say with regard to the expenses? It does not say that they are to be paid out of the principal sum, but out of the "monies" (not money) paid in to the bank, i. e., both the

principal and interest. Then another clause declares that the purchases to be made by the trustees were to be "to the extent of the free fund arising from the prices received;" and last of all, the clause quoted by Lord Gillies, expressly declares, that "if the money arising by the principal and accumulated interest shall exceed the amount of the original money," "then and in that case only," the surplus shall go to the heir in possession. If the Act supposed that the expenses of every kind were to be taken out of the principal, what meaning can be given to this word *if*. The meaning obviously is, that the accumulated fund was to be made liable, in the first instance, both for the original principal sum and the expenses; and it was only in the event of its leaving a surplus over both of these that the Act gives any claim to the heir. In the present case there is no such surplus, as the accumulated fund, under deduction of the expenses, does not exceed the price obtained for the lands sold. If there had been no provision in the Statute as to accumulation, the heir's claim to the interest, as a *surrogatum* for the rents, could not well have been disputed; but as the provision, though rather unusual, forms part of the Act, I do not see how it can receive any other interpretation than that which your Lordships have given to it.

The Court *refused* the petition.

Act. Pyper, Tawse; Tawse and Bonar, W.S., *Agents.*—*Alt.* Penney, Mure; Hunter, Campbell and Co., W.S., *Agents.*—*N. Clerk.*—[H.B.]

27th January 1842.

FIRST DIVISION.—(H. B.)

No. 97.—THE GLASGOW and SHIP BANK and SIR WILLIAM FORBES and COMPANY, *Raisers, v.* ALEXANDER STRUTHERS (*Craig's Trustee*), and the COMMERCIAL BANK of SCOTLAND, *Claimants.*

Bankrupt—Sequestration—Competition—Bank—Mandate—Letter of Credit—*In a competition between the trustee of a sequestrated bankrupt and a bank, for the proceeds of a letter of credit, "payable after the 7th" by another bank,—the bank having cashed the letter on the 2d, on the holder's indorsement, and the sequestration having been awarded on the 6th—Held that the bank was to be preferred.*

On the 1st July 1839, William M'Gavin, agent in Dundee for John Craig, paid into the branch of the Glasgow Ship Bank at Kirkcaldy the sum of £1528. 2s. 4d., and obtained from George Anderson, the agent there, the following letter of credit on Sir William Forbes and Company:

"£1528. 2. 4.

*Glasgow and Ship Bank,
Kirkcaldy, 1st July 1839.*

"GENTLEMEN,—After the 7th inst., please to honour the drafts of Mr John Craig to the extent of fifteen hundred and twenty-eight pounds 2s. 4d., on account of the Glasgow and Ship Bank Company. I am, Gentn., your most obedient Servant."

(Signed) "G. ANDERSON, Agent."

(Addressed) "SIR WM. FORBES and Co., Edinburgh."

On the 2d July, Robert M. Craig, son of John Craig, presented the letter of credit at the agency of the Commercial Bank at Leith, and obtained cash for it, *minus* the discount, amounting to £1. 0. 10., on indorsing it "pr. pron. of John Craig—Robt. M. Craig." The same day, R. M. Craig lodged in his own name, in the hands of Mr James Balfour, the agent for the Wine Company of Scotland, the sum of £2500, being the proceeds of the letter of credit and certain other sums. On the 6th of July (the 7th being Sunday) the letter was presented to Sir William Forbes and Company, who declined to make payment, on the ground of their not being in safety to do so in consequence of an application having been previously made for sequestration of John Craig's estates under the Bankrupt Act. On

the same day (6th July) sequestration was awarded. At this date, the sum remaining in Mr Balfour's hands was £2250—R. M. Craig having two days before (4th) drawn £250. On the 17th July, Mr Paul, manager of the Commercial Bank, addressed the following letter to R. M. Craig:

"SIR,—Having reference to the statement made by you, that the £1528. 2. 4., being the proceeds of the letter of credit on Sir William Forbes and Company which you cashed with our agent at Leith, are still in your hands, we require of you to keep the money in your possession, as unless we are paid the money we advanced, we hold you liable for the transaction. I am," &c.

On the 19th, R. M. Craig paid over the sum of £2004. 19. 10. to Mr Alexander Struthers, then the interim factor, now trustee, on Mr John Craig's estate, on obtaining the following letter:

"As interim factor for Mr Craig's creditors, I am very anxious to have deposited in the bank all the money that is available; and as you have some hesitation to pay me the £2004. 19. 10. in your care, lest you should be put to trouble and expense by other parties for so doing, I hereby engage to free and relieve you from any law expenses that you may incur by paying over to me for the creditors the above sum, and also guarantee you for any risk you may incur of being called upon to pay the money a second time. I am," &c.

At a meeting of John Craig's creditors on 2d January 1840, the claim of the Commercial Bank to be preferred for the amount of the letter of credit was discussed, when the majority of those present recommended that the trustee should indorse the letter of credit to the bank, and enable them to obtain payment. The recommendation was not adopted, and in consequence the present multiplepointing was raised by the Glasgow and Ship Bank and by Sir William Forbes and Company, in which the trustee claimed to be preferred, and

Pleaded—1. By virtue of the said sequestration, and decret of adjudication and confirmation, the claimant Alexander Struthers, as trustee foresaid, has acquired right to the said sum of £1528. 2. 4., and interest due thereon. 2. The letter of credit founded on not being transferable, no right was conveyed to the bank by the alleged blank indorsation by Robert M. Craig. 3. As the sum mentioned in the letter of credit did not become due to Mr Craig till the 7th July 1839, and as Mr Craig's estates were sequestrated on the 6th, the said sum being part of his estate, became the property of the general body of the creditors. 4. The alleged proceedings at the meeting of creditors of 2d January 1840, are no bar to the claimants' insisting in the present claim.

The Commercial Bank **pleaded**—1. The claimants having advanced the amount stated in the letter of credit in the circumstances set forth, are exclusively entitled to the fund *in medio*, in respect that from the date of such advances, they came to have the only real and substantial interest therein, and that the holders thenceforward were in possession of the funds for their sole behoof. 2. The claimants ought to have received payment of the fund *in medio* when payment of the amount was demanded from Sir William Forbes and Company on 6th July, and having been wrongfully refused payment, are now entitled to be preferred to the fund. 3. The resolution of the creditors, at their meeting of 2d January 1840, is binding on them as a

body, and excludes the trustee under the sequestration from claiming the fund *in medio*, and neither he nor the parties whose names are associated with him in the opposing claim, have any right, title, or interest, in and to the fund. 4. Mr John Craig, or the trustee on his sequestrated estate, having already received payment of the amount contained in the said letter of credit, and entered the same to the credit of Mr MacGavin, by whom the amount was remitted, his creditors have no longer any right or claim to the said fund; and as Mr Craig himself could not have claimed the amount in competition with the claimants, his creditors are in no better situation. 5. The claimants having advanced the amount of the fund *in medio* to Mr Craig, any right or interest which remained in him after the date of such advance, was in the character of trustee for their behoof, and such right or interest could only be attached by his creditors, subject to the latent equity in the claimants. 6. The advances made by the claimants on 2d July, having been set apart by Mr Robert M. Craig, and being still in his hands at the date of the sequestration, and the interim factor and trustee, for behoof of the creditors, having thereafter received the same in the manner stated, is excluded from claiming the fund *in medio* in competition with the claimants. 7. At all events, the claimants are entitled to demand repayment of the amount of these advances from Mr R. M. Craig, supposing the legal right to the fund *in medio* not to be in them but in the creditors of Mr Craig, and in this situation the claimants ought to be preferred to the creditors, seeing that in that event they are bound in relief to Mr R. M. Craig.

The Lord Ordinary pronounced the following interlocutor:

"18th December 1841.—The Lord Ordinary having heard counsel on the claims of the respective claimants, and thereafter considered the whole process and productions, sustains the claim of the Commercial Bank, and prefers them to the fund *in medio*; Repels the claim of the trustee on the sequestrated estate of Mr John Craig, and decerns: Farther, finds no expenses due to either party.

"**Note**.—The competitors in the present multiplepointing respectively claim a large sum, contained in a letter of credit, addressed by the agent for the Glasgow Bank at Kirkcaldy to Sir William Forbes and Company, as the agents for that bank in Edinburgh. That letter was transmitted to Mr John Craig, recently before his failure, by Mr M'Gavin of Dundee, who owed him a corresponding balance. It was dated at Kirkcaldy on 1st July 1839, and in the usual style of such letters, the Kirkcaldy Bank requested Sir William Forbes and Company to honour the drafts of Mr Craig to the amount specified, on or after the 7th of July. The agent for the Commercial Bank at Leith gave Mr Craig full value for the amount of this credit on the 2d of July, on delivery of the letter of credit, with a blank indorsation by Robert Mark Craig 'per procuracion' of his father, Mr John Craig. As the 7th of July 1839 fell on a Sunday, the bank presented the letter to Sir William Forbes and Company for payment early on the forenoon of Saturday the 6th July, but payment was then refused, on the ground that, by that time, an application had been presented for sequestration of Mr Craig's estate. It appears that the sequestration was not actually issued at that moment, but it certainly was awarded soon after, and Sir William Forbes and Company have brought the present process to determine the claims of the bank and of the trustee for Mr Craig's creditors to the sum specified in the said letter. The Lord Ordinary has preferred the Commercial Bank on the following grounds:—

"1. If the letter of credit be subject to no objection on the stamp-laws, the claim of the Commercial Bank in that view

was, it is apprehended, complete, by the delivery and indorsement to them of the letter of credit for full value received.

"The transaction here is somewhat different from that which would have occurred if Mr Craig had given an ordinary check on a banker holding his funds and payable on demand. On the day that he delivered and indorsed for value the letter of credit to the Commercial Bank, he had no money in Sir William Forbes and Company's hands. He held an order on them to pay him a certain sum on a future day, and when he gave up and indorsed that order to another party for value, it is apprehended that he was thus divested of all legal and equitable interest in the obligation.

"It is assumed by the trustee in his argument, that the letter of credit was *not transferable*, but the Lord Ordinary is not aware on what authority that proposition is maintained. The case is totally different from those in which letters of credit are given by parties to friends, to make *discretionary* advances to another on a personal introduction, as exemplified in the case of Phillips and Melville, Fac. Coll., 21st February 1809. The document here was a mandate to receive money *de futuro* in payment of a debt, and there is no reason or principle to prevent the holder of such a voucher from raising money on it for full value in the ordinary course of the trade. Even in the case of money or debts presently exigible, it is laid down by Mr Bell (Vol. II. p. 20), 'that money due by open account may either be conveyed by assignation, or by draft, order, or bill of exchange'; and he adds, 'that book debts may be conveyed by indorsement, to the effect of authorising the assignee to bring an action—the indorsement in such case being held as a mandate or letter directing payment to any factor or servant, and it does not require a stamp.—Laurie v. Perry Ogilvie, Fac. Coll., 6th February 1810.

"In England, also, it appears to be quite settled, that such delivery to a creditor would give the party receiving it a special *lien* over the fund, preferably to the creditors and assignees on bankruptcy of the assigner. Thus, in the case of Yeats v. Grove, in 1791, 'the holder of a note gave it up, on receiving an order to be paid out of a certain purchase-money of the debtor's property. It was not accepted; but purchaser verbally agreed to give the holder notice to attend when the deeds and money were ready. He did attend accordingly, but before the business was over, drawer was arrested, and soon after a bankrupt. It was determined by Lord Thurlow, Chancellor, that the holder had a *lien*, the order not being in contemplation of bankruptcy, though he knew drawer to be insolvent at the time.'—1 Vesey, jun., 280. There was an earlier determination to the same effect by Lord Hardwick, in the case of Roe v. Dawson, in 1749 (1 Vesey, p. 331.)

"II. It is objected, however, that the obligation or mandate now in question, when indorsed and transferred by the original holder, required *intimation*, in order to complete the right of the assignee; and it is added, that a sequestration took place before there was any intimation here to Sir William Forbes and Company; but it is apprehended that this plea is neither well-founded in law or in fact in the circumstances of the present case. In the *first* place, the Lord Ordinary conceives, that this was not a case which required intimation to complete the right of an onerous assignee for value. The letter of credit here was a mandate by a bank on their agents in Edinburgh, to pay money to a party on a definite day afterwards. That mandate gave a complete right to Mr Craig to draw the money, without any further intimation to the agent in Edinburgh than the bank itself would give; and in like manner, if Mr Craig was not precluded from transferring the mandate, it is rather thought that the indorsee or assignee did not require to intimate it till the day the money was due, as payment could only be made to the party who presented the draft.

"In the *next* place, however, it is hardly disputable here, that sufficient intimation was actually made of the Commercial Bank's right to Sir William Forbes and Company, in time to secure the preference of the former, in a question with the trustee in the sequestration. For, it is conceived to be clear, upon the statement in the 5th article of the condescendence for the bank, and from the trustee's answer thereto, that the *letter of credit* was presented to Sir William Forbes and Company by the Commercial Bank, at a period of the day, on the 6th of July, prior

to any deliverance on the application for Mr Craig's sequestration. The distinct allegation of the bank on this point is not met with any explicit denial on the part of the trustee, which he should have given upon a matter of fact which he could have ascertained at any time, by due inquiry at the respectable house in this city to whom the letter of credit was addressed.

"But still farther, the formal protest taken by the Commercial Bank, at a subsequent period of the day of sequestration, would be sufficient to secure the preference of the bank, according to the Statute of Sequestration then in force. This was the Act of 1814, according to which an onerous assignee could secure his preference by intimation of his right, at any time before the trustee was vested by *special conveyance* in the moveable estate of the bankrupt. That point was settled in the case of Buchan v. Farquharson, 24th May 1797, Dict., p. 2905; and though a more comprehensive provision is made for vesting the personal rights of bankrupts in trustees under the last sequestration law, that of course cannot affect the present question.

"III. Even if the letter were held to be a document *not transferable* by indorsement, or if the document were viewed as objectionable on the want of stamp or otherwise, it is thought the preference of the Commercial Bank would be equally clear. In that case the money, after the bankruptcy of Mr Craig, would fall to be still held as deposited in the bank of Kirkcaldy, at the credit of Mr M'Gavin, the original creditor. The extract from the books of the bank at Kirkcaldy produced, show that Mr M'Gavin raised the necessary sum to purchase the letter of credit, by discounting a bill, and having thus got an adequate sum at his credit, he thereafter desired the bank agent to send the letter of credit to Mr Craig in payment of his debt. It is quite clear, from that mode of carrying through the transaction, that Mr M'Gavin's debt to Mr Craig is not discharged till this letter of credit is paid and retired. In an analogous case in England, it was found, that a debtor who sends a *bank-check* in payment of an account is still liable in recourse, if the banker fail before payment of the cheque (Brown, 2 Bos. and Pal. 518.) Hence, if there was any invalidity in the letter of credit given by Mr M'Gavin to Mr Craig, the fund *in medio* must be held to be still vested in the person of Mr M'Gavin,—he would thus remain the debtor of Mr Craig till he could show that the money was paid.

"In this view, if there were any nullity in the letter of credit, the trustee would have to recur to Mr M'Gavin for payment of the sum which he now claims. But if the Commercial Bank can show that they have paid this very debt to Mr Craig, they would be entitled to interpellate the trustee from demanding payment of this debt from the debtor. As the implied assignees of the original creditor, they would be entitled now to demand the money from M'Gavin, and the trustee would be barred, both on the principles of law and common honesty, from demanding payment a second time of this, or any other old claim of the primary creditor. The whole principles of the bankrupt law are opposed to any such inequitable stretch of the trustee's rights.

"IV. Finally, the claim of the trustee in the present instance is thought to be less reasonable, as it appears that when R. M. Craig, junior, got cash on this letter of credit on 2d July, he did not mix it with his father's funds, but for some purpose (not explained) he placed it, and certain other sums which he received at the same time, in the hands of Mr Balfour, manager of the Wine Company, Edinburgh. This money remained deposited in Mr Balfour's hands till after the sequestration of Mr John Craig; and as R. M. Craig was bound, both in law and propriety, to warrant the validity of his transference by indorsement of the letter of credit, for which he had got full value, the Commercial Bank would have been entitled to recourse on him if the document was not negotiable, and the transference null. This seems to have been intimated to R. M. Craig, and he only consented to Mr Balfour giving up the money to the trustee on his *guarantee* to protect R. M. Craig against any claim from the bank. In this manner the trustee has truly got the contents of the letter of credit from R. M. Craig, while he seeks payment a second time from Mr M'Gavin's bankers. It is conceived to be clear that such a claim cannot be supported. For the present the Lord Ordinary has superseded the action

brought against R. M. Craig till the issue of competition in this process."

Both parties reclaimed—the trustee on the merits, and the bank against the refusal of expenses.

At advising,

Lord Gillies.—After listening with all the attention in my power to the able and ingenious arguments of the bar, I am satisfied that the interlocutor of the Lord Ordinary should be affirmed. One of the trustee's pleas in law is, that by virtue of the sequestration, he acquired right to the sum in question. The answer to this is, that he got the money; and I think the answer is sufficient. It is clear, that in consequence of the letter of credit, he has received a sum of £2000, which is more than the claim in the multiplepounding. Should the trustee, therefore, succeed in his claim, the effect will be a clear gain to the creditors of £1500. I am told this is an ordinary case. To me it seems a most extraordinary case of injustice. It is just a case of double payment. The trustee first gets the money, and he now claims to get it over again. This is the only view I can take of the matter, and the law must be clear indeed before I can give my consent to any thing so flagrantly unjust. The nature of a letter of credit is perfectly understood. Formerly, a party on going to a distance—to London for instance—got a bill; but now a letter of credit is universally adopted. It is precisely of the same nature as a draft or order. It always bears a term at which it is payable, and the number of days depends on the distance of the place. When drawn in London, the period is twenty days. A person leaves Edinburgh with such a letter in his pocket, and arrives in London in forty-eight hours after. The day of payment has not arrived, but still the letter of credit is just as good as cash. Perhaps he does not want the money till the day of payment expires, but if he does, he finds no difficulty in obtaining it, by putting his name upon the letter of credit, and so enabling the person who advances the money to fill it up, and make it an order payable to himself. That was exactly the case here; and the letter of Sir William Forbes and Company satisfies me that the custom of bankers is to pay in this way. The letter of credit was presented to them on Saturday; and it is clear, that if in practice it had not been held to be then due, the answer would have been, we cannot pay, for it is not due till Monday. Instead of this, they put their refusal entirely on the sequestration, which, they say, made it doubtful "if they could, or were in safety to pay."

Lord Mackenzie.—I have arrived at the same result, though perhaps not precisely on the same grounds. I am satisfied, in the first place, that a letter of credit is not transferable, and if made so, would be null for want of a stamp. It cannot be indorsed, so as to make it payable to the indorser himself as the proper party; but, on the other hand, I think that the indorsement, or putting of the name on the back, is a proper mode of explicating the draft so as to obtain payment. But I can't say I am so well satisfied, that when the draft is made payable on or after a certain date, it is in the power of the party previously to execute an order which shall be completely valid to confer a right to the holder to receive payment. Say a long period were to elapse before the day of payment,—a year, or a month,—and the party in right of the letter, the day after giving authority to a third party to draw the amount, to become bankrupt, would that be an effectual transfer in a question with his creditors? I doubt very much if it would. I suspect the authority is of no validity before the day of payment. There may, indeed, be no date expressed, but the earliest that can be supposed, is that on the face of the letter itself. But it is said, that by the practice of bankers, an order to pay on the 7th, if that proves to be a Sunday, is held to be an order to pay on the 6th. I am not in a condition to determine whether this is the practice or not. Were I disposed to go upon this ground, I would think it necessary to go into a proof; but I am rather inclined to go upon the other ground, that the letter was not paid to the bankrupt himself, but to his son. The son got the letter, and gave it to the Commercial Bank, from whom he received payment. Then he does not pay over the amount to the father, but keeps it as his own. The bank becoming doubtful if they could make the letter of credit available, call upon him to take it back, and refund

to them. Was this incompetent? Undoubtedly not. He, however, instead of doing this, pays over the sum to the trustee on receiving a letter of indemnification. The effect of this is, that if he is liable to the bank, the trustee must refund. On that view, the trustee cannot in equity make a claim in the multiplepounding.

Lord Fullerton.—I feel a considerable difficulty in this case, but after considering it as attentively as I can, I am inclined to concur in the view taken by the Lord Ordinary. I confess I am not much moved by the circumstance that the money was still in the hands of the son, as received from the Commercial Bank, and that the trustee, if successful, would be getting payment twice. That does not seem to be the legal ground on which the case is to be decided. For, if we are satisfied that the document was not available to transfer the right, the payment made by the bank would just be an advance; and in the circumstances, an advance on a bad security. The result is, not that the creditors receive payment twice, but receive payment once, and along with it other money that belonged to their debtor. Cases of this kind occur every day. Take the case of a debt which has been assigned for value, but before intimation is made, the creditor in the debt becomes bankrupt and is sequestrated. Could it be said, that because the money received for the assignation is still extant among their debtor's effects, the creditors, by claiming payment from the original debtor, are demanding double payment? They, in fact, get two sums, but the one which came through the assignee was just an advance on a bad security. But on looking at the document, I rather think that the claim of the Commercial Bank ought to be sustained. For what is the effect of the document? Both parties agree that it cannot operate as a bill. It is merely a mandate by the Glasgow Bank to Sir William Forbes and Company to honour drafts upon them to the amount contained in the letter. But from its very nature, the mandate can only be made effectual by the person who holds the document. When, therefore, the document was put into the hands of the Commercial Bank, it was just a mandate authorising them to draw the amount from Sir William Forbes. It was given for this very purpose. What, then, is the effect of such a mandate? Could it have been recalled at once by the creditors? It was not an ordinary gratuitous mandate, but a mandate for behoof,—the mandatory becoming *procurator in rem suam*. Such a mandate cannot be recalled. This mandate to draw money was not effectual without the document. The party in right of it wants money, and applies to the bank, who agree to advance on receiving the document. Is not this mandate irrevocable? Until the bank be made *indemnified*, neither the bankrupt nor his creditors are entitled to recall the mandate, or maintain action for redelivery of the document. Then, if they can't get the document, how are they to get at the money? It is clear that Sir William Forbes will not pay without the document. The true question then is, could the trustee re-demand the letter of credit from the bank? On the ground stated, I am clear that he could not. The mandate which placed it in their hands is irrevocable, and in virtue of that mandate they are clearly entitled to keep it until their advance is fully repaid.

Lord President.—This is a question of considerable nicety, and I am not sure if it would not be desirable to take more time to consider it; but if I am to give my opinion now, I must say, that I concur in the view of the Lord Ordinary, though without meaning to adopt every thing contained in the four pages of his note. I am inclined to go on the grounds just stated by Lord Fullerton. In my view, there is nothing in the letter making it impossible to render it available before the date of payment. There is nothing in the stamp-laws to prevent the party in right of it to put it into the hands of another party, so as to constitute him the holder. Then the Commercial Bank were made the *bona fide* holders. They not only advanced the amount, but that very amount, after being deposited in the hands of the Wine Company, is afterwards paid over to the trustee. That identical sum is just the fund *in medio* in this multiplepounding, and I cannot help thinking that the trustee, in again claiming it, is seeking something very like double payment. I go more, however, on the other ground taken by Lord Fullerton, that the bank now stand in the shoes of Craig, and hold a mandate which cannot be recalled, until made *indemnified* for the advances made on the faith of it.

The Court adhered.

Lord Ordinary, Cuninghame.—For *Commercial Bank*, Rutherford, More, Cowan; J. A. Campbell, W.S., *Agent.*—For *Craig's Trustee*, Solicitor-General (M'Neill), Anderson, Johnstone; Thomas Johnstone, S.S.C., *Agent.*—B. Clerk.—[H.B.]

27th January 1842.

SECOND DIVISION.—(J.W.)

No. 98.—JOHN GRAHAM, *Suspender and Pursuer, v. HIS GRACE THE DUKE OF HAMILTON, Respondent and Defender.*

Superior and Vassal—Investiture—Parts and Pertinents—Reservation—Precept of Clare—Coal and Limestone, Reservation of.—*In terms of the original rights and infeftments in certain lands, the dominium utile, together with the whole parts and pertinents thereof, including the coal and limestone, were acquired free of any reservation in favour of the superior. A reservation of the coal and limestone began to be inserted in the titles about sixty years back, for the first time, in a precept of clare constat, and subsequently in successive charters; but the minerals were never wrought—Held that the property of the coal and limestone was in the vassal, and that the reservation in favour of the superior was inserted without warrant.*

The present question regards the right to the coal and limestone within the lands of Gilbertfield, Overton and Bellhouseside, of which the pursuer is proprietor, holding of and under the defender as his superior.

The *dominium utile* of the lands was separated from the superiority by a feu-disposition, dated 1657, and by the instrument of sasine following thereon, the vassal was infeft in the said lands, parts, pendicles, and haill pertinents thereof whatsoever, without any reservation of the coal in favour of the superior. In some of the subsequent infeftments the instruments state, that the lands were to be held by the vassal "*cum domibus, edificiis, hortis, toftis, croftis, pasturis, carbonibus, carbonariis, moris, maresiis, partibus, pendiculis et omnibus aliis suis pertinent. quibuscunq;*" and a charter of confirmation and *novodamus* was granted by Ann Duchess of Hamilton in 1701, the tenendas of which is in these terms:

"Holding and for to hold all and haill" the said lands of Gilbertfield and Overtown, "with houses, biggings, yards, palrte, pendicles, and pertinents thereof whatsof. &c. in feu-forme and heritadge for ever. By all the rights, maiths, and marches of the same, old, new, and divydit, as the same lyes in length and breidth, with houses, biggings, yards, orchards, meadows, pasturs, moss, muirs, woods, fischings, hunting, haulking, doves, dovebots, cunnings, cunningairs, coall, coalheughs, lyme, limestone, and all uther liberties, privileges and immunities thereof, alseweill not named as named, alseweill under the ground as above the same, far and neir, without any revocation or obstacle in the contrair."

It was not till the investiture came to be renewed in the person of John Hamilton, as son and heir of Gabriel Hamilton his father, in 1778, that, in a charter of confirmation and precept of *clare* in his favour, there was inserted, immediately preceding the warrant of infeftment, the following clause:

"Reserving always to the said Duke, his heirs and successors, the coal and limestone within the bounds of the haill lands above mentioned, so that the said Duke and his foressaids may set down coal-pits, shanks, and sinks, and win coal and limestone within any part of the bounds of the said lands, and may have liberty to make all engines and easements necessary, with free ish and entry for the working, keeping, sale and away-taking thereof; they always giving satisfaction to the said John Hamilton and his foressaids for any loss, skaith, or damage they

shall sustain by the downsetting of any such coal-pits, sinks, or shanks, or by the winning of the said coal and limestone, or by the roads and passages for the away carrying of the same."

This charter and precept bears to have been granted by a quorum of commissioners specially constituted by Douglas Duke of Hamilton,

"for managing his affairs, and specially to enter and receive his Grace's vassals in all lands and others holding of him within Scotland, conform to the tenor of their old infeftments, and agreeable to the laws and practice of Scotland, and to grant all writs necessary for that purpose."

The lands were possessed by John Hamilton under his infeftment till his death in 1826, when he was succeeded by his son Gabriel Hamilton Dundas, who procured himself infeft therein under a precept of *clare*, obtained from the commissioners of the defender, dated 5th February 1827,—Mr Dundas having in the mean time disposed the subjects to certain trustees for behoof of his creditors, with powers of sale, and who were infeft therein in September 1826.

Thereafter the lands were purchased from the trustees of Mr Hamilton Dundas by the trustees of the deceased Adam Graham of Craigallian, conform to disposition in their favour, and infeftment following thereon in November 1827. These conveyances, viz., the conveyance by Mr Dundas to his trustees, and the conveyance by the latter to the trustees of Mr Graham, were of the whole subjects held by the vassal, in terms of their original feu-rights, without any reservation or qualification; and from Mr Graham's trustees the pursuer acquired right to the subjects in 1828. After he obtained his conveyance, he applied to the superior for an entry, which was granted, subject to the following qualified reservation inserted in the charter of confirmation:

"Reserving always to me and my heirs and successors, so far as we may have right thereto, the coal and limestone within the bounds of the whole of the said lands," &c.

No attempt was ever made, either by the defender or the pursuer, to work the coal in the lands, or any part of them. Recently, however, the defender intimated that he held himself entitled to work the coal, when the pursuer presented a note of suspension and interdict, which came to be advised upon answers, and the Lord Ordinary granted the interdict, upon the grounds stated in the following interlocutor:

"13th March 1839.—The Lord Ordinary having considered this note, with the answers and titles produced, in respect, 1^{mo}, That it is stated and admitted that the coal of the lands mentioned in the note are now proposed to be wrought for the first time by the noble respondent; 2^{do}, That the later charters, containing a reservation of coal from 1778 downwards, appear to be directly at variance with the older titles, which vested the complainer's predecessors, the vassals, with the coal, while it is proved by the deeds produced, that the charters of the same subjects, flowing from his Grace's authors, whom he represents, not only contained no reservation of any minerals, but confirmed the vassals' rights thereto; 3^{io}, That it appears reasonable, in this peculiar state of the titles, that the complainer should have an opportunity of trying his right to the minerals, either by declarator or reduction, as he may be advised, before any innovation takes place in the possession; passes the note, and continues the interdict."

An action of declarator was thereafter brought, with which the suspension and interdict was conjoined,—concluding,

"that the pursuer, and his predecessors and authors, had and

have the sole right and property of the said lands and others, and whole parts and pertinents thereof, including the said coal and limestone therein, free and disencumbered of any right or reservation in favour of the said noble defender and his successors, superiors thereof, and as fully and freely as if the deeds herein before referred to had not contained any such reservation;" and "that the said noble Duke has no right thereto, and ought to be interdicted from interfering with the pursuer in his possession and enjoyment of the same."

A summons of reduction was also brought, by the conclusions of, which the clause of reservation in the precept of *clare* 1778, and its repetition in the subsequent precept in 1826, as also in the charter of confirmation in the pursuer's favour, is sought to be reduced and set aside.

A record having been made up, the Lord Ordinary appointed the parties to prepare and lodge revised cases.

Pleaded for the pursuer—

1. An unquestionable right to the coal and limestone of the lands in question, and within the bounds thereof, was vested in the proprietors of the *dominium utile*, in virtue of the titles referred to in the record, long anterior to the charter of confirmation and precept of *clare* 1778; and at the date of that deed the superior had no right or title to the said coal and limestone more than to any other part of the *dominium utile*. 2. According to the sound construction of the clause in the charter and precept 1778, founded on by the superior, and more especially, and *inter alia*, having regard to the circumstances in which it was introduced, the declared purpose for which the deed was granted, the existing state of the titles at its date, and the established rights of the vassal, the reservation therein of right to the coal and limestone cannot be held to import, or to have been intended to import, more than that; whatever right was at the time in the superior, under the existing investiture, should remain unaffected by the entry of the heir, and be as entire as if a renewal of the investiture had not been granted, and the words ought to be viewed as of no greater efficacy than the qualified reservation inserted in the later titles. 3. The reservation, if intended to do more than preserve entire whatever rights were at the time in the superior, was wholly inept and void. And more especially, and *inter alia*, was it so, *first*, Because of the want of power on the part of his Grace's commissioners to go beyond the terms of the old infeftments in the renewal of the vassal's rights in the person of his heir: *Second*, Because, although the precept of *clare* had been granted by the superior himself, a reservation therein was an inabillie and inept mode of his acquiring any part of the *dominium utile*, and the nature and extent of the right in the vassal could not be so altered and limited: *Third*, Because the right to the coal and limestone, having been once separated from the superiority, became liable to be dealt with according to the same principles in regard to its re-acquisition by the superior with the *dominium utile* itself, as an *unum quid*, or any part or portion thereof: *Fourth*, Because, in the whole circumstances, it is evident that such an extensive meaning as is now attempted to be fixed on the reservation, could not have been contemplated by the vassal, and that any clause having that effect must have been introduced wrongfully, and *per ambages*, and is consequently not entitled to receive effect. 4. Supposing it to be held that, because of the reservation, no feudal right passed to the vassal in the coal and limestone under his infeftment following on the deed 1778, the right thereto, although personal, must nevertheless be held to be exclusive in the vassal, and to belong now to the pursuer, under the successive transferences mentioned in the record. 5. The defender having confirmed the titles by which the lands, with their whole pertinents, were conveyed to the pursuer, subject only to be restricted by such right to the coal and limestone, *qua* superior, as he might be found to possess,—*1st*, This is expressive of what had been all along the understanding of parties in regard to their respective rights, and is conclusive of the limited and qualified construction of the charter 1778, contended for by the pursuer: *2d*, and *separatim*, The defender is thereby barred from objecting to the right of the

pursuer to the coal and limestone, in the event of its being held that the defender himself has no right thereto, and it is, moreover, *jus tertii* on the part of the defender to object, in that event, to a declarator of the pursuer's exclusive right.

Pleaded by the defender—

1. It is not competent, on the grounds libelled, merely to declare that the noble defender has no right or title to the coal and limestone in the lands in question, and that the pursuer has the sole right and property of the minerals, as well as of the lands themselves, inasmuch as the Court could not decern and declare in terms of the conclusions of this summons to that effect, by virtually reducing and setting aside an important quality and condition in the existing investiture, which has been acknowledged and acted upon, and renewed for upwards of forty years. And this, the more especially as the pursuer alleges (*1st*,) that the writs and evidents were obtained from, or granted by, commissioners who had no power to grant them. And (*2d*,) that the reservation was inserted wrongfully and *per ambages*, or otherwise contrary to the laws and practice of Scotland. 2. As the pursuer and his authors have possessed the lands in question, and been duly infeft therein for upwards of forty years, under titles which were accepted by them with, and which contain an express quality and reservation in favour of the superior of right to the whole coal and limestone in the said lands, the pursuer is now personally barred from asking, and is not now entitled to have his qualified right to the lands declared to be an absolute and unqualified right, or to have it declared that the noble defender has no right to the coal and limestone, and that he ought to be interdicted from working the same. 3. The right of the superior to work the coal and limestone, being *res mare facultatis*, is neither lost nor anyways impaired by its not having been exercised for forty years, the more especially as there has been no exercise of any adverse right of working coal and limestone, or any prescriptive right acquired by the vassal to work them. 4. It was competent, and perfectly legal for the superior, in renewing the investiture to the heir of the former vassal, to reserve the minerals in the lands, and the reservation in the progress of titles in question is not inept and void: Bell's Principles, § 1821. Magistrates of Edinburgh v. Straton, 27th June 1777; Brown's Supplement, Vol. V. p. 612. 5. As the pursuer's authors, the vassals in the lands, accepted of the charters and precept under an express quality and reservation, upon which they have acted for upwards of forty years, the right so reserved by the superior is not now voidable, and cannot competently be declared to be of no legal effect on the grounds libelled, or any of them. 6. The commissioners of Douglas Duke of Hamilton had full power, by their commission, to reserve the minerals to his Grace and his successors. 7. And at all events, having accepted of the charter of confirmation and precept of *clare constat*, with the reservation, and having likewise accepted of renewals thereof, the pursuer is barred, *personali exceptione*, from maintaining that the insertion of the reservation was *ultra fines mandati* of the commissioners of Douglas Duke of Hamilton. 8. On a sound construction of the reservation in the charter and precept in 1778, and in the subsequent renewals of the investiture of the coal and limestone in favour of the superior, the reservation is not of the limited or qualified nature and import contended for by the pursuer; on the contrary, it legally and validly reserves right, without any limitation to the coal and limestone. 9. There is nothing in the circumstances of the case to indicate that the reservation was introduced wrongfully and *per ambages*, or otherwise, than by a paction between the superior and vassal, and consequently the right to validly reserve ought to receive full legal effect. 10. There is no ground in fact or in law for the pursuer's hypothetical plea, that if no feudal right passed to his author in the coal and limestone by virtue of his infeftment following upon the charter of confirmation and precept of *clare constat* in 1778, the right thereto, although personal, must nevertheless be held to be exclusively in the vassal, and now to belong to him under the successive transferences mentioned in the record.

The Lord Ordinary made avizandum with the cause to the Lords of the Second Division, and accompanied his interlocutor with the following note:



" This case is entitled to the deliberate consideration of the Court, from the importance of the question raised in it in the law of title, and from the probable value of the minerals involved in the issue.

" The question which occurs is, Whether the superior can found on certain *reservations* of minerals, inserted in his own favour in the later charters of renewal granted to the vassals, in order to support a complete and preferable right to these pertinents in opposition to the original grants by his ancestors, which not only were framed without any *reservation*, but contained a specification of coal and lime as included in the pertinents alienated to the vassal? The Lord Ordinary, as at present advised, considers the plea of the vassal to rest on the most solid grounds, and he will explain, as briefly as the nature of the case admits of, the grounds on which he has come to this conclusion.

" I. Upon the state of the titles detailed in the record, it seems impossible to doubt that the noble superior's predecessors alienated these lands to the predecessor of the pursuer, with all pertinents, *including minerals*. Certain criticisms are made on these titles which scarcely deserve any remark; as, for example, that the specification of coal, founded on by the vassal as one of the pertinents enumerated, occurs not in the dispositive clause but in the *tenendas*. As the minerals are included in the property, the conveyance of the one does, both in ordinary and in technical language, comprehend the other.

" In like manner it is objected, that while the earlier infeftments in the seventeenth century distinctly specify coal as forming part of the pertinents held by the vassal, the precepts or dispositions on which these sasines proceed are not produced. That objection is plainly obviated by the express terms of the Act 1617, which provides, that 'where there is no charter extant, they' (parties founding on a prescriptive title) 'show and produce *instruments of sasine*, one or more, confirmed and standing together for the said space of forty years, either proceeding upon *retours* or *precepts of clare constat*.'

" The present case, however, does not rest on these registered infeftments alone, though these are still unchallenged. The charter of confirmation and precept of *clare constat*, granted by Duchess Ann of Hamilton in 1701, is produced, and that of itself is conclusive—more especially following and confirming the prior infeftments. Among the subjects stated in that deed to be comprehended in the charter of *novodamus* which she granted in reference to Gilbertfield and Overton, there is a distinct and specific mention of 'coal and coal-heughs.' Moreover, in the prior part of that charter, her Grace confirmed the disposition granted by Robert Cuninghame (the first) to his son on 15th September 1677, and the instrument of sasine taken thereon 'in the bail heads, articles and clauses thereof, in all, and by all things, as is therein expressed.' The sasine thus confirmed applied to the whole lands of Gilbertfield, Overton and Bellhouse side, and it specially set forth infeftment as having been given (see condescendence, article VI.) '*cum carbonibus, carbonariis, calce*,' &c. &c. These titles (on which alone the vassals held possession for more than a century) established irrefragably that the coal of the whole lands now libelled on was vested *ab antiquo* in the predecessors of the pursuer.

" II. The next inquiry is, If the vassal at any subsequent period *renounced* or *reconveyed* to the superior the minerals thus alienated by his predecessors?

" The noble superior hardly alleges this distinctly in point of fact, but his Grace's plea is founded on a certain *reservation of the coal and lime* inserted for the first time in a charter and precept of *clare constat*, granted by the commissioners of Douglas Duke of Hamilton to John Hamilton of Westburn in 1778 (first incorrectly expede in 1773), on which infeftment followed in the same year. But the Lord Ordinary entertains great doubt if that reservation can be construed as conferring any greater right on the superior, than a *saving* or *reservation* of such right as the superior could afterwards instruct to be competent to him over the said minerals anterior to the date of the charter. This inference seems to be justly deducible on the following grounds:—

" 1st, Assuming that the earlier titles produced, and the infeftments confirmed by the superior, vested a right to the whole properties feued *a celo ad centrum* in the vassal, the charter of 1778 professed to be, and was, both in form and substance, an *entire confirmation* of these rights. There was not only no recital that there had been any *new transaction* between superior and vassal, but the contrary is manifest on the face of the right itself. The ancient rights and holding of the said lands were ratified—it being specially set forth that the said lands, *with the pertinents*, were holden of Douglas Duke of Hamilton in *feu-farm* and heritage, for ever. They were held in feu, however, only by the deeds before recited,—the last of which, flowing from Duchess Ann, contained a grant of *coals and coal-heughs* among the pertinents held by the vassal.

" 2d, The charter and precept of 1778 contained a specification of the *feu-duties* payable by the vassals, which on comparison will be found to correspond precisely with the duties and casualties set forth in the previous charter granted by Duchess Ann of Hamilton in 1701. As that charter shows that these payments were exigible in part for the minerals as well as surface, the same right, if ever valid, must be continued to the vassal under the charter and precept of 1778.

" 3d, The form and clauses of the charter and precept of 1778 not only exclude the idea that there was any *renunciation* or *conveyance* by the vassal of any right previously vested in him or his predecessors; but if any such inference were deducible in law from the clause of reservation founded on by the superior, the right so claimed by the superior would be a right *sine causa*. The charter itself contains evidence that no new *transaction* took place, and no consideration was given by the superior to the vassal for the renunciation of any right vested in the latter; and it is proved by a marking on the face of the charter, and by other written evidence, that the vassal in 1778 paid £105. 5. 9., being the ordinary casualty exigible from singular successors in these feus for the charter then granted to him as an ordinary *renewal* of the investiture.

" 4th, In so far as any difficulty now occurs from the insertion of the clause of reservation in the charter and precept of 1778, it seems in part to be explained by the fact established by the titles themselves, that the same country agent (John Boyes) then acted *both for superior and vassal*, and he seems thus to have been led to overlook, or negligently omitted to check a claim or pretension on the part of the noble superior, which, possibly, a more impartial and better qualified adviser, acting for the vassal, would have at once rejected. Mr Davidson's letter in 1778 produced (see statement IV.), shows that Boyes had some charge or other for the Duke of Hamilton's commissioners at that period; while the infeftment produced, taken by Mr Boyes for Mr Hamilton of Westburn in 1778 proves that he also acted for the vassal. It may be doubted if a country writer at that period ought to be held as in any sense to be *peritus juris*, even if he had acted for Westburn alone; but when he was employed for *both superior and vassal*, it ought more particularly to bar the presumption, that any unusual clause, inserted in a deed to which it was not appropriate, was meant or understood to affect the rights of parties as constituted by the previous titles in the investiture then confirmed. The circumstance also mentioned by the pursuer, that the vassal, Mr Hamilton of Westburn, had occasion, when the charter under consideration was first drawn, to take out two other charters of lands from the same superior in which a similar reservation was properly and correctly inserted, goes far to explain the origin of the inapplicable and ineffectual reservation in the charter of the lands now in question.

" 5th, Although Mr Hamilton of Westburn's son, Mr Gabriel Hamilton Dundas, took a precept of *clare constat* from the noble defender, with a similar reservation in 1826, and though the pursuer, Mr Graham, also took a charter in 1828, with a reservation of the coal and lime, but containing this important qualification, '*in so far as he*' (the superior) '*may have right thereto*,' it seems to be undisputed that *no possession* has followed, from 1778 to the present time, on the reservation inserted by the noble superiors in these charters. In fact, neither party has yet wrought any coal or lime within these lands.

" III. Thus standing the facts; the question which arises in

point of law here is, Whether the minerals within the lands labelled on belong to the superior, in virtue of the later reservations, or to the vassal under the original titles before detailed? The Lord Ordinary humbly conceives the plea of the vassal to be insuperable in every point of view in which the case can be considered.

"In the first place, it seems to be a point quite settled in the law of Scotland, that a charter by a superior confirming a vassal's investiture, and a precept of *clare constat*, must in general be held to comprehend every thing included in the original grant. A distinction is drawn between a charter of resignation and one of confirmation, which is immaterial in the present case, as the charter of 1778, in which the reservation now founded on was first inserted, was, in point of fact, a charter of confirmation and precept of *clare constat* combined. But, even if it had been a charter of resignation only, it is apprehended that the superior could not validly retain or re-acquire any right by mere reservation, inconsistent with his predecessor's original grant. Cases may indeed be figured of new transactions between superiors and vassals, when investitures come to be renewed, just as well as at other periods; but when these very rare cases occur, the charter must contain some evidence that a change of the title, and a retention of part of the subject, was mutually intended and transacted between the parties. No such case is raised either upon the title or record in the present instance.

"The distinction between reservations in an original charter and those inserted in a charter of renewal, is too obvious and important to require illustration. In the former, the reservation is truly a restriction of, and exception from, the grant; in the latter it resolves, as the words in the strict sense import, into a protest and claim, *valeat quantum*, by the superior of his own preference for such right as he may be able to instruct to the subjects reserved. Accordingly, on this ground, a superior is entitled by law to reserve what he chooses in a charter of renewal. He cannot delay giving a charter to a vassal, so as to complete his title in respect of doubts or claims upon the vassalage, or any of its pertinents; but he may reserve what he pleases; and there is a whole chapter in the Dictionary, under the title of 'Superior and Vassal,' as to the 'obligation of superiors to enter vassals, reserving their own right.' (See Dictionary, p. 15,064.) Of course if it be found, on due discussion of the superior's claim, when he comes to act on it, that it was altogether groundless, and founded on error and delusion at the time it was reserved, it falls to the ground as a *protestatio contra jus*, which cannot be available to any effect.

"In the next place, assuming that this is the general effect of reservations in charters of renewal, the Lord Ordinary does not conceive that there is any ground on which the vassal is precluded in the present instance from contesting the effect and extent of the reservation founded on by the noble defender. It is true that the reservation now under consideration has been inserted in successive charters, taken by the vassals for a period now extending back for sixty years; and if these reservations had been acted on by the superiors raising coal for the years of prescription, an unchallengeable *servitude* would probably have been created. But when no coal has been wrought, the Lord Ordinary doubts if there be any room for prescription in favour of the superior adverse to the ancient title of the vassal. For if the parties found solely on the title-deeds, without any overt act of possession therein, then the vassal is entitled to meet the reservation founded on by the noble defender, by the prior grants in his (the vassal's) favour, confirmed or homologated by the same charters in which the reservations are inserted. These not only confirm the original grants, but stipulate for the same *feu-duties* agreed to be given for the lands, including the minerals and other pertinents attached to the lands feued.

"In that view, if the later charters of renewal are strictly analyzed, they would be found to be inconsistent and contradictory in their clauses; at least if the reservation of the minerals were taken as importing more than a saving provision of such a claim, if any, as the superior could afterwards, on due investigation, instruct. By one clause, the noble superior was made to confirm the whole of the ancient grants of his predecessors, which expressly included coal and lime as enumerated pertinents; and by another clause in the same deed, it is alleged

that he reserved and excepted coal. A charter with such clauses could only have been so framed by fraud, or from ignorance, error, and inadvertency. As fraud is out of the question, it follows that the reservation was inserted by mistake, or possibly from superfluous and ill-directed precaution; but on either supposition, the claim of the superior under such a clause, now that it has been investigated and discussed, cannot be sustained.

"When the error or inefficacy of any clause in a charter of renewal is manifest on the face of the title, it is apprehended that it is never too late for a party interested to object to it so long as matters are entire; and so long as the parties have not, by some visible act and deed, admitted possession under the claim for the years of prescription. In all questions as to the rights of parties, the original grant must be the regulating title. Accordingly, this doctrine seems to have received effect in the late case of the Duke of Montrose and Bontine, where a *feu-duty* stipulated in an original *feu-charter*, but omitted in the later charters of renewal for a period exceeding the years of prescription, was nevertheless found due, because the vassal had in fact possessed no exemption, but had paid or accounted for the *feu-duties* to a comparatively recent period to the Duke of Montrose, as assignee of the Crown. On the same principle, as the noble superior here has had no possession adverse to the original grants in favour of the vassal's predecessors, it is apprehended that the right of the latter to the minerals, and all others pertinents included in their ancient feus, is still entire.

"Upon these views, the case in all its bearings is now submitted to the consideration of the Court."

At advising,

Lord Medwyn.—This is a charter by progress; and Craig and Erskine agree that such charters are, in dubious clauses, to be interpreted agreeably to the original one. The regular mode of making any change in the investiture is by resignation, when the superior is reinvested in the lands. There is here no change of the *feu-duty* in consequence of the reservation of the coal, and no indication of any intention in the parties to alter the investiture. I am therefore of opinion, that the reservation can have no effect.

Lord Murray.—I agree entirely with Lord Medwyn. The renewal of the investiture by precept of *clare* does not make any change in the titles, and the presumption is against any change unless the contrary appears. I don't go so far as the pursuer, and say that a change could not competently be made in a precept of *clare*, if an alteration was intended. That, however, is not the case here.

Lord Justice-Clerk.—I entirely concur; if there had been apparent from the charter an intention to make a new transaction, the case would have been very different; but there is no evidence of this on the face of the deed, and there is no acknowledgment of it on the part of the vassal. I am therefore of opinion, that we must hold that the reservation was inserted without warrant.

Lord Meadowbank and *Lord Moncreiff* absent from indisposition.

The Court pronounced the following interlocutor:

"Find that the pursuer and his predecessors and authors had and have the sole right to the *dominium utile* or property of the five-merk land of Gilbertfield, forty-shilling land of the lands of Overtown or Little Cambuslang, and half-merk land of Bell-houseside, as described in the summons at the pursuer's instance, and whole parts and pertinents thereof, including the coal and limestone therein, in terms of the original rights and infeftments in the same, free and disencumbered of any right or reservation in favour of the defender and his successors, superiors thereof, and that the defender has no right or title to the *dominium utile* or property of the said coal and limestone within the bounds of the said lands; and find, declare, and reduce, in terms of the conclusions of the pursuer's summons of declarator and reduction, and decern; suspend the proceedings complained of, and declare the interdict perpetual and decern: Find no expenses due."

Pursuer's Authorities.—*Ersk.* II. 6, 1. *Craig*, L. 2, D. 12, § 8, 9, 10. *Ersk.* II. 3, 20. *Hope v. Speares*, 11th July 1837. *Duke of Montrose v. Bontine*, 20th June 1840. *Kerr v. Dick-*

son, 20th November 1840. *Forbes v. Livingston*, 29th November 1827; 6 S. and D. 167. *Sandford on Her. Succession*, Vol. II. p. 4. Findlay, 20th July 1770; D. 14,480. Landals, 12th June 1752; D. 14,465.

Defender's Authorities.—Act 1617. Ersk. III. 7, 10. *Lindsay Crawford v. Bethune*, 10th July 1821. *Lindsay Crawford v. Durham*, 2d June 1826. Ersk. III. 7, 4; III. 8, 71; II. 5, 1. *Stair*, II. 11, 7. *More's Notes*, p. 264. Ersk. II. 3, 21.

Lord Ordinary, Cuninghame.—Act. Dean of Faculty (Wood), Cowan; Graham and Anderson, W.S., Agents.—Alt. Solicitor-General (M'Neill), Whigham; Ro. Rutherford, W.S., Agent.—F. Clerk.—[J.W.]

27th January 1842.

SECOND DIVISION.—(J. W.)

No. 99.—MALCOLM INGLIS (*Robertson's Trustee*), Pursuer, v. THE PORT- EGLINTON COMPANY, Defendants.

Bankrupt—Sale—Rejection on Insolvency.—*A party, considering himself insolvent, refused to receive a quantity of goods, and sent them back to the carrier's quarters. Thereafter he directed them to be taken to C and D, to be kept by them for behoof of the vendors; but on the ground that some of his creditors were complaining that he had refused to receive the goods, he ordered C and D to send them to his premises, from whence they were taken by the vendors—Held, in the circumstances, that this rejection was final, and could not be recalled.*

This was an action at the instance of the trustee on a sequestrated estate for the value of certain goods taken from the wareroom of the bankrupt by the sellers. The parties agreed to submit the cause to William Clerk, Esq., for the purpose of taking the evidence, and making up from thence and the admissions a special case or verdict for the judgment of the Court. The following was accordingly submitted:

"On the 8th of May 1839, John Robertson, manufacturer at Stirling, since bankrupt, ordered woollen yarns, as per invoice, to the value of £170. 16s., from the Port-Eglinton Company, carrying on business at Glasgow.

"The said goods were dispatched from Glasgow in four bales on the 13th of May 1839, by William Wordie, carrier, to be delivered to Robertson at Stirling. The said yarns were brought to Robertson's premises there, by Wordie, on the forenoon of the 14th of May. Robertson, considering himself then insolvent, refused to receive the goods, which were laid down at his door. After remaining there a short time, they were, by his orders, and on the same day, sent back to the carrier Wordie's quarters.

"On Friday the 17th of May, the aforesaid goods were, by Robertson's direction, carried to Campbell and Donaldson's at Cambusbarron, to be kept by them for the behoof of the Port-Eglinton Company.—Alexander Donaldson, the partner of Campbell and Donaldson, being the brother of Charles Donaldson, one of the partners of the Port-Eglinton Company.

"No notice was ever sent to the Port-Eglinton Company, either of Robertson's refusal to receive the goods, or of their having been returned to the carrier, or of their having been sent to Campbell and Donaldson.

"On Saturday the 18th of May, two bales and part of a third bale were sent to Robertson's premises, and on Tuesday the 21st, the remainder of the goods, with the exception of four hundred pounds weight, were sent to Robertson by Mr Campbell of Campbell and Donaldson, who were creditors of Robertson. This was done at Robertson's request, because, as he stated to Campbell, some of the creditors were complaining that he had refused to receive the goods.

"The aforesaid four hundred pounds of the said goods, valued at £46. 13. 4., remained in the possession of Campbell and Donaldson.

"A bill due by Robertson to Charles Inglis for £248. 15s.

11d. fell due, and was dishonoured by Robertson on the 16th of May. On the 21st May, Robertson issued circulars calling a meeting of his creditors, which meeting was held at Stirling on the 27th May. One of the circulars, addressed to the Port-Eglinton Company, was put into the Post-office at Stirling.

"The state of affairs, debts and goods, Nos. 22, 23 and 24 of process, prepared by Robertson, were then laid before the meeting.

"On the 4th of June, Charles Donaldson, of the Port-Eglinton Company, went to Robertson's, and demanded the three bales of goods then in his premises, which were delivered to him by Robertson's wife, under the belief that they were received by him for behoof of the creditors, though there is no evidence that he then represented himself to her as acting for them. The said three bales of goods were accordingly taken away by Charles Donaldson, and claimed for the Port-Eglinton Company. The value of the three bales is £123. 16. 8.

"Robertson was made notour bankrupt on the 5th of June, and his estate sequestrated on the 22d June."

At advising,

Lord Justice-Clerk.—The question in this case is, whether the goods were rejected by Robertson on the 14th, and if so, was the rejection final? The facts, in my view, make out the case. Now, it is said that Robertson, considering himself then insolvent, refused to receive the goods. No words can be stronger or more explicit. Then, after remaining for a short time at his door, the goods were, by his orders, sent back to the carrier's quarters. This also is sufficient to constitute rejection, and is the strongest point in the case. It is the legal duty of a carrier to bring back goods which are refused; and if he does not do so in time, he is liable in damages to the vendor. If they are taken off his hands, he has no more to do with them; but if refused, his duty, like the post-man, is to bring them back. On the 17th, goods were, by Robertson's direction, sent to Campbell and Donaldson's—Donaldson being the brother of one of the partners of the Port-Eglinton Company. The case implies that Robertson was doing the best he could for the company; and, under the circumstances, it was not only his right, but his duty to reject the goods. I do not attach much importance to what followed—the rejection being complete. Campbell and Donaldson could not destroy the right of the company. They received the goods as special depositaries for the company, after rejection on the ground of insolvency. It is asked, by what authority they held the goods? By the authority of Robertson, the person who was entitled to demand delivery, and who, being master of the goods, deposited them in Campbell and Donaldson's hands for behoof of the company. After the goods were offered, the right of stoppage *in transitu* terminated, and Robertson was the only person who could give authority to Campbell and Donaldson to hold them for the company. Campbell and Donaldson are creditors of Robertson, and pursuers in this action. Now, having received the goods refused on the ground of insolvency, and aware of it, were they entitled to undo what Robertson himself had done? I do not impute to them any dishonest purpose; but they had an interest to return the goods. No notice was sent to the company; and at Robertson's request, because, as he stated to Campbell, some of the creditors were complaining that he had not received the goods, they were restored on the 18th and 21st. Now, if a bankrupt, in the knowledge of insolvency, rejects goods, his creditors cannot undo what he has done. Whether the company ought not to have applied to the Sheriff for a warrant to take back the goods, is not the true question at issue. This might have been more regular; but the true point is, whether the rejection by Robertson was final? In my opinion, judgment should be for the defenders.

Lord Medwyn.—I do not differ from the conclusion arrived at by your Lordship, although I doubt whether, under other circumstances, the rejection of the goods would have been considered final, or whether Campbell and Donaldson, having received the goods by the order of Robertson, would not have been bound to obey his order to return them. I think a party is not only morally, but legally bound to reject goods in the knowledge of his circumstances being insolvent; and he can

recal that rejection only on some mistake as to his insolvency. But the reason here stated for taking back the goods is fatal to the case. It is not said that he was mistaken as to his circumstances, but merely that the creditors were complaining. Although, in other circumstances, such a rejection might be retracted, on the whole, I concur in thinking it cannot be so here.

Lord Murray.—I agree, although I had some difficulty at first as to what was the real point put. Now, however, I am satisfied it relates to the conclusiveness of the rejection of the goods by the bankrupt. I do not say it would be binding in all circumstances; but the fact that the creditors were complaining was no ground for recalling what had been done properly before.

Lord Meadowbank and *Lord Moncreiff* absent from indisposition.

The Court sustained the defences, and assolizied, with expenses.

Pursuer's Authority.—Bell's Com. I. pp. 226, 233.

Defenders' Authorities.—Carnegie, Hume's Rep. p. 704. Brown, *Ib.* 709.

Act. Rutherford, Robertson; John Cullen, W.S., Agent.—*Alt* Solicitor-General (M'Neill), G. G. Bell; Adam Paterson, W.S., Agent.—[J.W.]

28th January 1842.

SECOND DIVISION.—(J.W.)

No. 100.—MRS HARRIET RENNY STRACHAN and OTHERS (*Renny Strachan's Trustees*), Pursuers, v. The MAGISTRATES and HARBOUR TRUSTEES of ARBROATH, Defenders,—*Et de contra*.

Obligation—Delectus Personæ—Burgh—Privilege.—*At the request of the magistrates and town-council of a royal burgh, a neighbouring proprietor granted to them the liberty of certain quarries, not only for winning of stones to build a new pier, but also in all time coming for winning of stones to all the public works belonging to the said burgh. In consideration whereof the magistrates and town-council granted to him, his heirs and assignees, the liberty of exporting the victual of the growth of all his lands free from the payment of shore-dues imposed, or to be imposed at the harbour. The magistrates and town-council having sold the harbour and its dues to parliamentary trustees, for the purpose of being greatly enlarged and improved—Held that the privilege of quarrying stones was personal to the town-council, and did not admit of being conveyed by them to others; that the harbour trustees could not claim the benefit of the privilege; and that the magistrates themselves, having ceased to have any patrimonial interest in the harbour and its dues, could not exercise the privilege in regard to it.*

The trustees of the late Mr Renny Strachan are infeft in the estate of Tarrie, containing the quarries of Easter and Wester Seatouns, which form the subject of the present actions. The point raised is, whether the Magistrates of Arbroath and the trustees of the harbour have a right to quarry stones from these quarries for the purpose of making the new harbour at Arbroath; and the question arises in the form of mutual actions of declarator.

The harbour of Arbroath, with the piers, port, and pertinents thereof, were, by royal charter, vested exclusively in the Magistrates and Town-council of Arbroath; and the harbour dues, tolls, and rates levied therefrom, formed part of the general revenues of the burgh, and were applied, along with the other portions of the common good, for the use of the burgh.

In the summons raised by the Harbour Trustees it is stated, that about the year 1726 an arrangement was entered into between the Provost and Council of Ar-

broath on the one hand, and the proprietor of the estate of Tarrie on the other, whereby the privilege of taking stones from the Seaton quarries was given to the town-council for certain specified purposes. The agreement is contained in a minute of the town-council, dated the 27th June 1726, and bears to be as follows:

“That forasmuch as Alexander Strachan of Tarrie bath, at the earnest request of the Magistrates and Town-council of Aberbrothwick, granted the liberty of both his ston quarries of Easter and Wester Seatouns, not only for winning of stons to build the new pier of the harbour of the said burgh of Aberbrothwick, but has also granted to them the liberty of both the said quarries in all time coming, for winning of stons to all the publick works belonging to the said burgh: therefore, and in consideration of the favour done to the said town by the said Laird of Tarrie, they give and grant to him, and his heirs and assignies whatsomever, an liberty of exporting the victual of the growth of all his lands of Easter and Wester Seatouns, Tarrie, and Dickmoutlaw, for the crop 1725, and of all crops and years succeeding, and that free of payment of any shoar-dues or other dues whatsomever; and, furdur, the said Magistrats and Council binds and obliges them, and their successors in office, to make out an sufficient cart road from the quarry of Easter Seatoun, where they are presently winning stons, so as stons may be brought up from the said quarry by any cart.”

The Magistrates and Town-council exercised from time to time this right of quarrying, and the proprietors of the estate of Tarrie enjoyed the corresponding privilege of exporting grain free from shore-dues.

In 1756, Mr Strachan of Tarrie feued out a part of his estate called Dickmoutlaw, and by the feu-contract he conveyed to the feuar all right and title which he himself had

“of exporting at the harbour of Aberbrothock the victual of the growth of the said lands of Dickmoutlaw free of payment of any shoar-dues, or other dues whatsoever, imposed or to be imposed at the said harbour of Aberbrothock, and that conform to and in terms of an act for that effect made by the Magistrates and Town-Council of Aberbrothock in favours of the said Alexander Strachan, his heirs and assignies, proceeding on the onerous causes therein narrated, dated the 27th day of June 1726, surrogating and substituting,” &c.

In the leases of the quarries, on the one hand, and of the shore-dues of the burgh on the other, the mutual privileges of Mr Strachan, his assignees, and the Magistrates of Arbroath, are reserved respectively.

In 1839, application was made to Parliament to have the management of the harbour and its revenues transferred from the Magistrates and Town-council to a separate body of trustees; and an Act was accordingly passed (2 Vict. c. 16), intituled, “An Act for extending, improving, regulating, and managing the harbour of the royal burgh of Aberbrothwick, in the county of Forfar.” In pursuance of a provision of the Statute, a minute of sale and deed of agreement was, in September 1839, entered into between the Magistrates and Town-council on the one part, and the Harbour Trustees on the other, whereby the town-council, in consideration of the price of £10,000,

“sell, alienate, convey, assign, and dispoine, to and in favour of the trustees of the harbour of Aberbrothwick, and their successors in office, all and whole the piers, port, and harbour of Aberbrothwick, with the pertinents thereof, and rights, privileges, and immunities thereunto belonging; and likewise the whole harbour and other dues, tolls, and rates leviable at the said harbour, and the dues leviable at the said patent-slip; together with all right, title, interest, claim of right, property, and possession, petitory as well as possessory, which the said community, or the said Magistrates and Town-council, so re-

presenting the said community, had, have, or can any ways claim or pretend to the said harbour, patent-slips, and others."

Immediately thereafter the trustees determined on the execution of certain extensive works for the enlargement and improvement of the harbour, and entered into a contract with Spencer Sutherland and James Forbes, harbour contractors, who, in consideration of the sum of £38,909, agreed to complete and execute the works. These contractors proceeded to quarry on a very extensive scale at the Seaton quarries; and according to a statement rendered by themselves, it appears that they had quarried, previous to the 28th November last, 44,259 cubic feet of block stone, and 7936 tons of rubble stone.

On these operations coming to the knowledge of the pursuers, they caused a protest to be served both on the harbour trustees and on the contractors, complaining of the illegality of their proceedings, and protesting that they should be held liable for the loss and damage thereby sustained. They subsequently presented a note of suspension and interdict, directed exclusively against the contractors; and on advising this bill, an interim interdict was granted. But immediately thereafter, the pursuers agreed to allow the quarrying operations to proceed, under a reservation of their claim for the value of all the stone that might be quarried, and of damages for the injury which had been, or might thereafter be, occasioned.

Mutual actions of declarator were raised and conjoined, for the purpose of determining the rights of parties. The one at the instance of Strachan's trustees is directed against the Harbour Trustees, and the contractors under them for building the harbour, concluding to have it found and declared that they have no right by themselves, or others employed by them, to quarry and carry away stones from the Seaton or Ness quarries, or otherwise to encroach or trespass upon the property of the pursuers. And it contains the other subsidiary conclusions for interdict and damages.

A counter action of declarator was raised at the joint instance of the Harbour Trustees and of the Magistrates and Town-council of Arbroath, concluding, *1st*, that the Magistrates have undoubted right and liberty of quarrying stones from the said quarries, for the purpose of erecting, building, and repairing all public works belonging to the community, without payment of any price or quarry-mail; *2d*, that this right and privilege has been effectually conveyed by them to the Harbour Trustees, for constructing and repairing the harbour and its works, and that the said trustees have an undoubted right and privilege to use these quarries for these purposes, without paying any price or compensation therefor; or, *3dly*, in the event of its being found that this right has not been validly conveyed to the Harbour Trustees, that the Magistrates and Town-council are themselves entitled to use the quarries for the purposes of the harbour, and other works therewith connected.

In the first of these actions the Magistrates and Town-council craved leave to sist themselves as defenders; and against the action it was *pleaded*—The right of quarrying stones being vested in the defenders by a binding contract, under which the obligations stipulated in favour of the pursuers and their predecessors have been, and are in the course of being fulfilled, and

agreeably to use and wont, there is no ground for demanding the immunity from that right of quarrying which is sought by the present declarator.

In the counter action it was *pleaded* in defence—1. The privilege of quarrying stones, alleged to have been granted by the proprietor of Tarrie, was a privilege personal to the town-council, and did not admit of being conveyed by them to other parties. It was not competent for them to increase the burden by increasing the number of parties entitled to use it. 2. As the privilege was only to be used for public works belonging to the town-council, and as the revenues of the harbour are to be appropriated to purposes different from the proper revenues of the burgh, the Harbour Trustees cannot claim the benefit of this privilege. 3. The Magistrates, by selling and disposing to the trustees the harbour and its dues, have ceased to have any patrimonial interest in it, and cannot now claim the privilege of quarrying stones for the new pier and other buildings in the course of erection. 4. At all events, the alleged minute of council proceeds on the supposition of its being a mutual contract; and as the town-council are no longer in a condition which entitles them to exempt the defenders from harbour-dues, they cannot enforce implement of the counter obligation.

The record having been closed upon the summons and defences, the Lord Ordinary appointed the parties to state their argument in cases. This was done at their own request, with the view of obtaining an early decision. Having considered the cases, the Lord Ordinary made *avizandum* to the Lords of the Second Division, and accompanied his interlocutor with the following note:

"The opinion of the Lord Ordinary is with the Magistrates and Harbour Trustees. He thinks it clear that the privilege was granted to the community of the burgh, and not to the Magistrates in any other character than that of administrators or trustees. If there was any dominant tenement, it was the existing (and future) public works of the burgh, and in an especial manner the public harbour of the burgh, which was primarily in view when the servitude was constituted, and has ever since been the subject for whose use chiefly it has been exercised. If the grant was not that of a real servitude, but of a personal privilege, the persons in whose favour, and for whose advantage it was made, were very clearly not the individual Magistrates, but the individual inhabitants and traders of the burgh, who were interested in, and entitled to use the public works within it; and it is impossible to suppose that such a grant, even if entirely gratuitous, should ever cease or become inoperative by a mere change in the administrators or trustees who might at any time be more immediately charged with the duty of protecting and securing its enjoyment. If it was a real servitude, again, it would be at least as absurd to hold that it should ever become extinct by the mere transference of the dominant tenement to a new owner. The conveyance is of the harbour, 'with all the rights, privileges, and immunities thereunto belonging.'

"But the whole difficulty of the case vanishes, in another point of view, when it is considered that there was not an unilateral grant, either of privilege or servitude, but part of an onerous and mutual contract, of which, as long as implement is offered on the one side, it may clearly be demanded on the other, and of which in this case it is not denied that, in point of fact, the objecting party has had (and has practically taken) the benefit for upwards of a century; and for the continuance and preservation of which benefit, the magistrates and trustees are willing that he shall now have decree in such terms as he may dictate. By the terms of that contract, he was to have the use of the harbour in all time coming, without paying the usual dues, and in return, the harbour was to have the use of his quarries for all repairs and enlargements. This, beyond all doubt, was

the true substance and purport of the contract of 1726, and, in truth, its letter as well as its spirit; and no administrators of the harbour could, without his consent, deprive him of this stipulated exemption; so he could refuse to no such administrators the benefit of the corresponding privilege. But his party, from first to last, was and is not the board of managers for the time being, but the community for whom they manage. He has a privilege and advantage accordingly, not over the managers, but over all the rest of that community, by virtue of the contract; and they, in return, are justly entitled to insist that they shall have the corresponding advantage of taking stones from his quarries for the improvement of a structure in which they alone, and not their administrators, have the whole substantial interest. All questions as to any *abuse* or improper exercise of this privilege are very properly reserved till the point of right is determined."

At advising,

Lord Medwyn.—The present actions are founded upon a special contract entered into in 1726, when the Magistrates of Arbroath, wishing to build a new pier, applied to the proprietor of Tarrie for liberty to win stones for that purpose from his quarries; and at the earnest request of the Magistrates and Town-council, as their minute bears, liberty was granted to take stones, not only for the new pier, but for all the public works belonging to the burgh, in all time coming. In consideration of this favour the proprietor of Tarrie was to have the liberty of exporting the virtual of the growth of his lands free of payment of any shore-dues. The duties were then small, and the only public works contemplated were those of a poor and small burgh. In 1839 the harbour Act passed, and under its provisions the trustees have paid the Magistrates £10,000 for the acquisition of the harbour and the duties leviable therefrom. The trustees are also entitled to borrow £40,000 for the purposes of the Act; and they are empowered to raise the harbour dues. The object of the Act was to raise the dues and to enlarge and improve the harbour beyond what could have been done in either case by the Magistrates and Town-council. In the Act, there is no mention made of the contract with the proprietor of Tarrie. Do the trustees then come in place of the Magistrates; and have they acquired the privilege conferred by the contract? Viewing it as a mutual contract, the Magistrates, as one of the parties, have disposed the rights belonging to them, but the donee is different from them in every respect, and the privilege must be exercised to a far greater extent than they themselves could possibly have done. Originally, the new pier to be built and upheld out of these quarries was small, but the present harbour is to be greatly enlarged; and it is questionable if the trustees have the power to fulfil the counterpart obligation in the contract. The privilege of exemption from harbour-dues enjoyed by the proprietors of Tarrie is not noticed in the Act, and the trustees have no control over them. The creditors of the trust are entitled to insist that they should be exacted without exemption. Perhaps the trustees might stipulate in their bonds for the exemption of the produce of these lands, but the transference seems to alter so considerably the extent of the burden, that I do not think it can be sustained.

Lord Moncreiff.—I differ from the opinion now delivered, and coincide with that expressed by the Lord Ordinary. The contract founded on is constituted by a written grant. It is a mutual contract, being the counterpart of a privilege conferred upon the proprietor of Tarrie, his heirs and assignees. It has been followed on both sides by possession, and the privilege has been exercised for one hundred and fourteen years. It does therefore seem serious, that one party taking full benefit from the contract, should now be allowed to refuse implement of it, because he may imagine it will not be of such advantage to him in future as it has been hitherto. I know of no instance of such a contract, and so founded on, which could be broken off at the instance of one of the parties. If the privilege is not a servitude, it is much more binding, —not depending on possession alone, nor on grant alone, but on an onerous contract followed by a possession of one hundred and fourteen years. If founded merely on prescription, a distinction might be taken on the ground of its not being a proper servitude, or in a question with a singular successor. It seems a conventional servitude *sui generis*, framed

for perpetuity in regard to the subjects burdened; *Ersk. II. § 3 and 4*. Now, in the case of a servitude constituted by grant, the extent of the right is regulated by the grant, and not by the degree of exercise; *Earl of Aboyne, Dict. 14,517*. *Sinclair v. Town of Dysart*; and *Elchies v. Servitude*. In *Bruce of Kennet*, the servitude of building a mill-dam was limited by possession to three feet in height; but he was found entitled to raise it three times higher. Whether the present be a servitude or contract of a different nature, it was a lawful contract which, after such possession, neither party can repudiate. Besides, the contract relates to other things than the harbour, and must subsist unless the counterpart be extinguished. The Magistrates transacted as a corporation for behoof of the burgh; and although they could not quarry stones for the building of private houses, the case is different when the stones are taken for the construction of a new pier, or other public works. The interest in the contract is in the community for public purposes. It is said the right cannot be transferred. Not for other purposes certainly, which was the nature of all the cases quoted; but if it be transferred for the definite purposes of the contract, the proposition is far from being so clear. The counterpart privilege is conferred not only upon Strachan, but upon his heirs and assignees. Here there is no such understanding of personality in the right; and, in point of fact, it was conveyed by him in part to his feuars. The term "assignees" could not be so properly applied to the Magistrates; but the grant was for all time coming, *i. e.*, it could not be affected by any change of the Magistrates themselves, or in the corporation, or in the mode of administration of the public works. If the Magistrates had entered into an extensive contract for repairing the harbour, would this not have been legal. They might have got an Act of Parliament empowering them to raise the dues, and this would not have affected Strachan's right, but made it more valuable. If they had got also a power to borrow money, it would be *ius tertii* for Strachan to interfere. If they were to rebuild the church, or the jail, or the harbour, could they not authorise their contractors to take the stones from the Seaton quarries? The preamble of the Statute shows the whole character of it, that the subject of it was the harbour of Arbroath, and that the improvement and enlargement of the harbour would be of great advantage to the trade of the burgh. No doubt powers are conferred upon the trustees which the Magistrates did not before possess, and they were allowed to assign their whole rights in the harbour, and the dues leviable therefrom, on receiving compensation; but this was all for the improvement and advantage of the burgh. It is no alienation of the ground or harbour; there is no change of the thing; the dues are to be applied for the improvement of the harbour; the assignment is for the benefit of the community, and could not have the effect of destroying a right held for behoof of the community. The harbour is made over, with all the rights of the corporation,—words sufficient to carry the privilege; but if not, it must remain with the burgh. The only question is, whether the trustees have not the power to give the counterpart. But the argument is sound, that the trustees could only get the harbour and dues, such as they were, and including an exemption fortified by possession. This right required no reservation, and could not be excluded but by the express consent of Strachan. It was fully constituted, and was followed by possession. This is not the case of a transference to third parties, but of a mutual contract for carrying the purpose of the original contract into effect. We have no idea of the value of the exemption from the shore-dues at the time of the contract, or of what it may hereafter become. But have the trustees no power to take up such a contract? It is said other traders or creditors may object; but the trustees are not granting any immunity. The exemption is founded on a prior and onerous contract. The contract is against the interest of Strachan, and in favour of the harbour, and of all traders and creditors. It is their interest, therefore, to maintain the exemption; and I have no idea of the interference of any one to the contrary; but if there were, the trustees would have a clear defence against it, in the fact of their acting upon an onerous contract.

Lord Justice-Clerk.—The minute founded upon is that of one of the parties only, but the act of council being recognised in a feu-contract by a proprietor of Tarrie, makes it evidence for

both parties. With Strachan's representatives, therefore, who are parties here, the contract is complete. But as to the extent of the privilege, it is to be observed that the act of council confers a privilege upon Strachan, and it is only from the narrative of the grant that it appears what had been received from him. There is no deed by Strachan conferring the privilege upon the town-council; and in my opinion it is not transferable. The counterpart is granted in favour of the assignees in the lands only. This is not a servitude, but a matter of right and special contract, and cannot be regulated by the general rules applicable to servitudes. It is a grant conferring a benefit and favour upon an ancient burgh, but it is not assignable. The object was to confer the privilege upon the corporation for the benefit of the community,—not for the building of private houses, but on the corporation, having a distinct legal character different from any other body known in law. Strachan's lands lay within the regality, and he might grant a favour to the corporation which he would not to trustees, who were not limited in their operations by the means of the corporation. Having been granted with a view to the limitation which the means and powers of the corporation imply, and having been bestowed at the earnest request of the Magistrates, it is an inherent condition of the privilege that it can only be exercised by the corporation. That this limitation is not unimportant, the present case affords an ample illustration. The ancient corporations have all failed in making large improvements, without being conjoined with others, and without having enlarged powers. Where corporations have a grant of free port or market-dues, the rates are fixed by the charters or immemorial possession, and they have not the means of increasing them. The works are thus restricted in extent; and consequently the exercise of a privilege, such as is here conferred, is restricted also. But, further, the privilege originates in a *delectus personarum* in regard to the grantees. It is not divisible; and the corporation subsists, having still the charge of public works, which they may improve according to their means. The notion, that another and separate body can also exercise the privilege, because they have purchased part of the burgh property, appears to me not to be law. It is said that the subject to be enlarged is still the harbour of Arbroath; but the same would have been the case had the harbour been taken off the hands of the corporation by a joint-stock company. There is no analogy between a corporation and parliamentary trustees. A body, aided by parliamentary powers, might carry off the whole granite of the most valuable quarries, for accomplishing some of the gigantic undertakings of modern times. This is very different from a right limited by the ancient capacities or incapacities of royal burghs. The Magistrates have now no right in the harbour, and it is not one of the public works of the burgh.

Lord Meadowbank absent.

The Court pronounced the following interlocutor:

"Sustain the first, second, and third pleas in law maintained by the defenders against the conclusions of the summons of declarator and damages at the instance of the Magistrates and Town-council of Aberbrothwick, and Harbour Trustees thereof; and to that effect assolvize the defenders from the said conclusions, and decern; and in the counter action at the instance of Strachan's trustees, repel the defences for the Harbour Trustees, and decern in terms of the conclusions of declarator and interdict in the summons in that action, and declare accordingly: Find no expenses due to either party; and, *quoad ultra*, remit to the Lord Ordinary to hear parties' procurators on any remaining points in the cause, and to proceed thereanent as to his Lordship shall seem just."

Authorities.—*Murray v. Magistrates of Peebles*, 8th Dec. 1808, F. C. *Scott v. Bogle*, 6th July 1809, F. C. *Carstairs v. Brown*, 14th May 1829. *Keith v. Stonehaven Harbour Commissioners*, 12th Feb. 1829.

Lord Ordinary, Jeffrey.—*Act.* Rutherford, Anderson; T. Mackenzie, W.S., *Agent.*—*Alt.* Solicitor-General (McNeill), Robertson; Fotheringham and Lindsay, W.S., and L. Mackintosh, S.S.C., *Agents.*—[J.W.]

28th January 1842.

SECOND DIVISION.—(J. W.)

No. 101.—JAMES SMITH, *Pursuer, v. LORD DUFFUS, the HONOURABLE ROBERT DUNBAR and OTHERS, Defenders.*

JAMES SINCLAIR and OTHERS (*Lord Duffus's Trustees*), *Pursuers, v. The HONOURABLE ROBERT DUNBAR and OTHERS, Defenders.*

Entail.—**Fetters.**—**Clauses Prohibitory, Irritant and Resolutive.**—*By the prohibitory clause in a deed of entail it was declared, that it shall not be lawful to "contract debts, nor give bond or obligation, nor do any other fact or deed whatsoever, whereby the said estate may be apprized."* *By the irritant and resolutive clauses it was declared, that if the heirs shall contravene by the "contracting of debts," then the said "bonds and obligations" shall be null and void.*—*Held that the irritant and resolutive clauses were defective, and were not effectual against the contracting of personal debts, or the use of the diligence of adjudication proceeding thereon.*

Entail.—**Fetters.**—**Clauses Prohibitory, Irritant and Resolutive.**—**Title to Sue.**—*The above-mentioned prohibitory and irritant clauses found to be an effectual bar against the trustees of the heir of entail pursuing a declarator, concluding to have it found that the estate was liable for the debts of the heir, and consequently to be adjudged; and that they were entitled to give bonds and obligations for the debts whereby the estate might be adjudged.*

Entail.—**Clauses Prohibitory, Irritant and Resolutive.**—**Precept of Sasine.**—*Statute 1685.*—*The mandate in a precept of sasine being merely to give sasine "with and under the burdens, provisions, and irritant clauses above mentioned"—Held that the words "irritant clauses," comprehend both the irritant and resolutive clauses.*

The first of these actions was brought to have it declared that the estate of Hempriggs, belonging to the defender Lord Duffus, is not effectually entailed, and that the pursuer, who is a personal creditor of Lord Duffus, and has obtained a decree for his debt, is therefore entitled to adjudge it in satisfaction of his claims.

The action is defended by the Honourable Robert Dunbar, the second son of Lord Duffus, and a substitute heir of entail to the estate. He does not dispute that the pursuer is a creditor of Lord Duffus, but he maintains that the entail is valid, and that it excludes adjudication at the pursuer's instance.

The entail of Hempriggs was executed on the 11th October 1707, and was recorded in the Register of Taillies on the 13th of February 1708. It was conceived in favour of Miss Elizabeth Dunbar, the entailor's daughter, and certain heirs of tailzie. The following are the clauses which have reference to the question at issue:

"And in like manner, it is hereby expressly provided and declared, and shall be contained in all the subsequent infeftments and rights of the said estate and lands, in all tyme coming, that it shall nowise be leosome nor lawful to the said Dame Elizabeth Dunbar, nor to the heirs of taillie above designed, male or female, nor their heirs who shall happen to succeed to the said lands and dignitie, to alter, infringe, or break the said taillie and destination, nor the order nor course of succession above written, nor yet to give, grant, sell, annalizie or dispone irredeemably, nor wadset nor dispone under reversion (excepting as is after excepted), any of the lands, baronies, fishings and others above named, nor any part thereof, nor to burden the samen with infeftments of annualrents, or with any yearlie duties, more or less, to be uplifted forth of the samen, nor give tacks thereof for any longer tyme than the lifetime of the grantor, nor with diminution of the rental, unless tenants cannot be found to take it at the old rental, in which case that the samen may be set in public roup to the best advantage; nor to contract debts, nor give bond or obligation, nor do any other fact

or deed whatsoever, whereby the said lands and estate, or any part or portion thereof, may be apprized, adjudged, or any other way evicted from them or either of them, or the order or course of tailzy and succession any other way diverted, frustrat or interrupted; it being hereby understood, that although the forenamed persons be designed heirs of tailzy, and be to succeed to my said estate as such, they shall have no farther power to affect and burden the samen, nor if they were liferenters only: And if the said heirs shall contravene the premisses, by breaking the tailzy, contracting of debts, selling or wadsetting the lands, burdening the same with infestments of annualrents, or setting the same in tack, in manner at length above sett down; then and in any of these cases the saids venditions, alienations, dispositions, infestments, alterations, infringements, bonds, tacks, obligements, made in the contrair, shall be null and void in themselves *ipso facto*, without the necessity of any action or sentence of declarator."

The Act of Parliament 1685 declares, "that such taillies shall only be allowed in which the aforesaid irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine."

In the present deed the precept of sasine enjoins sasine to be given "with and under the haill conditions and provisions, declarations, restrictions, limitations, reservations, clauses irritant, burden, power, and facultie above exprest." The grounds of objection to the entail are set forth in the summons under three heads:

"(1.) The prohibitory, irritant and resolute clauses are directed against the institute and certain substitute heirs of entail therein designed, and 'their heirs who shall happen to succeed to the said lands and dignitie;' but the defender, Sir Benjamin Dunbar, Lord Duffus, does not fall within the description of heirs mentioned, inasmuch as he was not one of the heirs who happened to succeed to the said dignitie, as above set forth. (2.) The irritant clause before recited, while it contains an enumeration of specific acts, and declares them null and void, is not correctly applicable to the particulars enumerated in the prohibitory clause, nor sufficient to fence the same, and more particularly, it does not declare the debts contracted by the heir of entail in possession null and void; nor does it declare that any such debts shall not be made effectual against the estate by adjudication or otherwise; nor is it applicable to alienations, nor does it annul any other deeds by which the estate may be adjudged or evicted; neither does the resolute clause annul the right of such heir in respect of such debts or adjudications led thereon, or of any adjudications whatever. (3.) While the Act of Parliament provides that only such taillies shall be allowed in which the irritant and resolute clauses are insert in the procuratories of resignation, precepts and instruments of sasine, the said clauses are not contained in the precept of sasine in the said taillie; and the said precept, while it refers by a special enumeration to the haill conditions, provisions, declarations, restrictions, limitations, reservations, clauses irritant, burden, power and faculty in the said entail expressed, omits all reference to the resolute clauses."

The record having been closed upon the summons and defences, the Lord Ordinary appointed parties to prepare and lodge mutual minutes of debate on the whole case, with the view of reporting the same to the Court. His Lordship stated in a note, that he acquiesced in the propriety of at once sending this case to the Court, from its near resemblance to several other entail cases, now before both Divisions, on consultation; and by a subsequent interlocutor, he made great avizandum with the process to the Lords of the Second Division.

Pleaded by the pursuer—

1. It has been settled, that regard cannot be paid to the intention of the maker of an entail, unless expressed in the most clear, explicit and unambiguous terms, and that such deeds are

to be construed as *strictissimi juris* (Ardovie entail), *Speid v. Speid*, 21st February 1837, and subsequent decisions. 2. It has been held that, as each heir of entail takes a fee-simple in so far as he is not fettered, "the proof that he is fettered is thrown upon those who would fetter him; consequently, if there are two modes of construction of any given clause,—one which leaves him free and the other which fetters him,—the construction to be given to that clause is in favour of leaving him free, just as much as if there were only one construction, and that construction in his favour." (*Overton entail*) *Lang v. Lang*, 16th August 1839, M'Lean and Robison. 3. It has been decided, that although a good entail may be made where the irritant and resolute clauses contain a general reference to the acts and deeds prohibited; yet if either of these clauses contain a special but incomplete enumeration of prohibited acts and deeds, the general reference is thereby rendered unavailing, and such of the prohibited acts and deeds as have been omitted in the enumeration are to be regarded as not duly fenced. In the words of one of the noble Lords who presided in a late case (*Ballileisk*) in the House of Lords,—"Where a party undertakes to enumerate, in the irritant and resolute clauses, those acts which are to infer forfeiture, the prohibition is inoperative as regards any act which is not enumerated."—(*Tillicoultry entail*) *Bruce v. Bruce*, 15th January 1799, M. 15,539; (*Prestonfield entail*) *Dick v. Drysdale*, 14th January 1812, F. C.; (*Blairadam entail*) *Barclay v. Adam*, 18th May 1821, Hume's Decisions, and 1 Shaw's Appeals, 24; (*Ballileisk entail*) *Rennie v. Horne*, 13th March 1838, 3 Shaw and M'Lean; (*Banchory entail*) *Thomson v. Boswell*, 27th February 1839, B. and M. 4. It has been decided, that where words of flexible signification are used in a fixed and limited sense in one part of an entail, they are not to be construed differently or in a more extended sense in other parts of the deed.—*Dick v. Drysdale*, *Barclay v. Adam*, *Lang v. Lang*, *ut supra*; (*Ulbster entail*) *Sinclair v. Sinclair* (*Ulbster*), 26th February 1841, B. and M. These general rules, it was maintained, were applicable to the objections set forth in the summons; and in regard to the second, in particular, it was submitted that the first branch of the irritant clause, which declares the conditions or events upon which the nullity of the acts and deeds enumerated in the second branch is dependent, omits to mention the prohibition against "giving bonds or obligations;" and that the second branch of the clause, which enumerates the particular prohibited acts or deeds which are to be null and void in the event of the conditions or events specified in the first branch happening, omits all mention of "debts contracted." Neither of the branches of the clause make any reference to the prohibition—"Nor do any other fact or deed whatsoever, whereby the said lands and estate, or any part or portion thereof, may be apprized, adjudged, or any other way evicted," &c.

Pleaded by the defender—

1. That although the contraction of the debt is "the foundation of the bond or obligation, yet the nullity, not of the debt, but of the bond, is the proper result of the irritant clause; because the entailor could not extinguish the personal obligation imposed by the contraction of debt; all he could do was to protect the lands, which he has effectually done, by irritating bonds or obligations granted by the heirs. *Denham*, 15th December 1737; *Brown's Supp. V.* p. 200. 2. That although all the prohibited acts and deeds are not enumerated in each of the branches of the irritant clause, yet they are all mentioned in one or other of the branches, and consequently are all enumerated in the irritant clause,—a specialty distinguishes the present case from the *Tillicoultry* and other cases of defective enumeration, where the irritant clauses contained only one enumeration, altogether omitting to mention some of the prohibited acts or deeds.

A second action of declarator was also raised at the instance of the trustees of Lord Duffus, concluding to have it found, that the entailed lands and others are liable for the debts "due to the creditors of the said Lord Duffus, and that consequently the said lands and others are liable to be adjudged or otherwise affected by legal diligence, for all debts hitherto contracted by

the said Lord Duffus, and that the said Lord Duffus, and the pursuers, as trustees aforesaid, are entitled to give bonds and obligations for the debts of the said Lord Duffus, whereby the said lands and estate, or any portion thereof, may be apprized, adjudged, or evicted from the heirs of entail, or either of them, for payment or satisfaction, or in security of said debts."

At advising,

Lord Justice-Clerk.—There are two actions here, which fall to be very differently disposed of. One is at the instance of the trustees of Lord Duffus, concluding to have it found that the entailed lands are liable for his debts, and that they are entitled to grant bonds and obligations in his room, whereby the estate may be adjudged from the heirs of entail. I cannot give effect to this action. Whatever may be the effect of the irritant clause against creditors, I cannot sustain an action against the prohibitions of the entail at the instance of an heir of entail, or of trustees in his room. There is an express prohibition against contracting debts. The trustees are in possession in the room of the heir of entail. They are not themselves creditors, or commissioners, or mandatories for creditors, and they are not entitled to insist in a declarator that the lands may be adjudged for debts. This action, therefore, I propose, should be dismissed with expenses.

The other action is of a very different nature, and is at the instance of a creditor holding a decree for his debt, and concluding to have it found that, according to the construction of the entail, debts contracted by the heir are not null; and that adjudication is not excluded. This is a competent action at the instance of an onerous creditor; and to dispose of it, we must consider the terms of the entail. Among the prohibitions we have enumerated the contracting of debts, which shows that the entail had in view that manner of breaking the entail, and he ought to have guarded against it. The question is, is the estate protected from debts not founded on bonds and obligations, but attempted to be made effectual by the diligence of law? In the irritant clause there are no terms such as facts or deeds whereby the lands may be adjudged, or that debts are to be null and void,—thus striking at the foundation of diligence: nor is there any exclusion *per expressum* of diligence. This is, therefore, precisely a case where the heirs call upon us to supply what is a defect in the entail. It protects the estate only against bonds and obligations. The prohibition against debts will not do, as the irritant clause must declare them void. If the irritancy therefore be special and limited, and if the creditor can proceed without founding on any thing included under the irritancy, then he is clear of it. I think that this case well illustrates the principles of strict construction.

Lord Medwyn.—I concur, and have no difficulty in doing so. As to the action at the instance of the trustees, I cannot see that they have any right to insist in it. They do not say that there is any debt in their persons against the estate. The other summons is very different, and proceeds upon a decree for a debt; but instead of proceeding to adjudge, the creditor cautiously comes here for a declarator, in the first instance. As to the entail itself, the prohibitory clause is most comprehensive; but the irritant clause, instead of referring generally to the prohibitions, makes an enumeration of them which is defective. The prohibitory clause is directed against the contracting of debts, the granting of bonds and obligations, or any other fact or deed by which the lands might be apprized; but the irritant clause only provides, that if the heir contract debts, then bonds and obligations shall be null and void.

Lord Moncreiff.—I agree with your Lordships, that we cannot sustain the action at the instance of the trustees. If it had been stated that a definite debt had been contracted, as in Smith's action, and that the heirs of entail disputed the power to contract such a debt, it would be difficult to refuse to entertain it. In the Tillicoultry case there was first a sale, and then, being questioned, it was tried by a declarator. But this is very different. The summons narrates that a trust was executed by Lord Duffus, but says nothing of a particular debt. Neither do the trustees conclude to have it found that they

have a power to sell, but that they are entitled to grant bonds whereby the estate may be adjudged. I cannot go into these propositions. But in the case of Smith he states, that large debts have been contracted to him by the heir of entail; further, he states the nature of the entail, and concludes that he is entitled to adjudge on a decree for his debt. On all the principles of construction, this entail is not effectual against personal debts. If the irritant and resolute clause, subjoined to the prohibitory clause, had been expressed in apt terms, it would have been sufficient. But the things declared to be null are not among the contraventions, and the contraventions are not among the things that are null. There is another omission, in so far as there is no nullity of adjudications or other real diligence. Robertson, 13th June 1820, is precisely in point. The third objection relating to the precept of sasine, was repelled recently in the case of Porterfield.

Lord Meadowbank absent.

The Court decerned and declared in terms of the conclusions of the summons at the instance of Mr Smith, dismissed the action at the instance of the trustees, but found no expenses due in either action.

Defenders' Authorities.—Duke of Queensberry, 17th November 1807; Fac. Coll.; 2 Dow's Appeal Cases, p. 210. Denham, 15th December 1737; Brown's Sup., V. p. 200. Stair, II. 3, 59. Ersk. III. 8, 23. Munro v. Munro, 15th February 1826; 4 Shaw and Dunlop, 467,—affirmed in House of Lords, 3 Wilson and Shaw, 344. Cathcart v. Cathcart, 12th February 1830; 8 Shaw and Dunlop, 497,—affirmed in House of Lords, 5 Wilson and Shaw, 315. Speid v. Speid, 21st February 1837; F. C. Carrick Buchanan, 25th January 1838; Shaw and Dunlop, XVI. p. 358. Mackenzie, 23d May 1823; S. and D. Nisbet, 10th June 1823; S. and D. Ersk. III. 8, 26, 29.

Lord Ordinary, Cockburn.—*Act. Solicitor-General (M'Neill), Neaves; Horne and Rose, W.S., Agents.—Alt. Maitland, Crawford; Andrew Snoddy, S.S.C., Agent.—For the Trustees, E. S. Gordon; Robert Roy, W.S., Agent.—T. Clerk.—[J.W.]*

28th January 1842.

SECOND DIVISION.—(J. W.)

No. 102.—PETER M'MILLAN and GILBERT M'KELLAR, *Pursuers v. DUNCAN M'CULLOCH, Defender.*

Process—Libel—Citation—Agent and Principal—Company—Objection to an action, that it was libelled against a party alone, as manager or agent of the Highland Distillery, and that it was so insisted in after the proprietor was named in the defences, without calling the proprietor—sustained, and the action dismissed.

This was an action at the instance of the pursuers, tacksmen of the harbour and shore-dues of the royal burgh of Campbeltown, against Duncan M'Culloch, "manager or agent for the Highland Distillery, residing at or near Dalintober." The action concluded for payment of £48. 7. 7½, being the amount of shore-dues payable by the defender for whisky, barley and coals, shipped off, imported and landed by him at the quays, and within the harbour of Campbeltown. In the defences it was stated, "that the pursuers are in error in making him (who is only manager) a party to this action, in place of Mr George M'Lennan, his employer, and proprietor of the Highland Distillery, and therefore that process falls to be sisted till he is called as a party for his interest." A voluminous record was notwithstanding made up, and a proof led, after which the Sheriff repelled the preliminary objection stated in the defences, and pronounced an interlocutor on the merits. The pursuers advocated the cause, when the Lord Ordinary adhered to the interlocutor of the Sheriff on

the merits, but sustained the preliminary objection and dismissed the action as libelled. The Lord Ordinary annexed the following note to his interlocutor:

"The only point on which the Lord Ordinary differs from the Sheriff is in that part of his interlocutor which repelled the preliminary defences, while it is thought that the objection to the libel, as directed against a party designed as a mere *manager* or *agent*, should have been sustained. The objection to such a pursuit in general is considered insuperable, as demonstrated by the cases of King against Shirra, (5 Shaw, 231), and of Russell, 23d May 1837, quoted in the papers. In the latter of these cases the Judges expressed strong opinions as to the expediency, in a mercantile community, of holding this point as finally settled.

"It was indeed alleged here that the agent was a *partner* of the Highland Distillery; and further, that by the *table of regulations*, agents and servants are declared responsible for the cargoes of others, 'if the owners are not present.' But no proof of the alleged partnership was brought, and at any rate the summons was directed against the respondent solely as an *agent*, which was an incompetent ground on the face of the summons for claiming the dues libelled on from the defender. It is equally out of the question to refer to the *table of burgals* or *port-dues*, as entitling any burgh to levy dues from a party not liable at *common law* for such charges. No usage or possession could sanction such a claim at the instance of the magistrates of a burgh, without the authority of Parliament; and the claim was still more untenable when it appears from the record and proof that the company of distillers, for whom the respondent is said to be agent, carry on business, and must consequently have an office within the jurisdiction of the Sheriff. Even if there had been no such office, the proprietor of the distillery might have been cited on a supplement.

"On the merits of the case, so far as these depend on the proof, the Lord Ordinary has nothing to add to the brief and accurate summary of the evidence given by the Sheriff-depute in the note annexed to his interlocutor of 21st February 1840.—Printed record, p. 164."

On a reclaiming note, the Court pronounced the following interlocutor:

"In respect of the objection stated by the defender, as not being the proper party to be called in the original process, recal the interlocutor of the Lord Ordinary: Find that the objection to this action, as libelled against Duncan M'Culloch alone, as manager or agent of the Highland Distillery, and as so insisted in after the proprietor was named in the defences by the said Duncan M'Culloch, without calling the said proprietor, is well founded, and ought to have been sustained: Therefore dismiss the action, and assolvie the said Duncan M'Culloch, and decern: Of new find the respondent, the said Duncan M'Culloch, entitled to expenses, both in this Court and in the Inferior Court; allow the accounts," &c.

Lord Ordinary, Cuninghame.—Act. Dean of Faculty (Wood), G. G. Bell; Ferriers and Duff, W.S., Agents.—Alt. Solicitor-General (M'Neill), Patton; Archibald M'Neill, W.S., Agent.—F. Clerk.—[J.W.]

28th January 1842.

SECOND DIVISION.—(J. W.)

No. 103.—HUGH ALLAN, Pursuer, v. The TRUSTEES of ROBERT GLASGOW, Defenders,—Et à contra, Raisers and Claimants.

Trust-Deed—Revocation—Intention—An heritable property having been found to be ineffectually conveyed by a trust-disposition and settlement, in a competition between the testator's heir-at-law and the residuary legatee under a previous settlement, revoked by the trust-disposition only "in so far as inconsistent with these presents"—Held that the heir-at-law was excluded, and that the residuary legatee was to be preferred.

In 1802, Robert Glasgow of Montgreenan executed a trust-disposition and settlement, conveying the whole property, of whatever kind and wherever situated, be-

longing to him at the time of his death, to trustees, for the purpose of paying debts, and certain sums of money and annuities therein specified, and thereafter destining the free residue of his estates, real and personal, failing lawful heirs of his body, to his natural daughter Mrs Ann Glasgow, now wife of Robert Robertson Glasgow of Montgreenan. This deed reserved the granter's liferent, with full power and liberty to him, at any time of his life, to alter, innovate or revoke the same, and to make such other settlements, deeds or codicils relative to his estate, real and personal, as he should think fit.

The present question is, whether, under the more recent deeds executed by Mr Glasgow, the disposition and settlement of 1802 has been revoked, and rendered of no force or efficacy?

In 1818, Mr Glasgow executed a deed of entail, settling his lands and estates of Montgreenan and others, failing lawful heirs of his own body, upon the husband of his daughter, Ann Glasgow, and their issue in their order. Thereafter, in 1821, Mr Glasgow executed a supplementary deed of entail, and the three following deeds: *first*, a trust-disposition and settlement of his whole estates and effects in Scotland; *second*, a will and testament in the English form; and, *third*, a deed of lease and release in regard to his estates in the West Indies. These several deeds were executed of equal date, 23d June 1821.

The fourth and fifth purposes of the trust-disposition and settlement are declared to be:

"That my said trustees or trustee shall, as soon as they shall have it in their power, from the state of the trust-funds, and as they shall think proper, appropriate and apply such produce or proceeds of my real and personal estate hereby conveyed, to the purchasing of lands or other heritages in Scotland, lying contiguous, or as near as may be to my said lands and estate of Montgreenan in Scotland, as such purchases can be met with, and most conveniently and advantageously made, and take the rights of the lands and other subjects so to be purchased by them, to and in favour of themselves and the survivor of them, as trustees, for the ends, uses, and purposes particularly before and after mentioned. *Fifthly*, To the end that my said trustees or trustee shall, immediately upon making the said purchases, and having their titles thereto completed, or as soon thereafter as can be, make and execute a deed of entail of the said lands and others so to be purchased by them, settling and disposing the same to and in favour of the said Robert Robertson, Esquire; whom failing, to the other heirs of entail and substitutes named and appointed by me in the said deeds of entail executed by me of my said lands and estate of Montgreenan and others in Scotland, of the 10th day of February 1818, and on the date hereof, which are here specially referred to."

Mr Glasgow died in 1827, and possessed of a property called Seafield, lying at a distance from Montgreenan, the entailed estate.

The trustees having accepted of the trust, completed titles by adjudication in implement to the property which had been conveyed to them generally by the trust-disposition and settlement. This deed contained no power of sale, and the trustees brought an action of declarator, in which they called as defenders Mr Glasgow's heirs of entail and heir-at-law. The summons concluded, that they should be found and declared entitled to sell and dispose of the villa of Seafield, and to give a valid title to the purchaser, and to purchase lands in the vicinity of Montgreenan with the price thereof, and to entail them on the series of heirs mentioned in the former deeds of entail—all in terms

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of the trust-deed. The Court found and declared in terms of the libel (*vide ante*, Vol. IV. p. 365), but the judgment was reversed on appeal (*vide ante*, Vol. VIII. p. 144). This had the effect of taking the unentailed heritage in Scotland out of the trust-deed of 1821. Thereupon the present actions were instituted,—the one a process of multiplepoinding at the instance of the trustees, narrating that they had levied and received the rents and produce of the unentailed lands since the death of Mr Glasgow, and that they had already applied, and were willing to apply and distribute the same according to the various directions and appointments of the truster, contained in his trust-disposition and settlement, but had been interrupted therein by the questions which had arisen, and calling into the field the heirs-at-law,—the annuitants and legatees under the settlements,—Mrs Glasgow and her husband for his interest,—and the heirs of entail.

The other action is a process of declarator and count and reckoning at the instance of the heirs-at-law against the trustees, proceeding on the subsumption, that, in the circumstances narrated, the trustees "have no power to sell the lands of Seafield, or any other of the lands and others conveyed in the said trust-disposition, or to apply the price, prices, or produce thereof, for the purpose of entailing lands, in the terms mentioned in said trust-disposition, or for any other purpose therein mentioned;" "seeing that, according to the conception and terms of the said trust-deed, the said heirs-at-law have not been legally displaced, disappointed, or excluded from the said subjects in favour of the said trustees, or of the parties interested in, or favoured by the said trust-deed."

In the conjoined processes, claims, founded on a variety of pleas, were lodged by each of the parties called; but the following *pleas* stated by Mrs Glasgow were those on which the case was ultimately disposed of:—1. The trust-disposition and settlement of 1802 is sufficient to prevent the deceased from having died intestate, as regards any portion of his succession. 2. By that deed the heirs-at-law of the deceased were effectually exheredated. 3. The claimant, as residuary legatee under the deed, is entitled to the fund *in medio*, or, at least, as in competition with the heirs *ab intestato*, she is entitled to such part as shall be found not to belong to the heirs of entail or legatees of the deceased.

In the trust-disposition and settlement of 1821, there is contained a clause of revocation of former settlements in these terms:

"And I do hereby revoke all other former deeds of settlement executed by me in relation to my real and personal estate and effects herein before conveyed, in so far as the same may be inconsistent with these presents, excepting the said two deeds of entail, and a will, conveyance, and lease after the English form, made and executed by me relative to my personal estate in England, or the West Indies, and my property there, all of the date of these presents."

The English will revoked all former wills, codicils, and testamentary dispositions whatsoever, at any time heretofore made.

The Lord Ordinary ordered cases, and made avizandum to the Judges of the Second Division, who appointed the same, and additional cases, to be laid before the Judges of the First Division and permanent

Lords Ordinary for their opinions. The following opinions were in consequence returned:

Lord Jeffrey, concurred in by *Lords Cockburn* and *Murray*:

"It having been finally settled by the judgment of the House of Lords, that the trustees of Mr Glasgow, though actually vested with a (fiduciary) fee of his unentailed Scotch heritage, had yet no power to sell that property, nor (as I understand the judgment) to apply its proceeds for the purposes of the trust, there are only two questions, as I conceive, that now remain for adjudication,—*first*, to whom these trustees ought now to make over this property? and, *second*, under what burdens, or with what rights of relief, it must be so taken or conveyed?

"When the judgment referred to was given, there were no other claimants, as against the trustees and heirs of entail, but the heirs-at-law of the testator; and it was no doubt chiefly with reference to their peculiar rights or privileges that the views and pretensions of these other parties were rejected. Since that time, however, a competing claim has been put forward by Mrs Ann Robertson or Glasgow (a daughter of the testator), on the ground, that as heirs-at-law can only take where there is no valid disposition by the ancestor, she is in this case entitled to exclude them, in virtue of an earlier settlement in her favour in 1802, which she contends must revive and take effect, *quoad* this property at least, if the later deeds of 1821 are truly inoperative, and incapable of conveying the fee. If she succeed in this claim, there is substantially an end of the present litigation: the whole right of the heirs-at-law being consequently barred, while the trustees, and all the other parties, in effect abet and concur in her pretensions. The first of the questions above stated is therefore a strictly *prejudicial* question, and must consequently take precedence of all others in the discussion.

"Now, upon this question, I have no hesitation in saying, that my opinion is entirely against this claim of the daughter, and that I think the original destination in her favour, in the deed of 1802, was effectually revoked, and superseded *in toto*, by the subsequent settlements of 1821. I do not go so much on the words of revocation in these latter deeds (though these are by no means to be disregarded), as on the total diversity in the whole scheme and policy of the two settlements; and the utter impossibility of supposing that the party who executed the latter could intend that, in any contingency, any part of the former should have effect. My view of the matter is shortly this: Both settlements are *total* or general settlements, and import a destination of the whole property of the testator. But they are fundamentally irreconcilable with each other, and obviously incapable of standing together, not only in their general import and effect, but in every one head and item of their smallest details. The whole trustees and executors are different—the whole legacies and legatees are different; and the destination of the residue is entirely to different persons, and under totally different conditions. The provisions for the daughter, in particular, are of so opposite and inconsistent a nature as to make it a matter, not of probable inference, but of absolute certainty, that it must have been meant to recall the former *in toto*, when the latter were substituted in their place.

"The first general settlement is contained in a single deed, executed in April 1802. It is in the form of a trust-conveyance to ten several persons—some of whom undoubtedly survived till after 1821—and conveys expressly his whole property and effects, heritable and moveable, in Scotland, the West Indies, or any other place: And after directing the payment of his debts, and certain specific legacies and annuities, appoints the whole free residue to be made over, in fee-simple, to the lawful issue of his own body, if he should have any; or, on failure of such issue, to his daughter, the present claimant, and to other persons in the event of her predecease. In the event of his having lawful issue, her provision is reduced to a legacy of £10,000, payable on her marriage or attaining majority:—And this is the whole of the original settlement, on which she now founds, as still subsisting, at least, as to the unentailed Scotch heritage. It reserved, of course, the fullest powers of revocation; and, without any such reservation, was indisputably

liable, in its own nature, to be totally evacuated by any subsequent and inconsistent arrangement.

"The second and last general settlement was effected by four several deeds, which are all, however, to be taken together, and were, in fact, executed *unico contextu*, and with express reference to each other, in June 1821. Such, at least, I think, is now to be taken as the true date of this last or subsisting general settlement—for though one important part of it, the first entail of Montgreenan, was actually made in 1818, yet, as it was added to, and substantially completed by, a supplementary deed, of equal date with the others in June 1821, the whole entailed disposition may properly be held to have been deliberately confirmed and granted *de novo* as at that period, when it was for the first time adopted and incorporated into the general settlement, which was then undoubtedly completed, and left to govern the entire succession of the testator at his death. Now, the slightest sketch of the import and tenor of this last settlement will suffice, I think, to show how necessarily its execution implied (even if it had not expressed) the total and final revocation of the former.

"It consisted then, as I have said, of four main branches.—First, the entail and supplementary entail (the last being dated 23d June 1821) of the principal property of Montgreenan; in which it is very remarkable that his daughter is not called to the succession in any event, either as heir or institute; the destination being, first, to his own lawful issue, and on failure of such issue, to Robert Robertson, *the husband of his daughter*, and the issue of their marriage; whom failing, to other substitutes.

"Then comes, of the same date, June 1821, a last will and testament in the English form, making over the whole of his property, of every description, out of Scotland, to eight several executors or trustees,—no one of whom is the same with any of those in the deed of 1802,—for the purpose of paying all his lawful debts, and a great number of large legacies there specified; including an annuity of £3000 a-year to his daughter and her husband, and no less than £30,000 to their younger children. I do not see the least reason to doubt that this deed was intended to convey, and did effectually convey, to the trustees, the whole West India property of the testator; and indeed, as they are anxiously enjoined immediately to sell what is so conveyed, and out of the proceeds to pay these large legacies, and all the debts; and as the daughter now says, and the fact is not disputed, that he never had *any heritable property whatever* out of Scotland, except that in the West Indies, and very little personal,—it seems to me very plain, that it was mainly, if not entirely for the purpose of conveying his large West Indian estates, that this anxious and elaborate deed, containing full directions for the sale of all the 'lands, messuages, and real estate thereby conveyed,' was framed and executed.

"Nor does it appear to me that the slightest doubt is thrown upon this by the fact, that he also left behind him, in the third place, a supplementary or additional deed (of the same date of June 1821), having express relation to this West India property. This, too, is in the English form, and is entitled a lease and release, whereby the whole West India property is again made over, in a new technical form, to the very same trustees and executors as those in the general will—under burden of all debts affecting that property, and of all legacies which have been or may be left by any will or testamentary writing. The immediate object or use of this last deed I do not of course presume professionally to understand. But it appears to me to have been intended to give the executors more ready and advantageous access to the properties, and to vest them with a more authoritative title than they might have had under the general will alone, to which this deed is obviously relative and ancillary, and of which indeed, as being executed *unico contextu*, and in favour of the same parties, it can only be regarded as exegetic or complementary. I have omitted to mention, that the leading instruction in both these deeds is to invest the whole residue, after payment of debts and legacies, in the purchase of lands to be entailed along with those of Montgreenan.

"The fourth and last part of the general settlement of 1821 is the trust-deed more immediately in question, and of equal date with the three former, whereby the testator makes over to the same eight trustees and executors, as in the two last-mentioned deeds, the whole of his properties of every description

in Scotland, except only his entailed estates, under burden of his debts and legacies generally, and of certain specific legacies mentioned in the body of it, including one to his daughter and her husband, of his whole plate, furniture, library, &c.,—with a concluding instruction, parallel to that in the two other deeds, to invest the whole free residue in lands to be entailed with Montgreenan. The general will contains, however needlessly, an express and absolute revocation of all former wills and testamentary dispositions; while this trust-deed, of equal date, also expressly revokes 'all former deeds and settlements in relation to the subjects hereint conveyed, in so far as inconsistent with these presents—excepting only the said two deeds of entail, and a will, conveyance, and lease after the English form, relative to my estates in England or the West Indies.'

"Now, whether these clauses of revocation are looked to, or the general tenor of the settlements in which they occur, I think it equally clear, that, by their execution, the whole former settlement was *funditus* and totally recalled. I should hold this to be pretty clearly the case even as to the *special legacies* given by that former settlement; for though their subsistence might not be directly inconsistent with the tenor of those last executed, yet, considering that both were *general settlements*—that the original legacies (very few in number) were charged indiscriminately upon the whole fee-simple succession, and only directed to be paid by certain trustees from the undivided succession then placed in their hands—and that, twenty years after, the whole of that property was taken finally away from these original trustees—a very great part of it, viz., the large entailed estate, undoubtedly discharged of all legacies, and the remainder placed in the hands of an entire new set of trustees, who had no connection with, or knowledge of the former deed, with specific directions to pay out of its proceeds, *not* these, but certain other enumerated legacies, to entirely different persons, and to a very large amount,—it would seem difficult to doubt that the whole of these original bequests must be held to have been recalled; and the declared burdens which are alone noticed in that ultimate settlement, or in any way intimated to the present trustees, to have been the *only burdens* with which it was intended to affect it. The case is very nearly as if the original legacies had been charged exclusively upon a particular property, and that property had been afterwards alienated for obviously inconsistent purposes.

"But however this may be as to the original legacies, or the original legatees, to whom nothing whatever is left by the new settlement, it really seems impossible to doubt that at all events *the whole original provisions for the daughter* were finally recalled, and that it would be directly and palpably inconsistent to hold that any of these could be claimed along with those in the last set of instruments. The first provisions were an alternative legacy of £10,000, or (in the event which has happened) a right to take in fee-simple the whole free property, of every denomination. By the new settlement, however, she is most certainly to have neither of these things; but *in their place*, and as an entire new provision, she is to get, along with her husband, a joint annuity of £3000 a-year, with a legacy of plate, books and furniture—to have her husband institute, and her children first heirs in the new entail—to have £30,000 for her younger children—and the whole farm-stock and utensils upon the entailed property for her husband. The question then is—*not* whether this was or was not an adequate compensation for the annulment of the former provisions,—for the testator was entitled to annul all these without any compensation at all,—but whether the granting of this new provision did not necessarily import the total annulment of the old? and upon this I do not see how there can well be a doubt.

"The words of revocation are—'in so far as inconsistent with these presents.' But could 'these presents,' which did not leave a particle of heritage in fee-simple to any one, but directed the whole property, after paying debts and legacies, to be entailed to the entire exclusion of the daughter, be in any way consistent with a settlement which had no entail in contemplation, but left the great mass of the property directly to that daughter in fee-simple? Looking to the tenor of the deed, therefore, in which it occurs, the clause of revocation, I should say, must be read as if it had run in terms like these—'and whereas I now mean to make new provisions for my daughter

and her family, entirely inconsistent with those in my original settlement, I hereby revoke absolutely, and annul *in toto* the whole of these former provisions; in which case it does not seem to be disputed that the revocation would have been conclusive, even if the last settlement (from being made on deathbed, want of due execution, or otherwise), had proved altogether ineffectual. But the important thing here is, that that settlement *has taken effect* in almost all its particulars—and especially that the claimant has got (or will get) all that was intended for her by that deed—and will in fact suffer no substantial prejudice by the subjects in dispute being taken by the heirs-at-law. Not only is she and her husband in possession of the whole rents of the entailed estate, with all its stocking and pertinents, as part of the goods in communion, and her younger children provided in £30,000, which was plainly the main remuneration contemplated when the former provisions were withdrawn,—but she herself is in the enjoyment of her annuity of £3000, and her legacy of plate and furniture. But besides, if the other available funds are sufficient to pay the debts and legacies, the only persons having any interest in the present question are the heirs of entail, in whose number *she* is not included; and that this is truly the condition of matters may be safely enough assumed from the fact, that, till very lately, theirs was the only interest set forth by the acting trustees, one of whom is this very claimant, the daughter herself; and even if the other funds should prove *inadequate* for payment of the debts and legacies, the only parties who could be affected by the heirs-at-law succeeding in their vindication of the subjects in dispute, would be the creditors and legatees. But as it is only to the residue of the Scotch property, after satisfying all these, that she was originally provided by the deed of 1802, it is plain that, in such an event, nothing whatever would remain to be taken by her under that settlement. In any view, therefore, she has really no interest to maintain that that deed should still be held as subsisting.

"She refers to certain cases as to the effect of revocations occurring in deeds which were reducible on the head of *deathbed*. But nothing, I think, can be more unfortunate than such a reference. In the first place, there is nothing parallel in the principle on which effect is given or denied to revocations on deathbed, and that which allows or disallows them in cases like the present. In all these latter cases *intention* alone is looked to, and there is truly no question as to *power*; whereas a deathbed deed is always annulled, in a question with the heir, *as being ultra vires*, or rather, *as not being truly the deed of the party*; and accordingly, if the settlement of 1821 had been challengeable on that ground, the fundamental conveyance of the Scotch heritage to the trustees would have fallen *in toto*, and no question ever been raised as to its being applicable, or not applicable to the purposes of the trust; whereas, in the actual case, the trustees are infest on a confessedly valid conveyance to them; and the only question is, for what purposes, or for whose behoof, they shall now dispose of it? But, in the next place, the whole doctrine established by the decisions referred to, is, when properly considered, entirely adverse to the views of the claimant, and, in fact, of itself sufficient to exclude her present pretensions. It is settled, no doubt, that the mere execution on deathbed of an inconsistent disposition of heritage, will not be held *per se* to revoke a former revocable settlement, so as to let in the challenge of the heir-at-law; because such a disposition, in the event of such a challenge, would be a mere nullity; and the effect of the challenge, therefore, would necessarily be, to leave things exactly as they were before it was executed—and, consequently, on the footing of the former settlement. But wherever there is an *express revocation* of former settlements, though contained in a deed which is inoperative against the heir in respect of deathbed, it is equally well settled that such a revocation is effectual, and that no one can found, either against the heir-at-law or any one else, upon these former settlements. In the remarkable case of Crawford and Coutts, an attempt was made to amalgamate or combine *both* these rules, by a clause of revocation very peculiarly expressed; and it was a question of some difficulty to determine what effect should be given to it. But neither of the rules themselves was doubted of, or has ever since been brought into dispute: and it seems plain to me, that the present case is distinctly within the principle of the

last. The very fact, indeed, that there was thought to be great difficulty in Crawford's case, satisfies me that there could have been none whatever as to this. It was there attempted to exclude the challenge of the heir-at-law, by an ambiguous or implied saving of that of the donee in a former deed, to this limited effect, though all former settlements were generally revoked. In short, it was an indirect attempt to make the revocation of those earlier deeds depend upon the latter being allowed to subsist; and the greatest doubts were entertained as to the competency of effecting such a purpose, even by words introduced for that very object. In this Court, however, they were found to be effectual: But in the House of Lords, even this plain expression of intention was found to be unavailing, and the heir's right to challenge was admitted, in consequence of the general words of revocation, though so significantly qualified. In the present case, however, there is not the slightest indication of any such purpose being entertained. The revocation has no reference whatever to the ultimate validity of the deed in which it is contained, but only to the consistency or inconsistency of its actual tenor with that of any former settlement. The words, in my opinion, can possibly bear no other sense; since I am unable to conceive how one deed can be found to be consistent or inconsistent with another, except by collating the several provisions which they actually contain; and it does appear to me to be nothing less than simply unintelligible to say, that though their written tenor is wholly irreconcilable, they might become consistent by one of them proving ineffectual! That the one may no longer stand in the way of the other, in such an event, may be very true; but when it is confessedly settled, even in these favourable cases of deathbed, that an express revocation will still have effect, though contained in a deed wholly inoperative *quoad ultra*, the plain result is, that both deeds must, in all such cases, be found ineffectual, and neither of them capable of displacing the heir-at-law. In the present case, the revocation is as express as words can make it, and the inconsistency of the two deeds as indisputable; and therefore, unless it can be maintained, in the face of all the authorities, that a revocation must in all cases be soipite by the deed containing it proving inoperative, it is obvious that the claimant would have no case, even if the whole of the last general settlement of 1821 had been found incapable of execution, and she left accordingly without any provision under either. But when it appears that, on the contrary, she has actually been secured in the whole of these inconsistent provisions, it must appear altogether extravagant to maintain that she is yet entitled to exclude the heirs-at-law, as the undivested donee under that earlier settlement.

"Holding it then to be clear, that the heirs-at-law are the only parties now entitled to claim these heritable subjects from the trustees, the only remaining questions are—1st, Whether they are entitled to take them free from the debts and legacies with which the whole succession was burdened by the settlement of 1821? And 2dly, If they are liable for a share of those debts and legacies, whether, and to what extent, they are entitled to relief from those who take the other trust-properties?

"Both these questions are attended with difficulty, and I cannot say that I have absolutely made up my mind as to the first of them. But the inclination of my opinion is, that the heirs are now entitled to take these subjects freed from the purposes of the trust; liable, of course, as successors *titulo lucrativo*, to the debts of the defunct, and as representing him; but entitled to a total relief from those who have no other title to the rest of the trust-property than a disposition expressly burdening it with these debts.

"The chief difficulty in the way of this opinion arises on the cases of Erskine's Trustees, Hamilton and Campbell, referred to in the case for the heirs of entail. But I have already stated (in the note to my interlocutor of 13th March 1839) that these cases differ entirely from the present, in this important particular, that the parties there found liable for their share of legacies and provisions, had no other title to the subjects, which they took bodily from the want of a power of sale, than the trust-deed itself, which had burdened all that was contained in it with these legacies; whereas the heirs here take *jure sanguinis*, and by a title independent of the trust-deed altogether. In these cases, the parties, taking under the deed, were most justly

held bound by the deed; and the judgments, in so far as they touched the point now at issue, in truth proceeded on the plain principle of *approve and reprobate*. It is very true, that in the present case the heirs must take from the trustees; and do not and cannot challenge the general conveyance under which these trustees are now infest in these properties. But they assuredly take no benefit under that conveyance, and cannot therefore be held to *approve* it, in the sense of law; and above all, they do not, like the parties in those other cases, take from these trustees, by the express act or gift of the truster, but by their own inherent legal rights as his natural representatives: And, although the trust is construed into a trust for their behoof (because trustees can never have anything but a fiduciary holding,) still it is a trust constituted and created by the operation of the law alone; and, not being derived from the will or bounty of the ancestor, cannot be affected by the qualities and conditions which he could effectually attach to provisions having no other origin.

"This is the best ground, perhaps, on which to rest the opinion to which I incline. But even if it were thought more consonant with principle or legal theory, to account for the constitution or emergence of a trust for the heirs, by the supposition (or fiction rather) of an *intention* to that effect on the part of the truster, I should think that the only form such an intention could assume, consistently with what is now fixed in law and admitted in fact, would, if embodied in explicit language, be substantially to this effect:—'I make over all my property to you my trustees (except my entailed estates), and desire you to vest yourselves with it immediately on my death—and then I direct you to sell and turn the whole into money, *except my Scotch heritage; and out of the money* so realised, to pay my debts and legacies.—But you are not to sell the Scotch heritage; but to find out my heirs-at-law, and convey to them, to be held by them as if they had succeeded to it *ab intestato*.' Considering that the trustees are in point of fact legally vested with this property, and yet directed to pay the debts and legacies only out of the proceeds of what is conveyed to them—that it has been finally decided that the heirs-at-law are not displaced or excluded from this Scotch heritage; and that, as it cannot be sold or disposed of by the trustees, there can never be any proceeds of it in their hands—it really appears to me that the only way of reconciling the law and the facts, and of explicating the resulting rights of the parties, is to hold (or assume) that the views of the truster (or of the law operating on what has been effectually done by him) had been embodied in some such words as the preceding. The only other way, indeed, in which such a trust for the heirs-at-law could have been directly expressed, would have been by still directing the trustees (as above) to keep the Scotch heritage unsold, and to make it over to the heirs-at-law, 'but only in order that they might, out of its proceeds, pay their proper share of my debts and legacies, and take nothing but the surplus to themselves,'—an arrangement which, as implying that these unknown heirs-at-law were in truth to be nominated as a subordinate and additional set of *trust-disponees*, and associated as such with those originally appointed, in a joint administration of the property, and in the settlement of debts and legacies, and questions of relief among the different beneficiaries, does appear to me a great deal more irreconcilable, either with the settled law of the case, or the general frame and policy of the deed, than that first suggested.

"But even on the supposition that the heirs are to take the lands burdened with a share of the debts and legacies, there still remains the question as to the particular share which should be imposed on them, or the order in which they and the other beneficiaries should be made liable? Now upon this question I have never had any serious difficulty. I hold it to be quite impossible to maintain that the burden of these debts and legacies is laid on the Scotch properties conveyed by the trust-deed of June 1821, in any respect more onerously or directly than on the West India and other foreign properties conveyed by the other deeds of the same date; or that there is the least pretence for holding that these last properties were entitled to relief from the former; or only to be liable *subsidiarie*, and after these were exhausted. I take it, on the contrary, to be too plain to admit of question, that the whole were subjected equally, and intended to be made liable *pari passu*; in so far as the nature

of the several properties themselves did not entitle some of them to exemption or relief upon common principles of law: For, in the absence of any express provision to the contrary, I think it impossible to doubt that the ordinary rules of ranking, and rights of relief, as between heir and executor, for example, or far and liferenter, can never be held to be superseded, but must have effect, in the ultimate accounting under a trust, exactly as in the settlement of debts, and distribution of property, in ordinary succession *ab intestato*. Now it is upon a plain application of these familiar rules, that I come to the conclusion that the heirs-at-law in the present case, taking a land estate as such in *forma specifica*, are entitled to relief of all moveable debts and legacies from those who take the *executry* of the debtor or testator, whether directly as nearest of kin, or as special legatees, or beneficiaries under a trust-settlement: And then it only requires, for the practical decision of the question, to consider, that as the last will and the lease and release, not only grant power, but expressly direct and enjoin that the whole heritable subjects thereby conveyed should be sold and turned into money immediately on the death of the testator; so there can be no doubt that in all questions with the trustees and executors under these last deeds, this direction must be held to have been duly obeyed, and that the whole foreign property in their hands must now be considered and dealt with as *actual executry*. And upon this ground alone, I hold the heirs entitled to relief; or in other words, only liable after the whole personal estate has been applied and exhausted.

"I do not think it necessary to say anything as to the extravagant proposition of the trustees, that they should keep the property in question unsold, in *perpetuity*, and make over the annual proceeds to the heirs of entail—except merely, that it is not only wholly without warrant from the trust-deed itself, but, as I think, in manifest contradiction to its most express injunctions, as well as to the opinions judicially delivered in the House of Lords, to the effect that the heirs-at-law had not been displaced or excluded from their right of succession by the tenor of that deed.

"The opinion which I have thus formed, would give the heirs right, as I conceive, to the whole rents and profits of the subjects from the period of the ancestor's death: For the doctrine of *bona fide* perception and consumption appears plainly inapplicable; and I do not see how, in a question with beneficiaries under a trust, it is possible to stop short of this conclusion; the heirs, however, being always liable for a rateable share of the expenses of the trust-management."

Lord Mackenzie, concurred in by Lords Gillies and Cunningham:

"I rather think, that in this case the heirs-at-law are excluded, by the trust-disposition 1802, from all right to the subjects in dispute, i. e., the Scotch unentailed heritable subjects. This trust-disposition undoubtedly carries these subjects away from the heirs-at-law, if it be not revoked. Now, this trust-disposition 1802 is not revoked *absolutely* in the trust-disposition 1821, relating to the estates and effects in Scotland; but is revoked only 'in so far as the same may be inconsistent with these presents.' The English will 1821, indeed, which conveys the English property of the testator, contains an absolute revocation of prior deeds; but that, I think, must be held applicable only to deeds relating to English property; and not applicable at all to deeds disposing of heritage in Scotland, which fall under the qualified revocation of the Scotch trust-disposition of the same date as the English will. I cannot construe the English will so as to make it contradict the Scotch trust-disposition of the same date in regard to Scotch heritable subjects. That qualification must, I think, have effect given to it; for it is express. It might be inserted with a view to exclude the heirs-at-law from the chance of pleading the law of deathbed. But whatever was the reason for inserting it, there it stands, an express qualification of the revocation of the trust-disposition 1802. By that qualification, the trust-disposition 1802 is revoked, in so far as it may be inconsistent with the Scotch trust-disposition 1821. But in so far as it may not be inconsistent with this Scotch trust-disposition 1821, it is *not revoked*. These last negative words, indeed, are not expressed, but they are implied with perfect and complete certainty from

the express limitation; and the implication cannot have an effect less than the explicit expression of the negative would have had. Past all question, I think the matter stands just where it would have stood if the disponent had said,—‘I revoke the trust 1802 in so far as may be inconsistent with this present deed; but in so far as it may not be inconsistent with this deed, I declare that the trust-deed 1802 shall stand unrevoked.’ The question then comes to be, is this trust-deed 1802 inconsistent with the deed 1821, in relation to the subject now in dispute? Now, I think that it is not; for this reason: The effect of the judgment of the House of Lords, substantially, is just to take the Scotch unentailed heritage out of the trust-deed 1821 altogether. For, as the effect of that judgment is to establish that the trustees have no power to dispose of the unentailed Scotch heritage for any of the purposes of the trust 1821, it must follow, I think, that truly it is not conveyed to them in trust at all. It is said it may be held to be conveyed, in order to be by them conveyed over to the heir-at-law. As an arrangement merely between the heir and the trustees, such a thing may possibly be admitted by a kind of fiction of law. But in substance we may, I think, be quite sure that this was not the intention of the truster, and that he never made his trust in order to pass his heritage to his heir-at-law. His intention was just the reverse. It was to exclude his heirs-at-law from having any right as such heirs to this property. That intention he has, in respect to certain subjects, failed to express effectively; and so the heir-at-law claims the subject. But that claim rests not on any conjecture of the truster’s intention, but on a failure of the truster to express that intention. It comes just to this, that the trustees 1821 ought not to take this subject, because the trust-deed gives them no powers to execute any of the purposes of the trust in regard to it, and the disposition in that deed is given to the trustees only in trust, and for the purposes of the trust. They ought to leave it to the heir-of-law, as not disposed of at all by the truster. The heir may perhaps, *in form*, state it as vested in the trustees, though *sine causa*, and plead that they ought to convey it over to him. But his plea in substance rests on this, that the trustees never had right to touch it at all, and that substantially the trust-deed 1821 does not include it at all. Now, in that view, how can it be said, that in relation to this subject, the deed 1802 is inconsistent with the deed 1821? The trust-deed 1802 disposes of this subject. The deed 1821 does not dispose of it at all. How can the disposal of this subject, by the deed 1802, be inconsistent with the non-disposal of it by the deed 1821, or with the disposal of other subjects by the deed 1821? That I am unable to see. It is said that the whole tenor of the deed 1821 is inconsistent with every part of the deed 1802. That certainly is so, if the deed 1821 be read so as to dispose of the Scotch unentailed heritage. But if that unentailed heritage is not disposed of at all by the deed 1821, then this proposition does not seem to be true. One deed of conveyance cannot, I think, be inconsistent with another deed, where the operation of the first deed does not hinder the second deed from having full and entire effect according to its own tenor, precisely as if that first deed had never existed. I think, then, that the heir-at-law is excluded by the trust-deed 1802, which still carries the subject in dispute.

“What is to be the effect, then, of the deed 1802? I do not think that question is so before us as to enable us to decide upon it, nor is such decision perhaps necessary. If the heir-at-law be excluded, the other parties interested do not seem to differ as to the disposal of the subjects falling under the deed 1802, in which they only are interested.”

Lord Fullerton :

“I agree with Lord Mackenzie.

“The point is certainly not free from difficulty,—a difficulty much increased, if not created, by the omission of all mention of the trust-deed 1802 in the discussion in the former action, which terminated in the judgment of the House of Lords. It is also to be regretted, perhaps, that this point, I mean the claim of Mrs Robertson Glasgow under the deed 1802, has attracted so little attention in these pleadings. But informed as I am at present, looking at the import of the judgment of the House of Lords, and the grounds on which it appears from the report to have been pronounced, I cannot come to any other conclusion

than that expressed in the preceding opinion, viz., that the beneficial interests created in favour of Mrs Robertson Glasgow by the deed 1802, were not, in so far as regards lands situate in Scotland, effectually revoked by the deed 1821; and that consequently the heir-at-law was, and still is, excluded by the deed 1802.”

Lord President (Boyle) :

“I am disposed to hold, that the fair result of the judgment pronounced by the House of Lords, in the case that depended between the trustees and the heirs-at-law of the late Mr Glasgow of Montgreenan, reversing the decision of this Court with regard to the property of Seafield, part of his unentailed lands, that these lands are not effectually carried by his trust-deed, executed in 1821, in favour of any persons whatsoever, and that any claim that his heirs-at-law may assert to them, has not been affected by any of its provisions. Accordingly, the summons of declarator at the instance of the heirs-at-law that has since been raised, concludes, ‘that according to the conception and terms of the said trust-deed, the heirs-at-law have not been legally displaced, disappointed, or excluded from the said subjects, in favour of the trustees, or of the parties interested in or favoured by the said trust-deed;’ and on this principle it is maintained throughout their pleadings, that they take *jure sanguinis* alone the unentailed lands, which in reality must be held as not included under the trust-deed of 1821.

“It is at any rate clear beyond all question, that these unentailed lands are not conveyed, or directed to be conveyed, to the heirs-at-law of the granter, either in reality or under any fiction, to favour whom none of Mr Glasgow’s deeds indicate indeed the most distant intention. But if these lands have been disposed of to any other person or persons than the heirs-at-law, by any other valid deed, either under the denomination of lands belonging to, or that might belong to the granter at the time of his death, effect must be given to that deed, if it has not been revoked. Now, it is plainly manifest, that by the trust-deed of settlement executed by Mr Glasgow in 1802, his whole estates, real and personal, including consequently the unentailed lands that he might die possessed of, were conveyed to trustees, by whom the residue thereof, after fulfilling other purposes, was directed, on failure of heirs of the granter’s body, to be made over to and in favour of Ann Glasgow, his natural daughter, now Mrs Robertson Glasgow, to the absolute exclusion of his heirs-at-law, whose right of succession was thus entirely cut off.

“It is said, however, that by the trust-deed of 1821, relative to Mr Glasgow’s heritable and moveable estate in Scotland, the deed of 1802 was effectually revoked, and it certainly is by this deed alone that any revocation can be held to be established; because the English will, executed of the same date, however ample its revocation of former wills may be held to be, cannot, in my opinion, operate as a revocation of a settlement of Scottish heritage, nor could it ever be intended as such. What, then, are the words of revocation in the trust-deed of 1821? The clause runs thus:—‘And I do hereby revoke all former deeds of settlement executed by me in relation to my real and personal estate and effects hereinbefore conveyed, in so far as the same may be inconsistent with these presents, excepting the said two deeds of entail, and a will, conveyance, and lease,’ &c.

“Now, nothing can be clearer, than that the above is not an absolute revocation of all former settlements. It is only a qualified one, and solely applicable to deeds, ‘in so far as the same may be inconsistent with these presents.’ Whatever deeds are consistent with the deed in which this limited revocation is contained, according to the declared purpose of the granter, shall not be held as thereby revoked. Now, whatever may have been the object which the granter had in view by so restricting the effect of his revocation, there is no ground on which it can be denied effect. If, then, the trust-deed 1821, whatever may be its effect as to other subjects, has not disposed of, or affected the unentailed lands belonging to the granter, but has in reality left them as entirely open to the claims of the heirs-at-law as if it had never existed, it is not easy to see how the deed of 1802, which did contain a direct disposal of the granter’s whole estate, including his unentailed property, can be held as inconsistent with that of 1821, as both deeds may still be effectual for their

respective purposes, without any inconsistency whatever. On these grounds, and for the other reasons assigned by Lord Mackenzie, I concur in his Lordship's opinion."

Lord Ivory declined giving any opinion, having been counsel in the cause.

At advising,

Lord Medley.—I have considered the cases carefully, and feel great difficulty, but I incline to agree with the majority of the consulted Judges. Had the later settlements not contained such a qualified revocation of the one in 1802, I would have held it revoked, as it differs in so many particulars from those last. But the revocation is restricted to the terms, "in so far as inconsistent with these presents." The conveyance is said to be insufficient, because the House of Lords found that it was inoperative as to the unentailed lands; but still the deed is not null and ineffectual. It is a good conveyance to the trustees, who must convey either to the heirs-at-law or to Mrs Glasgow. The testator showed his intention, by his trust-deed, not to convey to her fully as much as he can be supposed to have done against his heirs-at-law. I own I am at a great loss whom to prefer; but the deed of 1802 does not seem to be inconsistent with that of 1821.

Lord Macgregor.—I concur with the opinion of Lord Jeffrey; and it is so very full, that I need not go into details. The deed of 1802 was not a special conveyance of lands to Mrs Glasgow, but a general settlement, superseded and revoked by the deed of 1821. Although there were no special revocation, it would be implied. The two deeds cannot stand together. Mrs Glasgow's claim appears to be an ingenious scheme for defeating the judgment of the House of Lords; but I am of opinion that her plea is not well-founded in law.

Lord Justice-Clerk.—I regret with Lord Fullerton that the argument in these cases has been conducted so exclusively against the heirs-at-law. The heirs-at-law first maintained that they were entitled to take the unentailed lands directly; but that view failing, they now follow it up and say, that the trustees hold the lands under the burden of denuding in their favour; that there are no trust-purposes applicable to the unentailed property, and hence, that the trustees must reconvey to them; that if the heirs-at-law had appeared in the adjudication in implement, it would not have been granted, seeing the trustees would have been bound just to reconvey; and in their additional case they state their claim *jure sanguinis*, and irrespective of the trust-deed altogether. They show that the trust-purposes don't apply to the unentailed lands; that in truth the trust-deed is silent as to them; and this is necessary for their case. For if there were any one purpose of the trust which could be, under the trust, worked out and satisfied from the unentailed lands, the law would effectuate the trust-deed to that extent. This being the nature of their pleas, it is necessary to determine the effect of the clause of revocation in the deed 1821, and I am of opinion that it does not revoke the deed of 1802. What is the effect on former deeds of a clause of revocation in one which conveyed lands to trustees for certain purposes which could not be extricated? The truster revokes all former deeds, as the same may be inconsistent with these presents. He makes reference to the effect of such a revocation when these deeds shall be brought into collision, and compared upon this principle, that the former are to stand recalled, in so far as inconsistent with the latter, and no farther. The testator has provided for such a question as has here occurred;—if the conveyance to the trustees be not sufficient, and if the ultimate trust be not effectual, the former is not to fail. He had no intention of dying intestate. If the last trust be not applicable to the unentailed lands, is not this a case where the first is not inconsistent with the second? The testator does not leave it on implied revocation, but on a question of law, viz., the legal construction of two deeds, as interpreted by a Court of law. He does not leave it to the Court to say merely what was his intention, but what are the effects of the two deeds, and the extent to which the former is inconsistent with the latter. If the deed of 1821 gives no directions as to the unentailed lands, the deed of 1802 must subsist. The intention of the testator would be violated, if we were first to hold the deed of 1821 silent, and then that the deed of 1802, containing directions, was revoked. I am therefore of

opinion, that according to the clause of revocation and the intention of the testator, the deed of 1802 was not revoked. His Lordship stated, that Lord Meadowbank had authorised him to say, that he concurred with the opinion of the Lord Justice-General and Lord Mackenzie.

The Court preferred the claim of Mrs Glasgow, and allowed expenses to both parties out of the trust-funds.

Authorities for R. Glasgow, &c.—Finnie, Nov. 30, 1836. Lord Stair v. Stair's Trustees, H. of L. Dick v. Gillies, July 4, 1828; 6 S. and D. 1065. Elliot v. Cleghorn, M'Lean and Robinson, App. Cases, 1033. Gordon v. Sutherland, 29th January 1791; D., 11,534. Scott of Harden, 20th Dec. 1751; D., 15,394. Kerr v. Turnbull, 15th Feb. 1758; D. 1551. Sloane Lawrie v. Donald; M'Lean and Robinson's Rep., 1063. Cameron v. Dick's Trustees, affirmed in the House of Lords, 29th Aug. 1833; 7 W. and S. 106.

Authorities for H. Allan.—Bower v. Browns, 26th Jan. 1770; Mor., p. 5540; Hsiles, p. 332. Dundas v. Lewis, 13th May 1807; Mor. App. Writ, No. 6, and Baron Hume's Dec. p. 917. Stanley v. Bernes, 11th Feb. 1831; 3 Haggard's Eccl. Rep., p. 372. Robertson on Pers. Succ., 297, *et seq.* Story's Conflict of Laws, p. 394. Brodie's Stair, Note, p. 599; and Naysmyth v. Hare, reported in Robertson on Pers. Succ., p. 283. Hill v. Hunter's Trustees, May 14, 1818; F. C. Bowie v. Bowies, Jan. 16, 1811; Bar. Hume's Dec., p. 765, and Observations of Lord Chancellor in Cameron v. Mackie, 29th Aug. 1833, 7 W. and S., 106. Angus, Dec. 6, 1825; 4 Shaw, 279. Russel v. Russel, Jan. 23, 1745; M. 5211. Campbells v. Campbell, 14th Jan. 1747; M. 5219. Executors of Sinclair v. Fraser, 14th Feb. 1798; Hume's Dec., p. 176. Fraser v. Fraser, 13th Nov. 1804; M. App. Heir and Executor, No. 3. Bell's Com. I. p. 96, and cases cited.

Lord Ordinary, Jeffrey.—Act. Rutherford, Cowan; James C. Reddie, W.S., Agent.—Alt. Solicitor-General (M'Neill), Horne; Maclean and Hamilton, W.S., Agents.—[J.W.]

29th January 1842.

SECOND DIVISION.—(J. W.)

No. 104.—A. v. B.

Bankrupt Act, § 4—Deceased Debtor.

An application was made for the sequestration of the estates of a deceased debtor before the expiration of six months from his death, but with the concurrence of his executor. The heir was a pupil; and a factor *loco tutoris* having been appointed, also concurred. The Lord Ordinary thought the duty of a factor was rather to realise and preserve the estate, than to concur in its alienation; and was advised that the factor should apply to the Court for special authority to concur.

Lord Ivory, Reporter.—[J. W.]

29th January 1842.

SECOND DIVISION.—(J. W.)

No. 105.—A. v. B.

Bankrupt Act, § 114 and 116—Declaration.

Before a bankrupt is discharged and reinvested in his estate, on the offer and approval of a composition, it is provided that he shall make a declaration that he has made a full and fair surrender of his estate, &c. When the death of the bankrupt intervenes between the approving of the composition and the stage for making the declaration, it was observed, that the cause of the declaration not being taken should appear on the record; and *observed obiter* by one of the Judges (Lord Justice-Clerk), that before the sequestration be

declared to be at an end, in favour of his representatives, they should make the same declaration, but only to the best of their knowledge and belief.

Lord Ivory, *Reporter*.—[J. W.]

29th January 1842.

SECOND DIVISION.—(J. W.)

No. 106.—MURDO MACKENZIE, *Objector*.

Agent and Client—Auditor's Report—Objection.

A client, dissatisfied with the party to whom the Sheriff had remitted certain business-accounts which he was owing to his law-agent, to be taxed, brought the cause into the Court of Session; and the Court, at his own suggestion, remitted to the Sheriff-clerk of Inverness-shire instead. On the day fixed for the taxing, the client intimated that he meant to apply to the Court for leave to appeal their interlocutor to the House of Lords, and required the Sheriff-clerk to postpone executing the remit. He proceeded, however, with the taxing; but it being in the absence of the client, he objected to the report, and craved to have an opportunity afforded him of stating his objections to the accounts. The Court approved, and decerned.

Act. Solicitor-General (M'Neill), Sandford.—*Alt.* Dean of Faculty (Wood), E. S. Gordon.—[J. W.]

1st February 1842.

SECOND DIVISION.—(J. W.)

No. 107.—MORRISON v. M'KIRDY.

Process—Bill-Chamber—Extractor—It is incompetent for the Inner-House to decern for expenses in a case in the Bill-Chamber.

The Lord Ordinary on the bills having refused a bill of suspension with expenses, the suspender reclaimed to the Inner-House. On advising the reclaiming note their Lordships adhered, found expenses due, and remitted to the auditor to tax the account, and report. The taxed amount was afterwards decerned for by the Inner-House. The process being transmitted to the extractor of Court, he declined to issue an extract, in respect it was Bill-Chamber procedure, and that the expenses ought to have been decerned for there. A note was boxed to the Court stating this, and craving their Lordships to delete the interlocutor approving of the auditor's report, and to remit to the Lord Ordinary on the bills to decern for the account. On moving the note on Friday last, the case was delayed for inquiry into the form. In the meantime, the following memorandum, which had been obtained by the agents from Mr Parker, was laid before the Lord Justice-Clerk:

"The Judges of the Inner-House, in reviewing an interlocutor of the Lord Ordinary on the Bills, are sitting as a Court of review in the Bill-Chamber. The proceedings are not in the Court of Session, and indeed cannot be, until the bill is passed and brought before a Lord Ordinary in the Outer-House, in the form prescribed by the Advococation and Suspension Act (1838). Accordingly,

"1st, Where a reclaiming note complains of an interlocutor refusing a bill of suspension in the Bill-Chamber, and their Lordships intend to alter,—they recal the interlocutor reclaimed against, but they do not pass the bill. They remit to the Lord Ordinary to pass it. 6 Geo. IV. c. 120, § 46.

"2d, If the reclaiming note complain of a judgment passing

a bill, and their Lordships intend to alter, they do so, and remit to the Lord Ordinary to refuse the bill, with or without expenses, as the Court may direct. See the same Statute and section.

"3d, In like manner, where the bill has been refused in the Bill-Chamber, with expenses, and the Court intend to adhere with costs, they 'refuse the reclaiming note, find additional expenses due, and remit to the Lord Ordinary to modify and decern for the same.' The proceedings are then retransmitted to the Bill-Chamber, where the account is given in, taxed, and decerned for. The Bill-Chamber Clerks issue the certificates or extracts of all judgments in Bill-Chamber cases."

On resuming consideration of the written note to-day, the Court granted the prayer thereof, and remitted to the Bill-Chamber accordingly.

Gibson-Craigs, Dalziel and Brodie, W.S., Agents.—[J. W.]

6th April 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 108.—THE ROYAL BANK OF SCOTLAND, *Appellants*, v. ADAM CHRISTIE and OTHERS, *Respondents*.

Trust, Latent—Bankrupt—Statute 1661, c. 24—Reduction—Completing Titles—Ancestor—Heir—Guarantee—Security—Cash-Credit—Thomas Allan, partner of the firm of Robert Allan and Son, bankers in Edinburgh, was infest as absolute proprietor of two estates which were purchased by him with funds belonging to the firm, and in the books of the firm, accounts were kept relative to, and in the name of these estates, in which the disbursements by the firm, in the purchase-money, improvements, &c., were put to the debit, and the rents drawn were carried to the credit of the accounts. Robert Allan and Son got a cash-credit from the Royal Bank, and in security and repayment of their operations thereon, gave their joint bond as a company and as individuals—Thomas Allan at the same time disposing one of the foresaid estates in farther security. In less than a year after Thomas Allan's death, his son and heir, also a partner of the firm, which was continued under the same name after Thomas's death, granted to the Royal Bank a second bond and disposition in security over the two foresaid estates, in consideration of an additional loan to the firm—Held (affirming the judgment of the Court of Session), 1. That these estates were the private property of the deceased partner, and not held in trust by him for the company: 2. That being so, the conveyance by his son, within a year after his death, was null and void, under the second branch of Statute 1661, c. 24, prohibiting dispositions by apparent heirs to the prejudice of their ancestor's creditors: 3. That the company was dissolved by the death of the partner, and that without any notification to the public or to customers, although the articles of copartnership provided specially, "that, in the event of the death of any partner, his heirs shall not be entitled to examine the books of the company; but the survivors shall make up a statement of the deceased's account, counting up to the first balance after the decease, and attest the same by their signatures or oath, if required; and such statement, signed and attested, shall be held as sufficient, and shall preclude any right to further examination by the heirs or others:" 4. That the first bond and disposition in security was not a continuing guarantee, but became inoperative on the death of the partner by the change in the company which then took place; and, 5. That the cash-credit having been operated upon subsequently to the death of the partner, in the same manner and under the same firm as before, and the account being kept by the bank as a continuous account, a balance standing against the company at the date of the partner's death, was cleared off by payments afterwards made by the surviving partners. 6. Observed by the Lord Chancellor, that the principle recognised in the case of *Devaynes v. Noble*, 1 Merivale, 530, is applicable in its full extent to the present case.

The company of Robert Allan and Son carried on business for many years as bankers in Edinburgh; and,

during the period of its subsistence, there were various changes in the individuals composing the firm. Upwards of twenty years ago, the late Mr Thomas Allan, who had then the sole interest in the concern, assumed his cousin, Mr Alexander Wight, as a partner; and Mr Allan's eldest son, Robert Allan, was added to the company in 1831, under a provision that his participation in the profits should not commence until January 1832. On that occasion the parties executed certain articles of agreement, by which their respective interests in the business were fixed upon the footing that Thomas Allan was to have one-half, and Alexander Wight and Robert Allan one-fourth share. The agreement provided, 12th, "That in the event of the death of any partner, his heirs shall not be entitled to examine the books of the company; but the survivors shall make up a statement of the deceased's account, counting up to the first balance after the decease, and attest the same by their signatures or oath, if required; and such statement, signed and attested, shall be held as sufficient, and shall preclude any right to further examination by the heirs or others."

Mr Thomas Allan died on the 12th September 1833. The company continued to carry on business till August 1834, when it stopped payment, and a sequestration of the company estates was awarded on 2d September following.

At Mr Thomas Allan's death he was infest, as proprietor, in the two estates of Campse in Fifeshire, and Lauriston in Mid-Lothian. The circumstances connected with the acquisition and management of these estates by Mr Allan, are detailed in the following extracts from a report by Mr Donald Lindsay, accountant, prepared by order of the Court of Session in the present action:

ESTATE OF CAMPSIE.

This estate was formerly the property of Mr David Betson, who appears to have obtained, in 1812, a cash-credit with the company of Robert Allan and Son for £8000, for which he granted to trustees for them a bond and disposition in security over his estate. It is stated that Mr Betson was sequestrated on 27th September 1814, and that, of this date (27th February 1816), the lands were sold by missives of sale to Francis Walker, Esq., W.S., at the price of £7000 Sterling, payable at Martinmas 1816; and that Mr Walker then declared that he had made the purchase for the behoof of Thomas Allan, Esq., banker in Edinburgh. The articles and minutes of sale are not produced.

The books of the company, previous to 1st January 1817, are not produced; but it appears from the cash-ledger, No. 10, fol. 404, that there was at that date a balance of £1887. 1. 6. due to them on an account kept in name of "David Betson, Dunfermline, and Messrs Anderson and Wilkins, London." It would appear from the whole tenor of the correspondence with Messrs Anderson and Wilkins, entered in the company's English letter-books, that whatever may have been the form adopted on the occasion of the sale of the lands of Campsie in 1816, the purchase was then made by desire and for behoof of Messrs Anderson and Wilkins. See letters to them of 23d December 1816, 4th April 1817, 4th April and 1st May 1818, 17th January, 4th February, and 21st February 1820. During the period of this correspondence, the account above referred to was continued, and the advances by the company thereon were greatly increased, the rents received for the lands of Campsie being brought to the credit of the account. Constant complaints are made by the company of the extent of their advances, and of the inconvenience thereby occasioned to them; and Messrs Anderson and Wilkins are urged to sell the lands of Campsie, or relieve the account by paying off the mortgage held by the company thereon.

Of these dates (21st November and 2d December 1820), a disposition of the lands of Campsie was granted by the trustee

on Betson's estate, with consent of the commissioners thereon, and of Mr Walker, in favour of Mr Thomas Allan; and of this date (13th December 1820), Mr Allan, as surviving trustee of Robert Allan and Son, executed a disposition and assignation, with consent of the company, of the heritable debt constituted in favour of Robert Allan and Son to himself as an individual. The narrative of this deed contains the following declaration: "And the said Francis Walker having declared that the said purchase was made by him for behoof of me the said Thomas Allan as an individual, an absolute disposition thereof is to be granted to me as the purchaser; and whereas the said Robert Allan and Son, as the creditors in the said heritable security, are entitled to draw the whole of the foresaid price of £7000, and interest thereon, to be applied towards payment of their aforesaid debt of £8587. 0. 3., bearing interest from the 16th day of July 1819; and it is fit and proper that, upon receiving payment thereof, a disposition and assignation of the said heritable security should be granted to me, as purchaser foresaid, for fortifying my title to the said lands; therefore, having instantly made payment to the said Robert Allan and Son of the foresaid price of £7000, and interest thereof from the said term of Martinmas 1816 to the said 16th day of July 1819, the receipt whereof the said Robert Allan and Son do hereby acknowledge, I, the said Thomas Allan, as surviving trustee for the said company of Robert Allan and Son, have sold and disposed," &c. Mr Allan was subsequently infest on the disposition by Betson's trustee. The account in the company's books is continued in the name of "David Betson, and Anderson and Wilkins," to 11th November 1823, when there remains a balance due to the company of £8909. 10s., which is of that date transferred to the debit of an account opened under the title of "Estate of Campsie, near Dunfermline." In making the transference, this balance is stated to be the "real cost of Campsie at this date." This account is continued under the same title, during the whole period of the existence of the company. There is brought to the credit of the account the rents received from the estate, and to its debit the outlay connected with the estate, and the expense of the title in Mr Allan's person, together with progressive interest on the account. It is balanced annually, and the balance is entered to the credit of stock in each year's balance-sheet, under the title of "Estate of Campsie."

ESTATE OF LAURISTON.

The negotiations for the purchase of this estate were commenced by Mr Thomas Allan in May 1823, by some correspondence between him and Dr Coventry; after which Mr Allan set off for London, where Mr Law, the proprietor of Lauriston, and the trustees who held the estate for him, resided, and where Mr Allan, of this date (18th June 1823), as appears from the copy in his own hand-writing produced, made an offer of £26,000 for the estate. Subsequent to this, difficulties had occurred with regard to Mr Law's title to the property, and the terms of the disposition to be granted by him and his trustees in favour of Mr Allan. It was not until the close of 1824 that these difficulties were arranged, by an agreement that £20,000 of the price was to be in the meantime invested in Government stock in the names of trustees, for Mr Law and Mr Allan, and the remainder to be paid to Mr Law. Both this £20,000 and the remainder of the price were provided for by the funds of the company.

In October 1823, an account was opened in the company's books, under the title of "Estate of Lauriston, near Edinburgh." This account is continued in the company's books under the same title, and is debited in 1824 with the price paid as above stated, together with stamps and other expenses, and is balanced on 31st December 1824 by the sum of £26,272. 8. 7., which is included in the company's balance at that date under the same title. In the succeeding year's account there are brought to its debit various payments made on account of outlay at Lauriston; but in the month of August 1825, there are two accounts opened in the company's cash ledger,—the one entitled "Improvements at Lauriston," and the other "Expenses at Lauriston." These accounts are continued in the company's books, the improvement-account being charged with all sums paid by the company of that nature; and the account for expenses, with payments for furniture, servants' wages, taxes, &c.

They are balanced annually,—the balance of the improvement-account being carried to the debit of the "Estate of Lauriston," and that of the expenses-account to the debit of the account of "Thomas Allan." The estate-account, besides the balance of the improvement-account, annually transferred, is debited with public and parochial burdens, insurance, &c., and also with progressive interest, stated annually, and is credited with the sums actually received for rents; but no account is taken of the rents of the house and gardens which were occupied by Mr Thomas Allan. By the agreement which was entered into between the partners when Mr Robert Allan was assumed in 1831, it is provided (article 8), "That Lauriston be taken as Mr Thomas Allan's own speculation, he paying the firm 3 per cent. interest upon the cost, and on what is or may be laid out upon the property; but the balance of the account in question is included in each year's balance of the company's stock, under the title of "Estate of Lauriston," as well after as before the date of this agreement.

The advances made by the company, to defray the expense of buildings and other improvements on Lauriston, amounted in the end, along with the original price of £26,272. 8. 7., to £45,987. 15s.

In March 1832, the company applied to the appellants for credit in a cash-account, to the extent of £20,000, to be kept in the bank's books in name of the firm of Robert Allan and Son—they giving their joint bond as a company and as individuals; and Thomas Allan at the same time granting a disposition of the estate of Lauriston in security of the advances. On these terms the proposal was acceded to by the directors of the Royal Bank, and a bond was executed on 30th March 1832, by which the whole of the partners bound themselves, jointly and severally, and their heirs, executors, successors, and representatives whatsoever, and also the company, and whole stock and profits thereof, to pay to the bank and their assignees the said sum of £20,000, or such part or parts of it as should be paid or advanced to the said company or firm of Robert Allan and Son, in manner therein mentioned; and "for further security and more sure payment to the said Royal Bank of Scotland, &c., and without prejudice to the before-written obligation for payment of the said sums, but in corroboration thereof," Thomas Allan sold, alienated, and disposed, all and whole the lands of Lauriston, under the usual conditions and provisions of cash-credit bonds.

Upon the precept of seisin contained in this bond and disposition in security, the defenders were infeft, and their infeftment duly recorded; and immediately thereafter, the company or firm of Robert Allan and Son proceeded to operate upon the cash-credit, drawing out and replacing from time to time such sums as their occasions required.

In July 1834, after Thomas Allan's death, the company, having occasion for a loan of money, over and above the amount of the cash-credit, again applied to the Royal Bank for an additional advance of £22,000. The application was acceded to; and the security then granted by them to the bank was in the form of an heritable bond, and bond of corroboration and disposition in security, being made applicable to the sums already advanced, or to be advanced on the cash-credit, to the extent of £20,000, as well as to the new loan of £22,000.

After narrating the former bond and disposition in security for the cash-credit, the new bond proceeded in these terms:

"And now, seeing that the Court of Directors of the said Royal Bank of Scotland have agreed to continue the said credit of £20,000 upon the said account, kept in the books of the said Royal Bank of Scotland, in Edinburgh, in the name of the said company or firm of Robert Allan and Son, as aforesaid, upon our granting the bond of corroboration and disposition in security after written—and that they have farther instantly advanced and paid to us, for behoof of the said firm of Robert Allan and Son, the sum of £22,000 Sterling, in consideration of our granting the bond and obligation for repayment of the same, and disposition in security thereof hereinafter written; therefore we, the said Robert Allan and Alexander Wight, do hereby, without hurt or prejudice to the heritable bond and disposition in security before mentioned, or to any of the obligations therein contained, or to the infeftment following thereon, and security thereby constituted in favour of the said Royal Bank of Scotland, and their foreshaids, but in farther corroboration thereof, *et accumulando jura jurius*, bind and oblige ourselves, both as partners of the said company and as individuals, jointly and severally, and our heirs, executors, &c., and also the said company or firm of Robert Allan and Son, and whole stock and profits thereof,"

to make payment to the Royal Bank of the said sum of £20,000, or such part or parts of it as have been, or shall be advanced to the company. Then followed an obligation by the partners in similar terms, for repayment of the loan of £22,000; and finally,

"without hurt or prejudice to the obligations for payment of the several sums hereinbefore written, or to the said heritable bond and disposition in security before recited, and infeftment following thereon, and security thereby constituted in favour of the said Royal Bank and their foreshaids; but in further corroboration thereof," &c.

Robert Allan thereby sold, alienated, and disposed to the bank, under the usual conditions and provisions, the lands of Lauriston, and also the lands of Campse, to both of which he had made up titles as heir served and retoured to his deceased father, Thomas Allan, for the express purpose of being enabled to grant this security. Upon the precept of seisin contained in the bond, infeftment followed in favour of the appellants. The result of the operations upon the cash-credit, as conjoined with the advance of £22,000, was to leave the company, at the date of their failure, debtors to the appellants in the sum of £42,000.

Mr Robert Christie, accountant in Edinburgh, was appointed trustee on the sequestrated estate of the company, and of Messrs Robert Allan and Alexander Wight as individuals. With his concurrence the present action was raised at the instance of the respondents, as creditors of the deceased Thomas Allan, either as an individual, or as liable for the debts of the company of which he was a partner, concluding for reduction of the heritable bond, and bond of corroboration granted in July 1834, and the security thereby constituted in favour of the appellants, on the ground, that being granted by Robert Allan within a year of his father's death, the security was void, as being to the prejudice of his father's creditors, contrary to the provisions of the Statute 1661, c. 24. The summons also contained a separate declaratory conclusion, having reference to the original bond and disposition in security granted in 1832, namely, that it should be found and declared that the balance due to the Royal Bank, as aforesaid, under that bond and disposition in security, whether taken as on the 12th of September 1833, when Mr Thomas Allan died, or on the 31st of December 1833, the date of the first balance of the books after his death, had been paid, and the security thereby extin-

guished, and the lands freed and disburdened of the debt.

In defence it was *maintained*—1. That the estates of Campse and Lauriston were not the private property of Mr Thomas Allan, but held by him as trustee for the company, and therefore most properly pledged for the advances to the company. 2. Even if they had been his private property, the Statute 1661, c. 24, was only applicable to conveyances by the heir in favour of his own creditors to the prejudice of his ancestor's, and not to the competition of ancestor's creditors *inter se*; and, 3. That the company was not dissolved by the death of Mr Thomas Allan in 1833, either at that date, or of the next balance thereafter; and that therefore the bond was a continuing guarantee, which covered all advances made to the company down to their sequestration.

The Lord Ordinary pronounced the following interlocutor:

"The Lord Ordinary" "repels the defences against the other conclusions, both reductive and declaratory, and decerns in terms of these conclusions: Finds the defenders (appellants) liable in expenses; appoints an account thereof to be given in, and when lodged, remits the same to the auditor to tax and report.

"*Note*.—Under the reductive conclusion, the Lord Ordinary thinks it clear that Campse and Lauriston must be considered as having been the property of Thomas Allan individually. He stood as the sole owner on the titles and on the record; and although his having obtained or taken the money of his partners to make the purchases, and caused accounts to be opened between them and these estates, these accounts do not contradict the titles, but, on the contrary, in some respects confirm them. So that, however the company might have compelled him to pledge or sell the estates in order to pay their advances for the original prices, if they had claimed them as their own during his life, this would have been a demand in which they would have had no right to succeed.

"If this be assumed to be the fact, the question, how far the creditors of Thomas Allan, who dealt on the faith of his apparent ownership, are liable to be affected by any latent equities to which he may have been subject, does not arise. He was not in the situation of a trustee, but in that of an absolute owner, liable to no such equities. And if so, the Lord Ordinary holds that the disposition of his property to the defenders by his son, within a year after his death, was an infringement of the Act 1661, c. 24. The defenders say that this disposition was granted to one of his creditors, and that this excludes the Statute. The Lord Ordinary differs both as to this view of the fact and of the law. This disposition was not to a creditor of Thomas Allan, but to the defenders, who once were, but who had ceased to be his creditors. On the security of this conveyance, the defenders no doubt made advances which went to the house kept by the surviving partners, and this house was a creditor of Thomas Allan. But the advances were not made, nor meant to be made to the house in its character of a creditor of Thomas Allan; and the son, in disposing the estates in security, had no view but to raise funds for the use of his own company. Even assuming, therefore, that the debt due by Thomas Allan was *de facto* diminished exactly according to the amount of these advances (which, however, was not the case), this use to which the borrowers chose to turn their loan, cannot alter the legal character of the original transaction.

"But even although the arrangement had been all along intended as a pure *bona fide* conveyance of the estate, in order to raise funds for the direct payment of one of Thomas Allan's creditors, still it would have been struck at by the Act. At least, the Lord Ordinary can discover no authority or principle for holding that that valuable Statute, which forbids an heir to affect his predecessor's estate within a year after his death, to the prejudice of the predecessor's creditors, can be held to be complied with by the heir's giving it all away to a single creditor of the ancestor. It is true that a separation of the ances-

tor's creditors from those of the heir, and not any distribution between the former, *inter se*, forms the chief description of the general object of the Act. But the result is an enactment, declaring that 'no right or disposition made by the said apparent heir' shall be lawful, 'in so far as it may prejudice his predecessor's creditors.' Can it be said that these creditors, as a body, are not prejudged by a conveyance of the whole property by the heir to a favoured creditor, as, for example, to a company of which he himself is a partner?

"The main declaratory conclusion—which is, that the debt due by Thomas Allan under a prior bond was paid before the second one was granted by the son—requires that it should be fixed, whether, in consequence of the death of Thomas Allan, on 12th September 1833, the company to which he belonged was dissolved, either then or at the next balance on 31st December thereafter. The Lord Ordinary holds, that there is nothing in the 12th clause of their 'notes of agreement' which excludes the operation of the established rule, that the death of a partner dissolves a company. The settlement with that partner's heirs is declared to be delayed till the next balance; but, *quoad* the public, the usual result is allowed to take place. And if the partnership was dissolved by Thomas Allan's death, the defenders don't and can't pretend that they required notice of it.

"If this shall be held to be the correct view, the principles of the case of *Devaynes v. Noble*, 1 Merivale, 530, as explained by Mr Bell, Vol. II. p. 638, apply here. And, if they do, it was agreed at the debate that the balance due by Thomas Allan to the defenders, under the first bond, was all paid prior to granting the second one."

The defenders having reclaimed, the accountant's report, above referred to, was ordered by the Court, upon the circumstances connected with the estates of Campse and Lauriston. Cases were also ordered. For the arguments of parties see *Jurist*, Vol. XI. pp. 448–450. These cases were afterwards appointed to be boxed for the opinion of the other Judges on the following adjusted queries:

"*Query*, 1. Whether, keeping in view the state of the feudal titles, the evidence afforded by the company's books and other documents, and the conduct of the parties generally, the estates of Campse and Lauriston, or either of them, were acquired and vested in the person of Thomas Allan as his own individual property? Or, whether they were held by him in trust, or for behoof of the company of Robert Allan and Son, or subject to their disposition, down to the period of his death?

"2. Assuming the said estates, or either of them, to have been vested in Thomas Allan in trust, or for behoof of the company, or subject to their disposition—Is the bond and disposition in security, of 29th July 1834, under all the circumstances appearing on the record in this process, reducible in whole or in part—and if in part, to what extent it is reducible under the Act 1661, as a conveyance granted by the heir within year and day of the ancestor's death, and to the prejudice of the ancestor's creditors?

"3. Assuming the said estates, or either of them, to have been the private property of Thomas Allan as an individual, or to have become so by any subsequent arrangement or conveyance in his favour—Is the bond of 29th July 1834, with reference to the whole circumstances of the case, reducible as above, under the Act 1661?

"4. Whether, and to what extent, the bond of 30th March 1832 remained in force, as a continuing guarantee and security over the estate of Lauriston, to cover advances, or any balance due upon advances, made by the defenders to the company of Robert Allan and Son, at or after Thomas Allan's death, and down to the date of the final sequestration of the company? or, if it did not so remain in force, at what period did it cease to operate as a continuing guarantee and security over the estate of Lauriston; and whether the balance, if any, that may have been due when the said bond ceased so to operate as aforesaid, was paid, or wholly or partially extinguished subsequently?"

Opinions were given in by the consulted Judges,

which see *ante*, Vol. XI. pp. 450-461. On advising (17th May 1839), the Court adhered to the Lord Ordinary's interlocutor.

The Royal Bank appealed, *pleading* a reversal on the following among other grounds:—1. The respondents have not instructed that the estates of Campse and Lauriston were the property of Thomas Allan individually. On the contrary, it sufficiently appears that these estates were not the absolute property of Thomas Allan as an individual, but truly belonged to the company of Robert Allan and Son, although the formal title was made up in the name and person of Thomas Allan, the principal partner of the company. This is a question of evidence and not of law, on which the Judges have hesitated and differed in opinion. Both estates were considered and treated by the firm as theirs in their books, &c.; and in a question of this kind, not with a third party, are onerous acquirers of the property from Thomas Allan, where the shape of the title might have been conclusive; but in a question as to the true nature of Thomas Allan's right, it is admitted on all hands that the books of the company must afford most important evidence. By the feudal law of Scotland, a company, as such, cannot in its own name or firm hold heritable property, which was the reason why the titles of the property were taken in the name of Thomas Allan alone, but he was merely a trustee for the company. This view is corroborated by other circumstances,—1st, the 8th article of the agreement in 1831, "That Lauriston be taken as Thomas Allan's own *speculation*, he paying the firm 3 per cent. interest upon the cost, and upon what is, or may be laid out on the property." Campse was held in the same manner as Lauriston, and no such stipulation was made as to Campse. The inference is, that Campse was still to be held in trust for the firm. But, even as regarded Lauriston, the arrangement was *prospective*, and was never afterwards formally carried into effect. 2d, The only important *use* of the property was for behoof of the firm, viz., by impledging it for the loan to the appellants in 1832. 2. On the supposition that the estates, or either of them, truly belonged to Thomas Allan himself and not to the company, the Statute 1661, on which the respondents found, would not apply to the present case, because the conveyance challenged was truly a conveyance in favour of creditors of Thomas Allan the ancestor, and the Statute does not strike at such a conveyance as that in question. 3. The security which the appellants got under the bond of 1832, continued as an effectual guarantee even after the death of Thomas Allan; and, at all events, it is effectual for the balance which was due at Thomas Allan's death, or at the 31st of December thereafter, and the appellants are not precluded, by any thing that has happened, from still striking the balance at one or other of these dates, if it shall be held that they were in error in supposing that they had an effectual security down to the date of the bankruptcy.

The respondents, in reply, maintained the pleas which are embodied in the opinions of the majority of the Judges.

At the conclusion of the Lord Advocate's reply on 6th April 1840:

Lord Chancellor.—My Lords, it is very much to be regretted,

that in a case which involves so much property, the materials upon which we are called upon to decide are so extremely meagre, and the evidence so very unsatisfactory. I do not find, however, that either party in this case has proposed to bring before your Lordships any other facts than those which are to be found on the printed papers before your Lordships' house; nor do I find that the learned counsel on either side now suggest that any opportunity should be afforded to them to enable them to bring forward any other means of explaining the transaction, beyond the papers which are before you. Under these circumstances, it appears to me that the only course your Lordships can pursue, is carefully to investigate the accounts, and the documents which are printed, and to see whether you can come to any satisfactory conclusion upon them. If it is found impossible to do so, why, then the question will be, what means your Lordships should adopt for the purpose of getting better information? It certainly does seem very strange, that in a transaction of comparatively very recent date, and of which so many persons must be cognizant, there should have been no better information as to the title of these respective parties who are claiming this property, than that which appears upon the printed papers before you. It may be that neither party has the means of bringing any farther evidence forward;—if so, then it is impossible that you should come to a satisfactory conclusion upon the evidence before you, without a very careful examination of all the accounts which have been brought under your consideration. If the points which were made as to the title to the estate, shall appear to have been decided one way, then of course the further consideration of these points of law would not arise. But it is material to come to some conclusion as to the title to this property; and for that purpose, I would propose to your Lordships that you should adjourn the further consideration of this cause.

The case being advised of this date, the Lord Chancellor said:—

My Lords, the first question which occurs in this case is, whether the estates of Lauriston and Campse ought to be considered as the property of the late Thomas Allan, or as held by him in trust for the firm in which he was a partner? and upon that question I have not been able to find any substantial difficulty. The negotiation and contract for the purchase of Lauriston was conducted by Mr Thomas Allan, and in his own name; the title was made up in his person;—he was, in respect of that estate, enrolled as a freeholder of the county of Edinburgh. He enlarged the house, and made extensive improvements to the estate, and lived in the house with his family, for which there is no trace of his having been charged with any rent to the firm. It appears, however, that the purchase-money was paid by the firm; and the amount, together with other expenditure in respect of the estate, was not placed to the debit of Mr Thomas Allan, but was the subject of a separate account, to which all such payments were carried as debits, and all receipts on account of the estate were placed as credits. That such an account should have been opened, proves nothing; for it appears that other private accounts of Mr Thomas Allan were kept in the books of the firm,—such as the education account of his children; but why the balance was placed to the account of the stock of the firm, and not to the private account of Mr Thomas Allan, is not explained. It may have been so done because the firm had advanced the money for the purchase of the estate, and it may therefore have been thought right that the property itself should, in their books, be treated as belonging to the firm till the payment of the purchase-money and other expenditure on the estate had been arranged between Mr Thomas Allan and his partners, although it does not appear that the firm had any security upon the property. But however that may be, all ambiguity which that mode of keeping the account might otherwise have produced, is removed by the notes of agreement entered into upon the admission of Mr Robert Allan in 1831; the 8th article being—"That Lauriston be taken as Thomas Allan's own *speculation*, he paying the firm £3 per cent. interest upon the cost, and on what is or may be laid out upon the said property." This has been considered in the argument for the appellants as a new contract, giving to Thomas Allan what before belonged to the firm. But it was probably entered into

only for the purpose of guarding against the new partner supposing, or concluding from the entries in the books, that Lauriston was to be considered as the property of the firm; and it does not appear that any change in the mode of keeping the accounts was adopted on this memorandum being made. The whole history of the purchase, the title taken, and the declaration of the partners, prove that Lauriston was the private property of Mr Thomas Allan. The case of *Campse* is so far different, that the firm had originally a mortgage upon it. The mortgagor having been subject to a sequestration, this property was sold, and it seems doubtful on whose account it was purchased. But in December 1820, it was conveyed by the trustee under the sequestration to Thomas Allan; and soon after, by a deed to which the firm were parties, it was declared that the purchase was made for Thomas Allan as an individual, and the firm assigned their security upon the estate to him as the purchaser, acknowledging the receipt of £7000,—the purchase-money. It is true that the accounts show that in this case, as in the case of Lauriston, the purchase-money was not paid by Thomas Allan, and that the accounts of the property were kept in the same way as was adopted with respect to Lauriston. But the parties interested have acknowledged that the property belonged to Thomas Allan, and his title was made up as beneficial owner; and all his dealings with the property were consistent with his being so. There is not, therefore, I think, sufficient evidence to convert him into a trustee for the firm. So far, therefore, I think the judgment of the Court below was clearly right; and in this judgment, ten out of the twelve Judges concurred. The question which it seems expedient to consider in the next place, is, whether, at the time of the date of the second bond, any thing was due to the Bank of Scotland from the estate of Thomas Allan alone? His bond, of the 30th of March 1832, was to secure repayment to the bank of any balance to the extent of £20,000 which might be due to the bank from the firm of Robert Allan and Son, in which Thomas Allan was a partner, in respect of advances and accommodation to be afforded to them by the bank. Thomas Allan died in September 1833, and beyond all doubt, by that event, the firm of Robert Allan and Son, as it had up to that time existed, was dissolved, so far as it affected the bank. That the business was to be considered as going on as before, for the purpose of settling between the surviving partners and the estate of the partner deceased, by special agreement between the partners, cannot affect the question; and it is also quite clear that the security which Thomas Allan so gave to the bank, to secure the repayment of advances made to the firm in which he was a partner, that is, to himself and his partners, could not be used as a security for advances made after his death to a firm in which he was not a partner; that is, to the persons who had been his partners, whether they continued the old style and firm, or adopted another. Now, it is not in dispute that the payments made by the surviving partners, with whom the account was continued after Thomas Allan's death, to the bank, without any specific appropriation prior to the date of the second bond, exceeded the amount of the debt due to the bank at the time of Thomas Allan's death,—and the defendants admit, as appears in the 59th page of the appellants' case, that there were periods between the time of Thomas Allan's death, and the date of the second bond, at which there was no balance due to the bank, and that at the date of the second bond, there was only a balance of £400, and interest due: So that there is no ground upon which it can be maintained that the debt due at the death of Thomas Allan was not paid at the date of the second bond, except that of the bond of 1832 being available to secure advances made after the death of Thomas Allan, for which there is no pretence. It seems to have been supposed by some of the learned Judges, that the case of *Devaynes* was not applicable to the present, because this was a case of credit, and not of deposit. Those learned Judges recognise the law in *Devaynes'* case as applicable to Scotland, as indeed the case of *Speirs v. Houston*, 4 Bligh, 615, and 3 Shaw and Wilson, assume it to be. It is to be regretted that the subsequent decisions which have taken place in England upon that subject were not brought under the consideration of those learned Judges. If they had been, I have no doubt but that the application of the principle, in its full extent to this case, would have been recognised by them. Many cases

have occurred in this country; but it is sufficient to mention *Pemberton v. Oakes*, 4 Russel, 154; *Bodenham v. Purchas*, 2 Barnewall and Alderston, 39; and *Simson v. Ingham*, 2 Barnewall and Creswell, 65; because in one or other of those cases, all the circumstances occurred which have been supposed to distinguish this case from *Devaynes'* case. Without therefore calling in aid the fact, that the whole debt at the time of Thomas Allan's death was destroyed by the balance due to the bank, from the continuing firm having ceased to exist, such debt so due at Thomas Allan's death, would have been discharged by the application of the subsequent payments to such debt,—such payments having been made without any appropriation by the parties paying, and having been carried by the parties receiving such payments to the account kept by them, consisting of the old and new transactions, and constituting, therefore, a continuing account, and from which appropriation it was not competent for the bank to remove such payments at a subsequent time, when the consequences were seen, as was decided in *Bodenham v. Purchas*. When, therefore, Robert Allan, the son of Thomas, executed the second bond to induce the bank to continue to himself and his then partners the floating credit to the amount of £20,000, and to advance £22,000 for their use, he was not dealing with a creditor of his father, or giving to any such creditor a security for any debt of his father, but he was providing a credit for himself, and securing a debt of his own, upon the security of property derived by him from his father, and that within one year of his father's death, which is precisely the case guarded against by the Statute of 1661. In what way this transaction might operate upon the state of the account between Thomas Allan's estate and the surviving partners, does not appear to me to be in the least material. That was not the object or immediate effect of the transaction; and it is not proved that what was advanced by the bank was applied in payment of the debt due from Thomas Allan to the firm. The question, therefore, does not arise, whether, within the Statute, an heir can within the year, effectually prefer one of his ancestor's creditors to another, by giving to him a security upon the ancestor's estate. The ground upon which I rest my opinion is, that the bond and security of 1834 was not given to secure or pay any debt of the father. This case has been most laboriously argued below, and at the bar of this House, and it seems to have engaged very largely the attention of the learned Judges. I cannot say that I have felt the difficulties which seem to have been entertained by some others. I think it sufficiently proved that Lauriston and *Campse* belonged to Thomas Allan individually; that the debt due to the bank at the time of his death was discharged before the date of the second bond; that the security of 1832 cannot be applied to secure any debt contracted after the death of Thomas Allan; and that his son Robert had no power, by his bond of 1834, to affect the lands for his own benefit, and to secure his own creditors to the prejudice of the creditors of his father. It follows from this, that, in my opinion, the judgment of the Court below was right, and ought to be affirmed. Taking this view of the case, it is unnecessary to consider what the effect of the bond of 1834 would have been upon the liability of Thomas Allan's estate to the bank, if any debt had remained due upon the bond of 1832. The surviving partners of Thomas Allan would have been primarily liable for the debt; and by the bond of 1834, the creditors took a new security for the £20,000, and continued the credit for that sum for an indefinite period, which, by the bond of 1832, and the law applicable to it, had determined at the death of Thomas Allan. As to costs, it is true, that upon some of the questions considered by the Judges, there was a very even balance of opinion; but if a majority had been in favour of the appellants upon some one of the questions, it would not have influenced the decision of the cause,—a majority upon other of the questions being against them. It does not appear to me that there is in this case sufficient to induce the House to depart from the rule (which I always do with reluctance) of making an unsuccessful appellant pay the respondent's costs, who in this case are unsatisfied creditors, and who have been under the necessity of instituting these proceedings, and of incurring the expenses attending their progress, for the purpose of obtaining relief against an act under which the appellants' claim, and by which an attempt was made to deprive them

of those means of obtaining payment of their debts to which they were entitled. I therefore shall move the House, that the interlocutors appealed from be affirmed, with costs.

Interlocutors affirmed, with costs.

Second Division.—Lord Cockburn, *Ordinary*.—Richardson and Connell, *Appellants' Solicitors*.—Alexander Dobie, *Respondents' Solicitor*.—[W.H.D.]

29th April 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 109.—MISSSES CASAMAJOR and OTHERS, *Appellants*, v. PEARSON and ROBERTSON, W.S., and OTHERS, *Respondents*.

Trust—Settlement—Succession—Construction—Annuity—A party having left a trust-settlement, with directions to lay out capital sums to answer annuities of £200, £400 and £400, for his three sisters, and if the residue of his estate should not be sufficient for yielding the annuities, to pay the interest arising on the whole residue to the sisters, in proportion to the annuities provided to them; and also with directions to pay the capital sums laid out for producing the annuities to certain residuary legatees, as and when the sums became tangible by the death of the said annuitants respectively; and one of the annuitants having predeceased the trust, and another having died during the subsistence of the trust; and it not being ascertained before the accounting was completed, whether the annual income, arising from the estate while both the annuitants surviving the testator were alive, would be sufficient to satisfy their annuities for that period in full—Held (altering the judgment of the Court of Session), that during the continuance of the trust, the annuitants could only divide among themselves the income of the estate as far as it would go, and that upon the death of one of them, the share or capital which was invested to secure the payment of that annuity became tangible and payable to the residuary legatees; and cause remitted to the Court of Session with a declaration to that effect.

This was a question in the Porterfield multiplepointing, in which a judgment on other points was formerly pronounced in the Court of Session (16th December 1836, *ante*, Vol. IX. p. 154), and carried to the House of Lords (18th July 1839, *ante*, Vol. XII. p. 101), where it was partly affirmed, and partly reversed. The points raised in the present proceedings chiefly regarded the rights of parties interested in the trust-funds retained to produce annuities for the sisters of the trust, Alexander Porterfield, in terms of his settlement. The clause of the settlement providing the annuities was in these words:

"*Quarto*, In the next place, I hereby direct and appoint my said trustees or trustee to pay the following annuities to my sisters after named, which I hereby leave to, and settle on them during their respective lives, viz.,—to Mrs Christian Porterfield or Fotheringham, wife of the said Frederick Fotheringham, an annuity of £400 Sterling; to Mrs Ann Porterfield or Paterson, wife of Lieutenant-Colonel Thomas Paterson, residing in Charlotte Square, Edinburgh, a like annuity of £400 Sterling; to Mrs Margaret Porterfield or Buchanan, an annuity of £200 Sterling, and this over and above, and in addition to the annuity already settled on the said Mrs Margaret Porterfield or Buchanan by me; which several annuities hereby provided, I direct and appoint my said trustees or trustee to pay to my said sisters, during all the days of their respective lives, and that half-yearly, commencing payment thereof at the second term of Whitsunday or Martinmas which shall happen after my death, for the year preceding such first term of payment, and continuing payment thereafter at two terms in the year, Whitsunday and Martinmas as aforesaid, during the lives of my said sisters respectively: And for the better fulfilment of this purpose, I hereby direct and appoint my said trustees or trustee to vest and lay out capital sums for answering the foresaid respective

annuities, on any security or securities which they or he may think proper, either personal, heritable, or in the public funds, and to take said securities in such terms as they or he may think best adapted for fulfilling the foresaid purpose: And in the event that, after payment of my debts, fulfilment of the obligations in which I may stand bound at the time of my death, payment of the expenses attendant on the execution hereof, and of the £500 to my said sister Mrs Alexander, the residue of the proceeds of my funds and estate shall not be sufficient for yielding the foresaid annuities hereby settled on my said sisters, then it is my meaning and intention, that the said residue, whatever it may be, shall be vested and laid out, and the interest and dividends arising therefrom be paid unto, and divided among my said three sisters, Mrs Fotheringham, Mrs Paterson and Mrs Buchanan, during their respective lives, in the same proportions, and exactly in the same terms in every respect, as above pointed out with respect to the full annuities of £400, £400, and £200; and I do hereby direct my said trustees or trustee to regulate themselves accordingly."

The fifth clause was as follows:

"In the event of there being any of the proceeds of my said funds and estate remaining, after setting apart capital sums sufficient to yield the three annuities of £400, £400, and £200, as above specified, then I hereby direct my said trustees or trustee to pay such surplus, together with the capital sums so to be set apart for answering the foresaid annuities, as and when such capital sums become tangible by the deaths of the said annuitants respectively, or, in the event of there being no surplus, then the capital sums, whatever their amount may be, so to be vested and laid out as aforesaid, as and when such capital sums shall become tangible as aforesaid, to and among Mary Paterson, Helen Paterson, Alexander Paterson, and Mary-Ann Paterson, all children procreated of the marriage between the said Lieutenant-Colonel Thomas Paterson and Mrs Ann Porterfield or Paterson; Buchanan, Buchanan, and Buchanan, all daughters of the said Mrs Margaret Porterfield or Buchanan, equally among the said Mary, Helen, Alexander, and Mary-Ann Patersons, and Buchanan, share and share alike, and the survivors or survivor of them, and that at the first term of Whitsunday or Martinmas after their respectively attaining majority or being married, whichever of these events shall first happen (under the declaration, however, after mentioned), or as soon after the first of said events as the said capital sums so to be set apart for answering the foresaid annuities shall become tangible by and through the deaths of the said several annuitants respectively."

Mrs Buchanan predeceased the trust, and Mrs Fotheringham, who survived the trust, died in March 1834. In the course of the management of the trust-estate, it was not distinctly ascertained whether the annual proceeds would be sufficient to pay the annuities of Mrs Fotheringham and Mrs Paterson in full. The trustee having made up a set of accounts, the Misses Casamajor and others, who had right to the capital sums laid out for the annuities when they should be disengaged, objected to these accounts, and the principle on which they were constructed. The trustee had proceeded upon the principle, that on the supposition of there not being more annual proceeds than would produce the annuities of Mrs Paterson and Mrs Fotheringham, the whole annual proceeds should be devoted to that purpose, without any deduction on account of disengaged fee or capital in consequence of the annuitant (Mrs Buchanan) predeceasing the testator. And the full annuity of £400 not having been paid to each of the ladies, Mrs Fotheringham and Mrs Paterson, for a certain number of years, it was maintained by the trustee that they had a claim for their arrears upon the whole annual proceeds, and that the

surplus of one year should supply the deficiency of another.

The Misses Casamajor, &c., on the other hand, *pleaded*—That two-tenths of the residue of the trust-estate had become divisible on the death of the testator, in consequence of the predecease of Mrs Buchanan, who would have been an annuitant to the extent of £200; that in like manner four-tenths were divisible on the death of Mrs Fotheringham, who was an annuitant to the extent of £400; and that in each case, the surviving annuitant or annuitants were entitled to no more than the proceeds or income arising from the remaining proportionate capital sums. But the various questions which arose will be best understood from the judgment of the Lord Ordinary disposing of them.

"20th December 1839.—The Lord Ordinary having resumed consideration of this cause, and having considered the interlocutors of the Court, and the judgment of the House of Lords as applied by the Court—Holds the state of the trust-accounts, No. of process, the revised objections to that state for Miss Jane Casamajor and others, No. of process, and the revised answers to those objections for Alexander Pearson, No. of process, as now duly lodged; and having heard parties' procurators on the state of the cause, and on the said objections and answers, Finds that the event of Mrs Margaret Porterfield or Buchanan, one of the annuitants, to whose benefit the proceeds of the trust-estate were in the first instance appropriated, having died before the testator, had not the effect of vesting in the residuary legatees any right over the portion of the capital of the estate or its proceeds, which must otherwise have been laid out for securing an annuity of £200 to her during her life, except in so far as there might be during the lives of the two surviving annuitants, Mrs Fotheringham and Mrs Paterson, a surplus of the annual proceeds of the whole estate, after paying in full to the said two annuitants the annuities of £400 each provided to them, in conformity to the findings hereinafter expressed: Finds that the full security and payment of these annuities constituted a primary and preferable burden on the whole residue of the trust-funds and estate, after deducting the sums necessary for paying and satisfying the testator's debts and obligations, the expenses of the trust, the legacy of £500 to Mrs Alexander, and the two legacies of £1000 each, payable to George and Thomas Patersons: And finds, that until the said annuities were fully satisfied, so far as the whole interests, dividends, rents, or profits of the said free fund or estate might be sufficient for that purpose, no tangible or divisible surplus fund could arise during the lifetime of the two annuitants which could be claimed by the residuary legatees: Finds that, in determining what shall be considered as the residue of the said trust-estate, and what shall be considered as the interest, dividends, rents, or produce of such estate primarily appropriated to the payment of the said annuities, the whole expenses incurred in realising, or endeavouring to realise and convert into money, the various subjects constituting the trust-estate, or in changing the securities thereof, must be deducted from the gross capital: Finds that the ordinary annual expense of managing the trust-estate, including the ordinary expense of management, and uplifting the rents of the heritable estate while unsold, must be deducted from the gross annual rents or profits thereof: But finds that all extraordinary expenses brought upon the trust-estate in the course of such management, such as the expense of processes for the division of a commonalty, or for augmentation of ministers' stipends, or any similar expenses, must be deducted from the capital stock of the estate: Finds that in so far as there may have been at the death of Mrs Fotheringham any arrears of the said annuities outstanding and unpaid to her, or to Mrs Paterson, to the utmost extent to which the free proceeds of the funds and estate, estimated in conformity to the judgment of the House of Lords, and the above finding, were adequate, in the annual produce thereof, to the full payment of the said annuities, such arrears must be paid in preference to any claim by the residuary legatees: And finds that, in case there may have been a surplus of the said annual produce be-

yond the payment of the said annuities in any one year, or more years, preceding the death of Mrs Fotheringham, such surplus must be applied to make up any deficiency thereof in other years of the same period: Finds that a portion of the capital stock, or money previously appropriated to the security and payment of the said two annuities, but which has been set free by the death of Mrs Fotheringham, one of the said annuitants, must, so far as necessary, be laid out for securing to Mrs Paterson, the surviving annuitant, in conjunction with the remaining sum already invested, the full payment of her said annuity of £400, during all the years and terms of her life, posterior to the term for which the annuity to Mrs Fotheringham was last payable; but in respect that the purpose of the payment of the said annuities in full is provided for solely by the investment of capital sums sufficient to yield an equal amount in the proceeds thereof, and that it is expressly declared in the trust-deed, that in the event that 'the residue of the proceeds of my estate shall not be sufficient for yielding the foresaid annuities hereby settled,' &c., the testator's 'meaning and intention' is, that the residue, whatever it may be, shall be invested, and the interest or dividends thereof paid to the annuitants in the proportions of their several annuities: Finds that there is no warrant in the trust-deed for applying any part of the capital of the trust-estate for making up any deficiency in the said 'proceeds' thereof, for paying the emerging annuities as they fell due during the lives of the annuitants respectively: Therefore, finds no claim competent to Mrs Paterson, or to the executors of Mrs Fotheringham, for sums alleged to be due as arrears of annuities falling due prior to Mrs Fotheringham's death, in so far as it may appear that the whole interest, dividends, or profits of the proceeds of the estate being insufficient for the payment of the full annuities, were paid to them, or may be payable under the previous finding of this interlocutor, proportionally, according to the terms of the trust-deed: Finds no sufficient or relevant ground set forth in the process for impeaching the management of the trustees in the exercise of the discretion committed to them with regard to the time and manner of bringing the heritable property, composing the chief part of the trust-estate, to sale; and finds that the trust-accounts, as between the pursuer, as surviving trustee, and the objectors, as residuary legatees, must be settled and adjusted in this process on the footing of the sale and previous administration having been in this respect duly conducted; and before farther answer, at the desire of both the parties, remits the whole accounts of the pursuer to Mr William Moncreiff, accountant in Edinburgh, with instructions to consider the accounts, as made up by the accountant employed by the pursuer, with the vouchers thereof, and the revised objections and revised answers for the parties, having in view the points of law determined by the Lord Ordinary's former interlocutor, adhered to by the Court, so far as the same has been affirmed by the House of Lords, and by the judgment of the House of Lords itself, and also having in view the findings of this interlocutor; with power to him to call for all explanations from the parties which he may think necessary, and for inspection of whatever books he may require for enabling him to make a satisfactory report on the matters still in dispute; and to report to the Lord Ordinary how far the account produced exhibits a just and true account of the pursuer's intromissions with the trust-estate and funds, according to the principles laid down in the said interlocutors and judgment; and in case it shall appear to him that it is in any respects insufficient or unsatisfactory, to state particularly the objections which arise to it, and the grounds of them, and in general having regard to the said state of accounts as reported by the accountant to the pursuer, to report to the Lord Ordinary what is the just and true state of the account between the pursuer and the parties severally interested in the trust-estate: And further, instructs the accountant, that, in framing his report with reference to the expense of the trust-management under the findings of this interlocutor, he do exhibit in a distinct form the particular articles of expense which are charged severally against the capital, and against the yearly rents, interest or dividends of the said trust-funds and estate. And recommends to him to prepare his report as soon as circumstances will enable him to do so.

"*Note.*—Some observations may be necessary or useful:

"1. The judgment of the House of Lords finds, 'that the

sum applicable to the payment of the annuities,' was 'the residue of the said trust-fund, after deducting,' &c. It is very clear to the Lord Ordinary that this can only mean that the residue of the estate, after the deductions specified were made, that is, the free capital, is the fund, the annual issues and profits of which are to be applied in payment of the annuities. There might indeed have been an ambiguity in the terms employed in the first part of the fourth provision of the trust, by which the annuities are appointed, because, in general, annuities given as special legacies, where no other intention is expressed, may be preferable over the whole capital of the estate: But when the whole of the fourth provision is read together, there can be no ambiguity, because it is in plain words provided that capital sums are to be invested for securing and paying the annuities, which are afterwards to be paid to the residuary legatees; but that 'in the event that, after payment of my debts,' &c., 'the residue of the proceeds of my funds and estate shall not be sufficient for yielding the foresaid annuities,' &c., 'then it is my meaning and intention that the SAID RESIDUE, whatever it may be, shall be vested and laid out, and the INTEREST OR DIVIDENDS arising therefrom, be paid unto or divided among my said three sisters,' &c., in the same proportions; and the testator directs his trustees to regulate themselves accordingly. The Lord Ordinary cannot therefore entertain any doubt, that all that the annuitants could claim, is either full payment of their annuities, or, if the estate did not yield so much in annual produce, the whole interest, dividends, rents, and profits of the free residue, whatever it might be; and the judgment of the House of Lords does not import any thing else. The object of that judgment was singly to find, that the two legacies provided to George and Thomas Patersons must be deducted from the capital before striking the residue, as well as the debts, expenses, and the legacy of £500.

"But, on the other hand, there can be as little doubt that the full annuities of £400 each must be paid to the annuitants, in so far as the free annual proceeds of the residue of the funds and estate, reckoned according to the judgment of the House of Lords, were or might be, at any time during their lives respectively, sufficient for satisfying them. Therefore the Lord Ordinary has no doubt that the arrears of the annuities unpaid must be made good, in so far as there are any funds in the hands of the trustee, which consists of rents, profits, interest, or dividends accruing from the trust-estate in any of the years during which both the rights of annuity subsisted, although in particular years the annuities may have been paid in full, while there was a deficiency in other years.

"2. The Lord Ordinary thinks it very clear that there is no ground for the plea that the annuity which was provided to Mrs Buchanan must be considered as a burden on the proceeds of the trust-estate to diminish the fund for payment of the annuities to Mrs Fotheringham and Mrs Paterson. That annuity never existed, having completely lapsed by Mrs Buchanan having predeceased the testator. But still the full annuities of £400 each were provided to Mrs Fotheringham and Mrs Paterson, and are found to have been primary and preferable burdens on the whole proceeds of the estate. The real meaning of the plea of the objectors is, that the benefit of Mrs Buchanan's predecease is to accrue to them as residuary legatees, although there should be a defalcation in the annuities to Mrs Fotheringham and Mrs Paterson; in other words, that these annuities shall not be preferable over the proceeds of the estate, but that the residuary legatees shall be preferable to them pro tanto. The Lord Ordinary conceives this to be contrary both to the express words of the settlement and to the final judgment of the Court and the House of Lords. Mrs Paterson and Mrs Fotheringham are asking nothing in the right of Mrs Buchanan, or as emerging to them by her death; for nothing ever was vested in her, and therefore nothing could so emerge. They are asking simply their own annuities and no more; and though the proceeds appropriated to the payment of them are greater in consequence of their being relieved of the annuity intended for her, they are still nothing else but the proceeds of the estate over which their claim is preferable, aye and until their full annuity shall be satisfied.

"3. As Mrs Paterson is still surviving, the Lord Ordinary thinks it clear that her full annuity of £400 must be paid de

futuro, although the proceeds of the estate may have been insufficient before Mrs Fotheringham's death to pay both the annuities in full. For her right remains just as it was,—a preferable claim over the whole proceeds of the estate, though the fund is enlarged by the death of Mrs Fotheringham.

"4. The only question on which the Lord Ordinary entertains real doubt is, how far there is a just claim over the now enlarged proceeds of the estate to make up retro the deficiencies in the annual proceeds to pay the two annuities during Mrs Fotheringham's life. It is with some difficulty that he has come to be of opinion that this part of the claim is not well founded. In the case of Mrs Fotheringham's executors, it can hardly be maintained; for, attending particularly to the words of the settlement, it is evident that the preference given to the annuities was over the annual proceeds of the estate only, and that there is no warrant for applying any part of the capital to make up those annuities. But to give Mrs Fotheringham's executors any part of the proceeds accruing after her annuity had ceased, would really be to apply part of the capital, otherwise devolving on the residuary legatees, to make up her annuities during her life; or, in another view, it would be to allow her executors to draw annuities after her whole right to them had fallen by her death. The question is much nicer in the case of Mrs Paterson, she being still alive, and in a situation to say that the whole free proceeds at any time arising should still be appropriated to the full payment of her annuity from the beginning. The Lord Ordinary is sensible of the difficulty of denying effect to this. But, on the whole, considering the anxious terms of the provision for payment of proportional sums only out of the proceeds existing, and the clause regulating the effect of the failure of one annuitant, he does not think that, on a fair construction, it can be held to have been the testator's intention to give such a retroactive effect to the increase of the funds by the death of an annuitant.

"5. The Lord Ordinary sees no sufficient ground laid in this process for any claim on the part of the objectors against the trustee personally on account of his administration, or the delay in the sale of the estate. In all such trusts there are difficulties which the parties interested in the ultimate result are very apt to undervalue; and they are but too much inclined to assign interested or unworthy motives for what is no more than the ordinary course of such things. If the objectors mean seriously to make a case of malversation to any effect against the trustee, they ought to have libelled a proper action of damages, on such relevant grounds as they might venture to adopt. All that the Lord Ordinary says, or means to find, is, that there is no sufficient ground laid in this process for requiring the pursuer to account on any other principles than those which are applicable to every trust, containing the usual clauses for the protection of such trustee.

"6. But undoubtedly the accounts of the trustee rendered, must be duly audited. And the Lord Ordinary certainly thinks that there are several matters involved in them which do require investigation. The points of objection at last insisted in were very few. Indeed, they were nearly confined to the payments made upon certain bills said to be prescribed, and the mode of charging interest on the one side of the account, and allowing interest on the other. But as there may be some other questions, the Lord Ordinary has thought it proper to make the remit to the accountant in such general terms as to embrace every thing. He has no belief, however, that the accountant will find it necessary to make up an entirely new state of accounts, though it is proper that the whole should be checked; and the result must be brought out in conformity to the judgments of the Lord Ordinary, the Court, and the House of Lords. There is of course some law involved, both in the questions regarding the bills and the mode of stating interest. But so much depends on the facts, that it is better to see the precise state of them before deciding any thing.

"7. A point of some difficulty was in the end debated before the Lord Ordinary, viz., in what manner the expenses of management of the trust-estate should be charged against the fund; that is, whether against the capital, or against the annual produce of that capital? It is clear enough that the expression in the trust-deed, 'the residue of the proceeds of my funds and estate,' means the residue of capital after the subjects are

converted into money, or at any rate, the residue of the stock of the estate, after the appointed deductions are made from it; and so the House of Lords have understood it; and therefore it is very clear, that all the expense incurred in bringing it into that state must be charged against the capital of the fund, according to the express terms of the deed, and the judgment of the House of Lords. But the difficulty which was not at all under the view of that House, or at all contemplated in the particular finding, is, that there was an heritable estate which could not in any view be sold in an instant, and which was not in fact sold for many years; and the material question relates to the expense of managing that estate in the meantime. It is not a simple point. On the one hand, the only clauses of the deed which relate to the expenses of the trust, suppose them to be deducted before the residue of the estate is to be struck, the whole interest and dividends of which are to be paid to the annuitants until the full annuities be paid; and it is not at all an ordinary case of *lifrent and fee*, but a case of *special annuities* appointed to be paid preferably. On the other hand, the state of the matter to which the words plainly apply is not that which occurred. There is no mention of *rents* at all; and therefore, assuming that the trustees did their duty, and that still the sale of the lands was unavoidably, or at least in *bona fide* delayed, the rents can only come in place of interest or dividends, by inference and construction, by a necessary implication of intention. Taking this to be the fair and just result, the question is, whether it can be more than the *free* rents, after deducting the ordinary and necessary annual expenses of management, that can be so taken. On the whole, the Lord Ordinary has come to be of opinion, that the rents cannot be reckoned as *surrogatum* for interest or dividends till after deducting the ordinary expenses required for producing those rents; but that all *extraordinary* charges occurring must be deducted from the capital when ultimately realised. He understands that the state of the trustees is made up in some degree on this footing. But being sensible that there will be difficulty in the adjustment, he has instructed the accountant to exhibit, in a distinct form, all the particulars to be charged the one way or the other."

Both parties reclaimed:

The Misses Casamajor and others prayed, that it should be found, 1. That on the death of the testator, two-tenth parts of the capital of the free residue of the trust-funds became tangible and divisible among the residuary legatees: 2. That any surplus of the capital of the free trust-funds, beyond what was then necessary for securing the annuities payable to Mrs Fotheringham and Mrs Paterson, did then become tangible and divisible among the said residuary legatees: 3. That any surplus of the annual proceeds of the free residue of the trust-estate which has existed in any year or years during the subsistence of the trust, beyond what was necessary for satisfying the annuities payable for such year or years respectively, was not claimable by the annuitants to make up deficiencies in other years, but belonged to the said residuary legatees.

Mrs Fotheringham's trustees and Mrs Paterson prayed, that it should be found that there was a claim competent to the executors of Mrs Fotheringham and to Mrs Paterson to be paid the arrears of annuity due to them prior to Mrs Fotheringham's death, out of the income of the trust-funds subsequent to that event. The claim for Mrs Fotheringham's executors was given up at the bar, but that for Mrs Paterson was insisted in.

At advising on 6th June 1840, the Court pronounced the following interlocutor:

"Alter the interlocutor of the Lord Ordinary, in so far as it finds no claim competent to Mrs Paterson for sums alleged to be due as arrears of annuities falling due prior to Mrs Fotheringham's death."
SCOTTISH JURIST.

ham's death, in so far as it may appear that the whole interest, dividends, or profits of the free proceeds of the estate being insufficient for the payment of the full annuities, were paid to Mrs Fotheringham and Mrs Paterson, or may be payable under the previous finding of the Lord Ordinary's said interlocutor, proportionally, according to the terms of the trust-deed; and find that Mrs Paterson is entitled to payment of the whole arrears of annuity due to her out of the interest, dividends, or profits of the free proceeds of the whole trust-estate accruing during her own lifetime: *Quoad ultra*, adhere to the interlocutor reclaimed against, and refuse the desire of both reclaiming notes; reserving all questions of expenses, and decern."

Misses Casamajor and others, the residuary legatees, appealed, and *maintained*—1. During the period, at all events, prior to Mrs Fotheringham's death, the annuity payable to Mrs Paterson was limited, by the trust-deed, to the free annual proceeds of a certain proportion of the trust-estate; and Mrs Paterson is not entitled to have her annuity for that period made up to £400 a-year from the annual proceeds of the trust-estate accruing subsequent to Mrs Fotheringham's death. 2. The proportion of the capital of the trust-estate, which Mrs Paterson is entitled to have set apart for providing her annuity, did not become larger after Mrs Fotheringham's death than it was during her lifetime. 3. It ought to be ascertained under the accounting, whether, at the time of the testator's death, the free capital of the trust-estate was more than sufficient for procuring investments for providing the full annuities; and if such was the state of matters at that time, the surplus which then existed should be dealt with as a fund which was then divisible among the fiars of the residue; and the subsequent interest or annual proceeds thereof should be held to have belonged to them, and not to the liferent annuitants. 4. At all events, any surplus of the annual proceeds of the free residue of the trust-estate, which has existed in any year or years during the subsistence of the trust, beyond what was necessary for satisfying the annuities payable for such year or years respectively, was not claimable by the annuitants to make up deficiencies in other years; and the same, with the interest thereof, belongs to the fiars of the residue. 5. According to the true meaning and construction of the settlement, two-tenth parts of the capital of the free residue of the trust-funds became divisible among the fiars of the residue, on the truster's death; and each of Mrs Fotheringham and Mrs Paterson became entitled only to the revenue of four-tenths thereof.

The respondents (the surviving trustee and surviving annuitants) *maintained*—1. As there was a deficiency in the annual revenues of the trust-estate, after deducting the preferable burdens, to pay the full annuities to Mrs Fotheringham and Mrs Paterson, and as Mrs Buchanan had predeceased the testator, the payment of these annuities constituted a primary burden on the whole residue, and no portion of the capital was set free by the death of Mrs Buchanan or otherwise, so as to admit of its being divided among the residuary legatees. 2. As the interests and dividends drawn from the whole residue of the trust-estate were appointed to be applied to the payment of the annuities, it was the plain meaning and intention of the testator that the surplus revenue of one year should be applied to make up the deficiency of another year, while such surplus accrued during the lifetime of the annuitants respectively. 3. The rights and interests of the annuitants

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cannot be affected by the delay on the part of the trustees to bring the heritable property more immediately to sale.

Lord Chancellor.—My Lords, this case, which has unfortunately been the subject a second time of appeal to your Lordships' House, raises a question of some difficulty from the obscurity of the mode of expression which has been adopted by the author of the trust-deed, upon which the question arises. My Lords, with regard to the former appeal, I will only observe, that nothing that was decided upon that occasion will have the slightest reference to the present. It regarded totally different interests, and different parts of the trust-deed. The questions now for consideration, therefore, are totally unaffected by any thing which was decided by this House or by the Court of Session upon the former occasion. My Lords, the circumstances which gave rise to the present questions are shortly these:—Provision was made in this trust-deed for three annuities, and, subject to the interests of those annuities, a gift was made to certain persons who were entitled to the residue of the estate. The testator, it appears, had three sisters. One sister died before his own death. The provision was, that the property should be sold, and the proceeds invested in sufficient sums to provide for the payment of those annuities. Now, one question raised was, whether the amount which would have been necessary to provide for the annuity of the sister who predeceased, was or was not to be a fund applicable to the payment of the other annuities, or whether it was to go immediately to those who were to take in remainder upon the death of the annuitants? Now, the short answer to that claim is, that the annuity having lapsed by the previous death of the legatee, at the moment of the death of the author of the trust, there was no such annuity, and no such legacy. That sum, therefore, was a fund applicable to pay those legacies and annuities which remained. The legacies and annuities which remained, were the two annuities of £400 each, to each of the surviving sisters. The deed therefore must be read and construed as if there were no such disposition in it. Upon that point there does not appear to be any difficulty whatever; and I apprehend it to be quite clear, that the Court of Session were right in holding, that the property which existed at the time of the testator's death was applicable to pay the two annuities of £400 each. But, my Lords, the difficulty arose here. The testator had directed the property to be sold, and out of the proceeds of the sale, sufficient sums to be invested to answer those two annuities and the legacies. His death took place many years ago, and the property was not sold. It remained in the character of land, and produced an income, which, it appears, for the first year after the death, was more than sufficient to pay the annuities of £400 to the two sisters, but which, at a subsequent time, did not produce sufficient to pay those two annuities. Nothing, however, was done. No sale took place—no application was made by the annuitants to have a sale—no application was made by the residuary legatees to have a sale; but the property remained as land for several years. To the extent of the income of the land, whatever was produced after paying the prior charges, was paid over to the annuitants—leaving at first a surplus, and subsequently not producing enough to pay the annuities. Then one of the annuitants died—one of the sisters died—and the surviving sister makes this claim, which has been recognised by the Court of Session (the Court of Session differing, in this respect, from the opinion first expressed by the Lord Ordinary),—namely, that the surviving sister has not only a title to the income which may arise from one-half of the property which was devoted to the payment of that annuity, but that she has a title, as against the moiety released by the death of the sister, to be paid the arrears of the annuity which were not paid out of the proceeds of the land at the time of the testator's death. Another claim was made, that the surplus income which arose in the first year after the death of the testator, is also applicable to pay the subsequent deficiencies. The Court, however, have decided, that this is a privilege belonging to the surviving sister alone, and that the representatives of the sister who is dead, are bound to take that which the estate produces, and have no claim against any part of the property for the payment

of the deficiency. My Lords, I cannot but think that there has not been quite that accurate attention paid by the Court below to the terms in which this property is devoted to the payment of the annuities, and in which it is afterwards given over, which might have been bestowed upon it, and which, if understood in the sense in which I understand them, would have prevented all the difficulty which has arisen in the Court below in dealing with those minute parts of the case,—inasmuch as, according to the construction which I put upon this instrument, there is no room left for raising those minor points. It is clear that the testator contemplated two events. It is clear that he contemplated an immediate sale. He directs an immediate sale. It is contrary to his intentions, and contrary to the expectations he entertains, that an immediate sale should not take place. Perhaps, before I advert to the particular language used in this instrument, I may recollect to your Lordships' recollection the rule which has been established in this country, after some difficulty and some doubt, but which is now fully recognised, and which is the only rule by which questions of this sort can be determined with any thing like certainty, or any thing like justice to the parties. It frequently happens that what a testator contemplates does not take place. He intends land to be converted into money, or money to be converted into land, and he gives directions accordingly, and those directions are not acted upon; and after many years having passed, the question arises, how the interests of the parties are to be arranged?—not entirely according to the directions of the testator, because he has given no directions with respect to the state of circumstances that has arisen,—but how the intentions of the testator are best to be carried out with regard to the state of circumstances which has arisen subsequently to his death; because, of necessity, the Court must adopt some course of arranging the interests of the parties. You cannot arrange them exactly as the testator intended, because the facts are different from what he contemplated: the Court is therefore under the necessity of adopting some course with reference to the intention of the testator, and with reference to what is just between the parties. My Lords, I allude to the doctrine laid down in the case of *Sitwell v. Bernard* in 6th Vesey; and there are many other cases in which a similar difficulty has occurred. In that case the testator intended that all the moneys should be converted into land. That was the declared intention of the author of the trust-disposition; and contemplating that to take place, and intending that to take place soon after his death, and intending to impose upon the parties claiming under his will a motive to stimulate them to carry his intentions into effect, he gave the whole of his estate in trust, and directed his income to accumulate till land should be purchased. He directed the money to be invested in land, and then gave a tenancy for life, with remainder over in the land to be purchased. Many years elapsed, and no land was purchased. The property remained as the testator had left it, in the shape of money; and the question arose, what was to be done with it? It was quite contrary to the testator's declared intention, that any party should derive any benefit from the fund, so long as it remained in the shape of money; but the Court held, that as it had remained in the shape of money, and there had never been a conversion of it, it was necessary to adopt some middle course in order not to defeat the obvious intention of the author of the gift,—namely, that the tenant should derive some benefit; and the Court directed the accumulation to cease after the expiration of the first year after the death of the testator, considering that a reasonable time within which the intentions of the testator ought to have been carried into effect, and directed the income of the fund so existing to be paid to the party who was tenant for life of the land,—thus departing from the terms of the author of the gift, but doing that which, under all the circumstances, appeared to be most consistent with his intention. Now, in this case there is a direction to convert the land into money; and when converted into money, after setting apart funds to meet the amount of the annuities of £400 a-year each, the surplus was, in so many words, given over to the legatees. Now, it is obvious that, by not converting the land into money, the chance which the testator contemplated of the proceeds of the estate being more than was necessary to meet the annuities, and of there being,

therefore, a fund applicable to the immediate payment of the residuary legatees, would not come into operation, because it never could be ascertained that there was any such fund; and therefore, there could be no such claim enforced till after the sale took place; and therefore, to that extent, they were disappointed and postponed. Those who claimed the annuities had reason to be content; because it was immaterial to them whether the annuities came out of the land or out of the money, provided there was sufficient. So long, therefore, as a sufficient income came out of the land, they received what it was intended they should receive. But when that income failed, and the produce of the estate was not sufficient to pay the annuities, they had the remedy in their own hands. They might then have insisted upon the execution of this trust, and upon the sale of the estates, in order that they might have the benefit of having a fund which probably would have produced more income in the shape of money than whilst it existed in the shape of land, in order to pay the annuities which the land was to pay. But they took no such step. They received the income of the land, so far as it would go. They permitted the property to remain in the state in which the testator had left it, but which he had directed to be changed into another form, for the purpose of securing the payment of the annuities. The question therefore is, whether, independently of the particular terms of the gift to which I have adverted,—whether, if there had been more doubt upon these terms than in my opinion there is,—the fair justice of the case between the parties would not be, to act upon the rule established in *Sitwell v. Bernard*, and the other cases, that if the parties chose to permit the property to remain, contrary to the intention of the testator, in the state in which he left it, but which he had directed to be changed, that they should take it for better or worse, in the situation in which they have it, and are not entitled, at a future time, to pay themselves in full, to the prejudice of those who, if the property had been converted at the time the testator directed, might at least have had a chance of having a share in it, and who, in all probability, would at that time have had a share. Therefore, independently of the particular provisions of this deed, I should have thought the justice between the parties would have been, to let them receive such income as the land would produce, until the period of conversion, and to give them no title, as against either the future income of the fund, or as against the capital of the fund that has not been converted, for the purpose of paying the deficiency of the fund. Your Lordships will just permit me to call your attention to the extraordinary consequence of yielding to this claim. The first year after the death of the testator, the land produced more than enough to pay the annuities. Now, supposing there was £200 more than enough to pay the annuities, the claim is, that that surplus fund is to be held liable to make good the deficiency in any future year. Now, a deficiency might not occur for twenty or thirty years. The land might have been sufficient to keep down the annuities, and only just sufficient, or it might have produced more. Then, was that accumulating income to be held *de anno in annum* by the trustees, because perchance, twenty years hence, the land might not produce sufficient to pay the annuities? And yet, according to the claim made by these annuitants, that would be the consequence. If they have a claim of lien to answer future deficiencies, the trustees would not then be warranted in paying it over to the legatees. In what situation, then, would the legatees be? They are entitled immediately to receive the surplus of the fund beyond what is necessary to pay the annuitants; but they would be prohibited from receiving the surplus beyond what is necessary to pay them; and the funds are to be retained during the continuance of the lives of the annuitants, in order to meet the possible chance, more or less remote, of the land not being sufficient to pay the annuities. It seems quite impossible that such a construction should be adopted, leading to such extravagant consequences. In point of fact, there has been no one year in which a surplus has been found beyond the first two or three years. But that makes no difference in principle. It only shows how extravagant the proposition would be, to consider the annuitants as entitled to the surplus of one year, in order to meet the deficiencies of future years. But, my Lords, when we come to see what it is that the testator has directed upon the face of this deed, it appears to me that

these considerations may be thrown out of view; because, as I construe this instrument, it is this:—Upon the sale of the estate, if the funds were sufficient to secure the annuities of £400 (an event which undoubtedly the testator contemplated), then there would be capital sums invested sufficient for that purpose, and then any surplus of the proceeds of the estate, and those capital sums so invested, when made “tangible,” as the expression is, by the death of the annuitants, were to be paid over to the residuary legatees. But the testator had the prudence not to confine his view to that event only, because he contemplated the possibility of the proceeds of the sale of the estate not being sufficient to secure the whole amount of those annuities, and he then directs, that in that event, there being no surplus, the whole proceeds of the sale, after paying the prior charges, shall be invested, be the amount what it may, and that the income arising from that fund, which is assumed to be inadequate to pay the annuities of £400 a-year each to the sisters, shall be divided between the sisters, in the same proportion in which they would be entitled to the full income, provided it had been sufficient to pay the annuities, and then upon the death of each of the annuitants, either the whole fund which shall have produced sufficient to pay the £400, or the amount of the fund, whatever it might be, should in that event be paid over to the residuary legatees. Now, my Lords, if that be the construction of the deed, then it excludes all the other questions, because the event there has happened,—a deficient fund exists—a fund not sufficient to pay the whole of the annuities. Upon the death of one of the annuitants, that portion of the fund which was set apart to answer that annuity is to go over to the residuary legatees. Then, what claim can the surviving annuitant have against the income of the other moiety, to keep down the annuity which had fallen in arrear? It is quite obvious that there cannot be both claims. If it is liable to keep down the deficiency of the fund to pay the annuity, then it cannot go over to the residuary legatees. If, then, the construction of this instrument be, that supposing the fund to be inadequate to the payment of the annuities, yet upon the death of one of the annuitants, the capital of the fund is to go over to the residuary legatees, then all claim of the surviving annuitant to that released portion of the fund must necessarily fail, according to the construction I put upon this deed. It is also free from the argument which was pressed at the bar, and which seems to have been rather assumed in the Court below,—namely, that in the event of the fund being sufficient, it was not to be divided into different investments, to answer the different annuities, but was to remain in one fund, and the annuities to be charged upon that gross fund. Now, if the testator has directed, that upon the supposition of the fund not being sufficient upon the death of one of the annuitants, the fund answerable to that annuity shall go over, it is not very material whether the fund was to remain as one aggregate fund, or whether the fund was to be divided; though undoubtedly the intention would be more manifest, if it appeared upon the face of the instrument that the fund, even in that case, was to be divided, and to be set apart to answer the annuities of the remaining annuitants. According to the construction I put upon this instrument, however, he has directed, in case of deficiency, the fund itself to be appropriated according to the shares and proportions to which the annuitants would have been entitled, had there been a sufficient fund. The case is the same,—there is no difference in the result,—if he had directed that the share, whether a divided share or an undivided share, applicable to the annuity of one of the sisters, was to go over, in the event of the death of that sister, to the residuary legatee, and not to be a fund to make good the annuity of the surviving annuitant, to the extent of forming a fund which might be adequate to the purpose. Now, before the particular words are adverted to, there is another part of the instrument only necessary to be adverted to, for the purpose of showing how much it was in the contemplation of the author of the deed that the property might not be found adequate, or nearly adequate, to pay those annuities of £400 a-year, and the legacies. He directs, in a subsequent part of the deed, that two legacies of £1000 each should be paid, according to the construction of this instrument, in priority to the application of the funds to secure the annuities. That is to say, if the residue amounts to a certain sum, £15,000, then the two legatees were to have

£1000 each; but if the residue was under £15,000, and not less than £8000, then they were to have £500 each. He contemplated, therefore, the possibility of that event; and he also contemplated that there might be less than £8000, and then they were to have no legacy at all. Now, I will suppose that it was exactly £8000. If it came exactly to £8000, then the two legatees were to have £500 each,—they therefore were to have £1000 out of the £8000,—£7000 remaining to answer annuities of £1000 a-year. It is quite clear (for it runs through the whole instrument) that he contemplated not only the case of there not being enough to pay the £1000, but of there being a fund very inadequate indeed to meet those charges. With that present to his mind, and guarding against both alternatives, he makes this provision: He directs the property to be sold, and “in the event that, after payment of my debts, fulfilment of the obligations in which I may stand bound at the time of my death, payment of the expenses attendant on the execution hereof, and of the £500 to my said sister Mrs Alexander, the residue of the proceeds of my funds and estate shall not be sufficient for yielding the foresaid annuities hereby settled on my said sisters” (he had before provided for their being sufficient—he now provides for their not being sufficient)—“then it is my meaning and intention that the residue, whatever it may be, shall be vested and laid out, and the interest or dividends arising therefrom be paid unto, and divided among my three sisters, Mrs Fotheringham, Mrs Paterson and Mrs Buchanan, during their respective lives, in the same proportions, and exactly in the same terms in every respect, as above pointed out with respect to the full annuities of £400, £400 and £200.” Now, here he directs not merely that the annuities shall be paid in those proportions, but he directs that in case of a deficiency, the residue shall be invested, and the income paid, “in the same proportions, and exactly in the same terms.” How is that direction to be complied with? Why, if there were but two, as the annuities were equal, equal sums to be invested, and equal annuities to be paid,—whether the sum amounted to only £2000, or to what was sufficient to pay the annuities of the £400 a-year, was perfectly immaterial. Whatever it was, the sisters were to share it equally between themselves. The intentions of the testator, and his directions, were applicable to the one case as well as to the other,—the only difference being, that the income of the sisters would depend upon the amount of the fund. In no other respect were the directions of the testator to be varied by the circumstance of the estate producing more or less money. That is the principal direction; and then he goes on,—“and I do hereby direct my trustees to regulate themselves accordingly.” Then comes the fifth provision, which gives the fund over—“*Quinto*, In the event of there being any of the proceeds of my said funds and estate remaining, after setting apart capital sums sufficient to yield the three annuities of £400, £400 and £200, as above specified, then I hereby direct my said trustees to pay such surplus, together with the capital sums so to be set apart for answering the foresaid annuities, as and when such capital sums become tangible by the deaths of the said annuitants respectively.” Now, so far he has provided for the event of the capital being sufficient to meet the annuities, and he has directed what is to be done with the surplus, if any, together with the capital sums invested, when they become tangible by the death of the annuitants. Now he is about to provide for the other contingency, of the fund being inadequate for this purpose: “Or in the event of there being no surplus, then the capital sums, whatever their amount may be, so to be vested and laid out as aforesaid, as and when such capital sums become tangible as aforesaid.” Then, what is the second alternative? He has presented us with two alternatives. In the early part of the instrument he has directed the investment of capital sums sufficient to answer the purpose of the annuities, and if these be not sufficient, he has directed an investment of the residue, whatever it may be, to answer the annuities *pro tanto*. Then, in the gift over, he says: if there be a surplus, the surplus, together with the capital sums so invested, when become tangible by the death of the annuitants, is to go over; or in the other event, of the funds invested not being sufficient to pay the annuities, then the capital sums, become tangible by the death of the annuitants, are to go over. That, my Lords, is precisely what has happened, although the

property has not been sold, and the money not invested. It has been hitherto an inadequate fund; and it cannot be contended, that if the estate had been sold, and had produced a fund inadequate to pay the annuities in full,—that if in that event the residuary legatees had been entitled to one-half of the residuary fund on the death of one of the sisters,—they would not be entitled to one-half of the fund when it is not converted into money. If that could not be contended in the event of the fund being invested, it is clear that it could not be contended in the present circumstances of the fund not being invested. If the right construction of the sentence be, that in the event of the fund being deficient, there nevertheless shall be an investment of the fund, whatever it may be, to answer the annuities *pro tanto*, then the whole is intelligible. But if that be not the right construction, it is not very easy to understand or to decide the meaning of the terms of the instrument. But how does that affect the claims of the annuitants? The fund is answerable to pay the annuities equally: each annuitant, therefore, is entitled to one-half, whether it exists as one fund, or whether it is divided. It is difficult to see how that can affect the claim of either of the annuitants to receive out of the future income of the other, what shall remain unsatisfied by the produce of the estate. My Lords, whether the one construction or the other be correct, I apprehend that the testator has sufficiently declared that the parties, if they cannot get the whole amount of the annuities, must take the income which the fund will produce, whatever it may be, and that upon the death of one of the annuitants, the fund which thus becomes tangible shall go over to the legatees; and with that declaration, your Lordships probably will think it right to vary the interlocutor which has been appealed from. The better way will be, to declare that to be the construction which your Lordships put upon this instrument, and to refer it back to the Court of Session to apply that to the interlocutor to be pronounced. This case presents some difficulty. In the first place, with regard to the interlocutor of the Lord Ordinary, which is left untouched by the Court of Session, except so far as it is altered with regard to Mrs Paterson's claim to future arrears of the annuity, I am not quite sure that I entirely follow all the provisions of that interlocutor. The expressions are not sufficiently distinct to enable me to understand how far the learned Judge intended to go. For instance, the second finding “finds that the full security and payment of these annuities constituted a primary and preferable burden on the whole residue of the trust-funds and estate, after deducting the sums necessary for paying and satisfying the testator's debts and obligations, the expenses of the trust, the legacy of £500 to Mrs Alexander, and the two legacies of £1000 each, payable to George and Thomas Paterson.” That is perfectly correct, according to my view of the case, if it is confined to each year; but it appears to me impossible, from the language used, to ascertain whether the learned Judge meant to confine it to each year, or whether he meant to say that the fund is answerable, during the whole continuance of the trust, to make good those annuities. If that be the meaning, then I differ from the learned Judge.

Mr Attorney-General.—My Lords, if I may humbly suggest, it would be very important that your Lordships should make an express declaration in your order upon that subject.

Lord Chancellor.—It will be quite explicit, if the House declare the true construction of the instrument to be, that although the income was inadequate to pay the annuities, upon the death of one of the annuitants, one-half of the fund went over to the residuary legatees, and it precludes the possibility of the income of that fund being applicable to any other purpose.

Lord Advocate.—Also to find (which was not done), that Mrs Paterson, the surviving annuitant, is entitled only to the income of one-half of the fund from the death of Mrs Fotheringham.

Mr Attorney-General.—That would follow.

Lord Chancellor.—The Lord Ordinary thought that neither of them took it. When it came before the Court of Session, they were of opinion that Mrs Paterson was entitled to payment of the whole arrears of the annuity due to her. But it appears to me that it will be quite free from all doubt, if the House declare, that during the continuance of the trust, the annuitants can only

divide the income of the estate as far as it will go, and that upon the death of one of them, the share which was invested to secure the payment of that annuity went over to the residuary legatees. That would exclude all the other questions; and I think the better way will be to make these declarations, and then to refer it back to the Court of Session to apply them.

Ordered accordingly.

Second Division.—Lord Moncreiff, *Ordinary*.—Richardson and Connell, *Appellants' Solicitors*.—Simpson and Cobb, *Respondents' Solicitors*.—[W.H.D.]

2d February 1842.

FIRST DIVISION.—(H. B.)

No. 110.—ROBERT KEMP (*Napier's Trustee*), and OTHERS, *Pursuers*, v. JOHN NAPIER and OTHERS (*Mrs Elizabeth M'Whinnie or Napier's Trustees*), *Defenders*.

Husband and Wife—Donatio—Revocation.—*A husband, a number of years after marriage, executed a bond of annuity, in which, for the alleged purpose of supplying the want of a marriage-contract, he bound himself to pay to his wife, in satisfaction of her legal claims, an annuity of £200 during his life, and of £500 after his death, in the event of her survivance.—Held that the annuity of £200 was revocable, as a donatio inter virum et uxorem.*

John Napier of Mollance married Mrs Elizabeth M'Whinnie in 1791. At the date of the marriage he was a clerk in the office of the Bank of Scotland at Kirkcudbright,—was possessed of little substance, and received no toger with his wife. A few years after he engaged extensively in business, and in speculations of various kinds. In 1806, when the Galloway Banking Company was established, he became a partner and manager, and continued owner of one-half of the whole stock of the bank till its dissolution in 1821. In the meanwhile, and subsequently, he made large purchases of land—the value having been estimated at above £120,000. In 1827, he executed an heritable bond of annuity in favour of Mrs Napier. This bond, on the narrative that no marriage-contract had been executed between the spouses, “proceeds to supply that defect” by binding Mr Napier, his heirs, executors and successors, to pay to Mrs Napier, in satisfaction of all legal claims,

“a free annuity of £200 Sterling yearly during all the days of my life, for her sole use and benefit, and exclusive of my *ius mariti* or control, debts or deeds, in any manner of way, payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the term of Whitsunday first, and the next term's payment at Martinmas thereafter, and so forth half-yearly, termly and proportionally thereafter during my lifetime, with one fifth-part more of legitimate penalty in case of failzie, and the legal interest of the said annuity from and after the respective terms at which the same falls due, and in time coming during the not-payment thereof;”

and farther, to pay to her “a free annuity of £500 Sterling yearly during all the days of her life,” in the event of her survivance. In security of these two annuities the bond contains procuratory of resignation and precept of sasine in the lands of Mollance in favour of Mrs Napier, who was accordingly infeft. At the date of this infeftment, the estate of Mollance, though burdened to a considerable extent, afforded ample security for the annuity, but subsequently additional bonds were granted more than sufficient, independently of it, to exhaust the whole estate.

In 1836 Mr Napier became bankrupt, and his estates were sequestrated. In these circumstances the present action, for the purpose of reducing the bond of annuity, was raised by his trustee, Mr Kemp, and insisted in by Messrs Hankeys and Company, bankers in London, who, as heritable creditors of a date subsequent to that bond, had the real interest in the action—there being no hope of any reversion for the personal creditors.

Defences were lodged by Mrs Napier, and her husband for his interest; and she having died during the dependence, the action was carried on by her husband and two of her children, as her trustees, who alleged that the whole sums falling due under the annuity, from 1827 to 1839, the date of Mrs Napier's death, were unpaid, and fell to be ranked preferably on the estate.

The following were the grounds of reduction:—*First* (formal).

“*Secundo*, The said heritable bond of annuity is null and ineffectual as against the pursuer or the creditors of the said John Napier, in respect it was granted by him whilst he was insolvent, or at least in labouring circumstances and largely indebted, and was a fraudulent and collusive device, intended for the purpose of excluding or prejudicing the claims of the grantor's creditors, prior as well as future. *Tertio*, The said heritable bond of annuity is null and reducible at the instance of the pursuer, as trustee foresaid, under the Statute 1621, c. 18, which enacts and declares ‘all alienations, dispositions, assignments and translations whatsoever, made by the debtor of any of his lands, teinds, reversions, actions, debts, or goods whatsoever, to any conjunct or confident person, without true, just, and necessary causes, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors, to have been from the beginning and to be in all time coming, null and of none avail, force nor effect, at the instance of the true and just creditor, by way of action, exception or reply, without farther declarator.’ *Quarto*, At least the said heritable bond of annuity is revocable or reducible, in whole or in part, as a *donatio inter virum et uxorem*, and is to be held as revoked or reduced by the subsequent contraction of debts, both heritable and personal, to such an amount as to produce the insolvency and bankruptcy of the grantor; and, at all events, the said heritable bond of annuity ought, under the circumstances before stated, to be now reduced and set aside accordingly, at the instance of the pursuer under his foresaid right.”

The pursuers *pleaded*—1. The bond of annuity challenged is null and reducible at the instance of the pursuers, in respect the grantor was at its date insolvent, or at least was largely indebted and in labouring circumstances, and the granting of said bond was a fraudulent and collusive device between the grantor and his own wife, made with the purpose of excluding or prejudicing the grantor's creditors. 2. Said bond is null and reducible at the instance of the pursuers under the Statute 1621. 3. The bond is revocable or reducible, in whole or in part, as a *donatio inter virum et uxorem*, and must now be held to be revoked, and the pursuers are entitled either to exercise the power of revocation, or have the deed declared invalid. 4. At least the said bond, in consideration of the circumstances under which it was granted, and the purpose for which it is now attempted to be used, ought to be set aside at the instance of the pursuers, in whole or in part. 5. *Separatim*, The bond is ineffectual or reducible, in so far as relates to the annuity of £200 during the husband's life; in respect it was gratuitous, unreasonable, revocable, and incapable of competing with onerous creditors,—and the claim for arrears of

annuity, now insisted in by the wife's representatives, over and above the aliment and support afforded to herself during her life, is untenable in law.

The defenders *pleaded*—1. The pursuers, Messrs Hankeys and Company, who are posterior creditors, having contracted with Mr Napier long after the date of the bond in question, and the said bond having been made public, and acted upon from its date, and in the knowledge of the pursuers at the time they took their heritable securities, it is not competent for the pursuers now to plead the alleged insolvency of Mr Napier at its date as a ground of reduction, and they are barred *personali exceptione* from maintaining this action. 2. It is not competent for Messrs Hankeys and Company to pursue reduction of the bond to Mrs Napier, they being personally barred from challenging it on the grounds libelled on; inasmuch as they acted and transacted with Mr Napier up to the date of his sequestration in 1836 as his general agents and bankers in London, and were well aware of the state of his affairs, and had numerous transactions with him, and were conjunct and confident persons at the time when their own heritable bond in security and infestment were taken. 3. The bond of annuity and the sasine in favour of Mrs Napier are neither null nor reducible on any of the grounds pleaded by the pursuers, Messrs Hankeys and Company, who are posterior creditors, transacting on the faith of the public records, and were aware of the real prior security in favour of Mrs Napier. 4. More particularly, they are neither null nor reducible on the alleged ground of Mr Napier's insolvency at the date of the bond, or as a fraudulent and collusive device between him and Mrs Napier, for the purpose of prejudicing or excluding his creditors: in respect that, at the date of the bond, Mr Napier was not insolvent, nor even in labouring circumstances; and so far from being a fraudulent and collusive device to injure his creditors, the transaction was, on the contrary, a natural, fair, and onerous one. 5. As the bond was granted for a just, true, and onerous consideration, and in return for the rights surrendered by Mrs Napier, it is not reducible under the Statute 1621. 6. The bond is not revocable or reducible, in whole or in part, as a *donatio inter vivos* or *revocum*, and neither in fact nor in law can it be held as revoked, or as still revocable by the pursuers. 7. *Separatim*. In respect that Mrs Napier renounced her right of terce, claims of *jus relictæ*, and all others competent to her after her husband's death, in consideration of the annuity of £200 during his life, as well as the provision thereafter, such annuity was neither gratuitous nor unreasonable, neither is it revocable at the instance of posterior creditors, taking infestment in the full knowledge of such prior security. 8. As the said annuity was granted to Mrs Napier, exclusive of her husband's *jus mariti*, her trustees are entitled to recover the arrears; nor have the pursuers any just counter-claim in law, except for such sums as Mr Napier may have granted to Mrs Napier for her sole use and benefit since the date of her husband's sequestration.

The Lord Ordinary pronounced the following interlocutor:

"18th December 1841.—The Lord Ordinary having heard counsel on the record, and thereupon considered the process and

writs produced, sustains the reasons of reduction, and reduces, decerns and declares in terms of the libel: Finds no expenses hitherto incurred due to either party, and decerns.

"*Note*.—This is a challenge of an heritable bond of annuity granted by a husband in favour of his wife, whereby he bound himself instantly to pay to her an annuity of £200, secluding his own *jus mariti*, and which was to be raised to £500 in case she survived him. That bond of annuity was granted in 1827, when the spouses had been married for nearly forty years, and when the husband was engaged in a most extensive trade. Infestment was at the same time given to the wife over lands which certainly formed an ample security at its date for the annuity, if the bond was valid and irrevocable.

"The husband, however, afterwards contracted heritable debts over the properties contained in this security to an amount exceeding their value; and he incurred other *personal* debts to a very large amount, for which it is said there are not funds to afford *one farthing of a dividend*. His estate was sequestrated in 1836, and the trustee has brought the present action for setting aside the wife's bond of annuity; and it is insisted on, it is believed, chiefly for behoof of *posterior* heritable creditors, whose security will be greatly deficient if the heritable bond in favour of the wife be sustained. She herself is now dead; but her family, as her successors, allege that the whole annuities from 1827 till her death in 1839 are *unpaid*, and fall to be ranked preferably on the proceeds of the heritable estates now sold. Her bond has now been reduced on the following grounds:—

"1st, The bond of annuity was a voluntary unilateral deed, granted by a husband in a precarious and extensive trade in favour of his own wife, while no *antecedent obligation* has been proved binding him to execute such a deed. It is humbly thought that this is a plain case of *donatio*, which the husband was entitled and bound to *revoke*, when it was necessary for the purposes of justice to his onerous creditors that he should execute a revocation.

"2d, If the husband had the power of revoking this donation, it is supposed to be a clear and incontestable proposition in law, that this faculty was adjudgeable by his creditors, and must be held as transferred to the trustee in the sequestration for their behoof, in virtue of the adjudication contained in the Act of Sequestration.—See Erskine, B. I. tit. 6, § 31.

"On the whole, it humbly appears to the Lord Ordinary that the security under challenge is a novel species of preference attempted to be given by a husband to a wife, and that it would be alike contrary to the principles of bankrupt law and to the interests of trade to support it."

Both parties reclaimed,—the defenders on the merits, and the pursuers for expenses.

At advising,

Lord President.—There is a manifest distinction between the annuity of £200 made payable during Napier's life, and the annuity of £500 made payable after his death, in the event of his wife's survivance. The latter is granted in lieu of her legal claim, as *jus relictæ*, &c., and may be considered onerous; but if there ever was a purely gratuitous donation between husband and wife, it is this annuity of £200. The simple question then is, whether, in consequence of Mr Napier having become insolvent (for I don't say that he was so at the time when the bond was granted), his creditors, who will otherwise be cut out of their debts, are not entitled to have it recalled as a *donatio*? This is the question; and I think the Lord Ordinary has decided it rightly, only he has gone a little too far, for he has sustained the whole reasons of reduction, while we are inclined to go entirely on the fourth.

Lord Gillies.—I concur. In consequence of Mrs Napier's death, the annuity of £500 may be laid out of view, though indeed it may be founded on as an *admissio* of proof, showing that it was granted in lieu of the wife's claims, and that the other was not so granted, but was a pure donation. In fact, it was just pin-money. The defenders, in their statement, endeavour to give the matter a different complexion, and say (p. 22) that Mrs Napier "was desirous, during her husband's life, to have the means in her power to be of immediate service both to her children and grandchildren." This is stated as the inductive

cause of the annuity of £200, and makes it even less than pin-money,—making it, in fact, just continue to be the husband's own property. In these circumstances, insolvency having taken place, and there having been a *de facto* revocation of the annuity by the subsequent granting of bonds in favour of other heritable creditors, I can have no difficulty in concurring with your Lordship to sustain the fourth reason of reduction.

Lord Mackenzie.—I concur. The interlocutor of the Lord Ordinary must certainly be varied. As to the annuity of £500, it is gone; but the Lord Ordinary sustains the whole reasons of reduction, whereas all that is meant is only to sustain one-half of one reason, namely, the fourth. Now, in so far as the action concludes, that on sequestration the annuity of £200 became revocable as a donation, I am clear that it must be sustained. It was clearly a *donatio*,—she was to draw it during her husband's life,—she granted nothing in return, and she was, moreover, to receive an annuity of £500 in the event of her surviving. Being thus a *donatio*, it was clearly revocable; and then, when the husband became insolvent, and sequestration took place, the creditors, without reference to the period when their debts were incurred, became vested with the right of revocation. It is not disputed that they have revoked it; and had they not done it themselves, they were clearly entitled, after the sequestration, to compel the husband to do it for them. I don't see that any thing depends on the date of the reduction,—it rests on the right of revocation. And I have always understood, that when a *donatio* is revoked, it is revoked altogether, as to all effects of being good. It is said, that if part had been paid, there would have been no title, on revocation, to reclaim it,—the money having been actually paid under the exclusion of the *ius mariti*. I have some doubt of this. If the money is actually spent, it is gone. The spouses have spent it together, and neither the husband nor his creditors could, by revocation, reclaim payment of what he had given his wife to spend. But nothing of the kind is asked here. There is no conclusion to this effect. But the wife's trustees maintain, not only that she was entitled to keep what she spent, but to make good the whole right which vested in her,—meaning by this the whole of the arrears. I cannot see it; as I have already said, in so far as the money is spent, it is gone; but in so far as it exists, I cannot see in what respect it differs, after revocation, from the case of moveables. Say moveables existed to the value of £1000, how could the wife have resisted the husband's right to revoke a donation of these? Just as little could she have resisted the revocation of a sum of money, if the money had been marked, and not spent. The present is an *a fortiori* case; for here the money has not been paid at all, and what the wife's trustees claim is, only the arrears not paid. Suppose that, instead of an annuity, the bond granted by the husband had been for a sum of £1000 instantly payable, is it possible to doubt that on revocation, if none of it had been spent, but all had remained due, there would have been a good ground to reclaim payment of this? I cannot have the least doubt. The plain effect of revocation is, that the wife can demand nothing, past or future, on the ground of the donation. It is said that the Messrs Hankeys are claiming for a debt contracted in 1835, whereas the bond was granted in 1827. I don't see the relevancy of this statement. They are creditors, and are entitled to the full benefit of the revocation. They are just in the husband's place. I am therefore clear that we ought to adhere to the interlocutor, in so far as it sustains the fourth reason of reduction, and declares that nothing can now be claimed by the wife under the bond of annuity.

Lord Fullerton.—I concur entirely. In the *first* place, it is almost admitted that the annuity for £200 must be considered as a donation; and in the *second* place, it cannot be disputed that the granting of subsequent heritable securities and sequestration amount to a revocation. It has in fact been recalled; and the only question is the effect,—whether the revocation disposes of all claims for arrears previous to its date? I cannot see the slightest doubt for holding that it does not. After revocation has been made in circumstances like the present, if a sum, forming part of the donation, is clearly extant or traceable, the effect is to enable the party interested in the revocation to recover it. Suppose each year's annuity had been paid as it fell due, and lodged in bank, the creditors would clearly have been

entitled to the whole amount; but all difficulty is here removed, because no payment has been made, and the only sums in dispute are arrears not paid. I cannot see any ground for the defenders' claims.

The Court pronounced the following interlocutor:

"Recal the interlocutor of the Lord Ordinary, in so far as it sustains the whole reasons of reduction libelled; adhere to said interlocutor, in as far as it sustains the fourth reason of reduction as applicable to that part of the heritable bond which relates to the annuity of £200, and to that extent refuse the reclaiming note for said trustees, and reduce, decern, and declare in terms of the libel accordingly: Find it unnecessary now to entertain the action as to any other part of said bond, or to any of the other reasons of reduction; refuse the reclaiming note for said Robert Kemp and others, and find neither party entitled to expenses."

Lord Ordinary, Cuninghame.—*Act.* Robertson; Shepherd and Grant, W.S., *Agents.*—*Alt.* Whigham, Aytoun; William Spalding, S.S.C., *Agent.*—*F. Clerk.*—[H.B.]

2d February 1842.

FIRST DIVISION.—(H. B.)

NO. 111.—LETHEM'S REPRESENTATIVES, *Raisers*, v. WILLIAM BAIRD and MRS JANET HADDOW or FELL, *Claimants*.

Husband and Wife—Surrogatum—Circumstances in which a wife was preferred to her husband's creditors, for a sum of money which had been lodged by him in the hands of a third party for a special purpose, but which was held to be clearly traceable as part of the price of her heritable estate.

John Haddow of Easterseat, was succeeded in that property by his two daughters, as heirs-portioners. Mary, one of them, was married to William Fell, who afterwards acquired right to the other daughter's half. The whole property thus came to belong to Fell and his wife—one-half *pro indiviso* to each. In 1827, Fell borrowed the sum of £540 from William Robertson, to whom, with the concurrence of his wife, he granted a disposition of the lands of Easterseat, *ex facie* absolute, but restricted by a back letter to a security for the sum lent. At the same time, Fell addressed the following holograph letter to Robertson:

"The disposition granted to you by me and Mrs Fell, for the lands of Easterseat, for the purpose mentioned by you to me, of your letter of this date, should they ever be sold by you, I hereby bind myself to allow you to retain £500, to secure an annuity for Mrs Fell, in such manner as we shall think proper. Should you get up your money, they shall be returned to us in the same manner as previously disposed."

In 1829, Robertson, with the consent of Mr and Mrs Fell, sold the lands of Easterseat to George Hamilton for £1260. Before the price was paid, certain alleged creditors of William Fell used arrestments in the hands both of Robertson and Hamilton. The price was however settled in terms of the following state, holograph of William Fell:

"1829.
April 4.—By price of Easterseat, received by Mr Robertson
this day, £1260 0 0
Sum uplifted from property during his possession, 53 15 0
£1313 15 0
To principal sum of debt due Mr
Robertson, £600 0 0
To interest due thereon, 56 16 8½
Carry forward, £656 16 8½ £1313 15 0

Brought forward, £656 16 8½	£1313 15 0
Sum expended by Mr Robertson relative to the property,	0 16 7
Sum retained in hand to pay expenses and burdens,	42 0 0
Amount of sum already advanced,	150 0 0
	<hr/>
	849 13 3½
	<hr/>
	£464 1 8½

"This account settled, and the bal. of £464. 1. 8½. pd. to me by Mr Wm. Robertson, jun. of Kennedies, who is hereby discharged by me of all demands this 4th day of April 1829 years."
"WILLIAM FELL."

On this occasion Fell addressed the following letter to Mr Patrick Lethem:

"4th April 1829.—SIR, As your friend Mr Robertson entertains some scruples about some arrestments lodged in his hands by alleged creditors of mine, and as I have every wish to give him satisfaction on the subject, I now consign in your hands the sum of £300 Sterling for his relief, in case of any of the arrestments lodged in his hands, or in the hands of Mr George Hamilton, are found to be effectual in any respect, and any expenses he may be put to on that account; and if he is subjected, his draft upon you will be sufficient warrant to you for the money."

It appears to have been understood at the time by Messrs Robertson and Lethem, and also by William Fell himself, that the £300 consigned belonged to Mrs Fell. Accordingly, in a note by William Fell to Lethem, he says,

"28th October 1829.—Mr Lethem will please pay Mr Robertson the interest due upon the money deposited in his hands belonging to Mrs Fell, and this shall be his authority,"

And in a letter of Robertson, addressed after Lethem's death to his son, he calls the sum consigned, "money belonging to Mrs Fell."

Fell having gone off to America, a process of multipointing was raised by Lethem's representatives. The fund *in medio*, being composed of the £300 originally consigned, with the interest accruing thereon since 1829, was claimed *in toto* by Mrs Fell, and also by William Baird, *pro tanto*, in payment of a debt for which decree had been obtained against William Fell previous to the sale of Easterseat. Baird had endeavoured to fortify his claim by successive arrestments. No arrestment had been used by Mrs Fell.

Baird *pleaded*—1. The arrestments used by the claimant in the hands of the raisers, being the first and only effectual diligence to attach the fund *in medio*, the claimant, in virtue of said arrestments, is entitled to be preferably ranked and preferred to the whole of said fund. 2. Whatever claim Mrs Fell may, under the circumstances alleged by her, have against her husband or Mr Robertson to make good their alleged obligations to her, she can have no claim to compete with the claimant for any part of the fund *in medio*, which was clearly a personal fund belonging exclusively to Fell, the common debtor, and as such was duly attached by the claimant's diligence.

Mrs Fell *pleaded*—1. The claimant is entitled to be ranked and preferred in terms of her claim, in respect that the fund *in medio* is now, and always has been, the claimant's property, as being the *surrogatum* for her portion of the *pro indiviso* half of the said lands, which does not fall under the *jus mariti* of her husband, and is not attachable by his creditors. 2. In

respect, farther, that the said consignment was made on the understanding that the rights of parties were not to be thereby affected, but were to be given effect to as if the price had still remained in the hands of the purchaser. 3. In any view, the claimant's husband had no power to impignorate the said sum, belonging to the claimant as aforesaid, in security of his own proper debts, without the special consent and authority of the claimant herself. 4. Even supposing the sum consigned had been attachable for the debts of her husband, the claimant would be entitled to be ranked and preferred over it, *pari passu*, with her husband's other just and lawful creditors, who have not validly attached the same by diligence, for the amount of one-half the price of the said lands, with interest from the said 4th April 1829, the date of settlement of the price. 5. The claim of Mr Baird ought to be repelled, in respect he has not produced legal evidence of the debt said to be contained in the alleged decree at the instance of him and Mr Maxwell, on which the horning at their instance bears to have been issued. 6. Mr Baird's claim ought not to be sustained, as stated, seeing that, of the two arrestments founded on by him, the first is prescribed, and both are otherwise invalid and insufficient to create any preference over the fund *in medio*, in respect of the circumstances herein before stated.

The Lord Ordinary pronounced the following interlocutor:

"16th December 1841.—The Lord Ordinary having heard counsel in this process, and thereafter considered the claims and productions of the respective claimants, finds that the fund *in medio* is composed of the sum of £300 Sterling, with the interest accruing thereon since 1829: Finds that the principal sum is clearly traced to have been a part of the price of the lands of Easterseat, of which the claimant, Mrs Fell, was proprietrix to the extent of *one-half*, and that the same was brought to sale in 1829, in virtue of a general disposition (qualified by a back letter limiting it to a security) extending over the whole property, to which Mrs Fell became a party for a debt of her husband's: Finds, that when Mrs Fell subscribed the said disposition for her husband's behoof in 1827, he granted a holograph letter or obligation, addressed to the creditor, binding himself, in the event of a sale, that £500 should be invested in the purchase of an annuity for the claimant; which obligation seems to have been highly just and proper in itself, and at all events has never been reduced or challenged: Finds that the sum *in medio* forms part of the price of the claimant's lands, which were sold during her coverture for £1260 Sterling, or thereby, and consequently is a portion of the fund which should have been employed in the purchase of the said annuity for her: Finds that the claimant is entitled to trace and to claim this fund preferably, and to the exclusion of the creditors of her husband, prior to the sale of her lands: And finds it established that the debt of the competing claimant, Mr Baird, was not contracted posterior to the sale, or on the faith of the fund *in medio*, but was due to Baird at a prior period by William Fell, the husband alone: Therefore, on the whole, sustains the claim of Mrs Fell, and prefers her to the fund *in medio*; and repels the claim of Mr Baird, and decerns: Finds no expenses hitherto incurred due to either party, and decerns.

"Note.—As the Lord Ordinary views this case, it is one in which the principles, both of strict law and of equity, alike support Mrs Fell's claim.

"When she was asked to join her husband in a security extending over her portion of the estate in 1827, the husband most properly bound himself, if the lands were sold, that £500 of the price should be expended in purchasing an annuity for Mrs Fell. This was a highly onerous and most reasonable obligation, entitled to every support from the law. Accordingly, when the lands were sold in 1829, they brought a price which showed that Mrs Fell's half of the price was far above £500.

According to a state produced, it was upwards of £630, but after certain appropriations to her husband's debts, the free balance left to her in the purchaser's hands, in April 1829, was reduced to £464. Had Mr Robertson acted rightly in reference to this balance, he should have brought a multiplepoinding, in which a separate *curator* should have been appointed for Mrs Fell, and every shilling of this balance should have been invested for the purchase of the annuity to her.

"Instead of that, £164 was paid to Mr Douglas, and the remaining £300 was deposited (on 4th April 1829) in Mr Lethem's hands as a *guarantee* fund to meet certain arrestments raised by the husband's creditors, in case any claims under them should ever be rendered effectual. Fortunately no claim has arisen under these arrestments; and, therefore, the question is brought simply to this,—whether the wife can now demand this payment of the price of her own lands to meet in part her onerous and just claims, arising from a sale of her estate, to which her husband, during her coverture, got her accession?"

"The Lord Ordinary is clearly of opinion that she is now entitled to trace and identify this fund,—seeing that none of the parties for whose use it was (improperly) pledged in 1829, can urge any claim upon it. She has now a good right, both in equity and law, to be placed in the same situation she would have been if a multiplepoinding had been brought by Robertson relative to the fund in his hands in 1829. If the Lord Ordinary do not greatly mistake the case, the claim of Mrs Fell, for her own half of the price, or at least for £500 of it, could not then have been resisted.

"It is quite true, as pleaded by the opposing competitor, that Mrs Fell used no *diligence* to attach the fund, while the other claimant has fortified his claim by successive arrestments of it as belonging to *Fell*; but in the Lord Ordinary's opinion, no diligence on the part of Mrs Fell was necessary to attach the fund, as it was radically *her own* property; and whatever plea might have been set up by any creditor under a very specific pledge, to which her consent may have been obtained, she has that *equitable lien* on the fund, *quoad ultra*, which entitled her to claim it to the exclusion of all the other creditors of her husband.

"The Lord Ordinary has given no expenses yet incurred, because Mrs Fell would have been obliged to make a claim in this process, even if unopposed; but if the litigation goes on, both the past and future expenses will be in the hands of the Court."

Both parties reclaimed,—Mrs Fell for expenses, and Baird on the merits.

At advising, the Court did not call on Mrs Fell's counsel.

Lord Gillies.—I concur in the opinion of the Lord Ordinary. Fell bound himself, in selling Easterseat, to vest £500 of the price in the purchase of an annuity for his wife,—was this a binding obligation? I cannot conceive any obligation more strictly onerous.

Lord President.—I am of the same opinion. On looking at the whole productions, I think it impossible not to be satisfied that the fund *in medio* is clearly traced to be in right of the wife. Look at the letter where he describes it as Mrs Fell's money, and to the letter of Robertson of the same effect. Even after she recovers this sum, the lady will still be very unfortunate, as she only gets £300 instead of £600, the price of her *pro indiviso* half.

Lord Mackenzie and *Lord Fullerton* concurred.

The Court *adhered* on the merits, but *altered* as to the expenses, and found Baird liable to Mrs Fell in the whole expenses of the competition.

Lord Ordinary, Cuninghame.—*For Mrs Fell*, Rutherford, Horne; *M'Lean* and *Hamilton*, W.S., *Agents*.—*For Baird*, Solicitor-General (M'Neill), Monteath; John Henderson, S.S.C., *Agent*.—B. Clerk.—[H.B.]

2d February 1842.

SECOND DIVISION.—(J.W.)

No. 112.—DANIEL KING, *Pursuer*, v. MARGARET PATRICK or KING, *Defender*.

Divorce—Adultery.

Vide ante, p. 27. The Court of this date resumed consideration of this cause, and disposed of it on the merits. Lord Medwyn and Lord Moncreiff concurred in opinion with the Lord Ordinary, that the adultery was proved; while the Lord Justice-Clerk considered that the evidence was not sufficient to establish guilt. The following interlocutor was pronounced:

"Find it proved that the defender committed adultery with the Rev. J. M. on the night between Tuesday the 7th and Wednesday the 8th of March 1837; and on the night between Tuesday the 1st and Wednesday the 2d of August 1837, and therefore decern and declare in the divorce, in terms of the conclusions of the libel."

Lord Ordinary, Cuninghame.—*Act*. Rutherford, Robertson, Macfarlane; Lockhart, Hunter and Whitehead, W.S., *Agents*.—*Alt. Solicitor-General* (M'Neill), Patton, Paterson; Wotherpoon and Mack, W.S., *Agents*.—[J.W.]

3d February 1842.

SECOND DIVISION.—(J.W.)

No. 113.—JAMES M'CLELLAND (*Allans' Trustee*), *Pursuer*, v. ROBERT RODGER and COMPANY, *Defenders*.

Process.—Jury Trial.—Motion for New Trial.—*Held incompetent, when moving for a new trial, to found upon misdirection, or omission in point of law on the part of the Judge, no exception to the charge having been taken at the trial.*

About the beginning of February 1839, the defenders made an advance of £3000 to James Allan and Son, who drew a bill on them for the amount, payable at four months' date. The bill of lading of the cargo of the "Hope," consisting of grain, was indorsed over and delivered to the defenders; but it was alleged that no real transfer of the cargo was thereby intended to be made. It was said to have been agreed between the parties that Allan and Son should pay discount on the bill to the bank, or person who discounted the bill; and besides, they were to pay the defenders a commission of four per cent. for making the advance, if the sale of the cargo of the "Hope" should be unprofitable. But if the cargo should be sold to profit, the defenders were to be entitled to one-half of the profits. On the arrival of the Hope at the Broomielaw in March 1839, James Allan took charge of the cargo. Part of it he sold at the ship's side, and the remainder he put in the store of Alexander Galloway in his own name. The cargo commenced being discharged on the 21st March 1839, and its delivery was completed on the 30th. On the evening of the 31st March, or early in the morning of the 1st April, Allan resolved to suspend payment; and about ten o'clock on the forenoon of the 1st April, and immediately before the despatch of circulars notifying his bankruptcy to his creditors, he addressed to Alexander Galloway a note in the following terms:—"Deliver to Messrs Rodger and Company all our English barley landed from the Hope." The storehouse-keeper, after receiving this letter, executed and delivered an acknowledgment of the receipt of 740 bolls of barley on account of Robert Rodger and Company,

and subject to their order. This document was obtained by James Allan, who went to the store in order to obtain a transfer of the grain, and was handed by him to the defenders. A corresponding entry was made in the books of the storehouse-keeper, and an account was opened in the name of Rodger and Company. Thereafter the barley in store was sold by the defenders, and they drew the proceeds. Further, there were sums due on account of purchases from the cargo of the Hope, unpaid to Allan, amounting to about £544. 13. 5; and on the 2d and 3d of April, new invoices were rendered by him to the purchasers, bearing that he had sold the grain for behoof of the defenders. In consequence, they demanded and received payment from the parties, but two of them insisted upon an indemnity against being subjected to a second payment.

On the 8th April 1839, the estates of James Allan and Son, and James Allan as the sole partner of the firm, were sequestrated. The pursuer was appointed interim factor on the sequestrated estate, and on the 7th of May 1839, he was appointed trustee. His nomination was confirmed by the Court on 8th May 1839.

The present action was instituted for the purpose of challenging the transactions, and the deeds expressive thereof, whereby the grain in store, and the proceeds of what was sold and not recovered by Allan, were appropriated by the defenders.

Pleaded by the pursuer—1. The transactions whereby the defenders appropriated the grain in store, and the proceeds of so much as had been sold by Allan and Son, but unrecovered by them, are reducible, seeing that they were not truly the proprietors of the grain at the time, that the right of property in the cargo never was truly transferred, or intended to be transferred to them, and the right to the grain, and to the unrecovered proceeds of so much as was sold by the bankrupt passed to his creditors. 2. The transactions challenged, and deeds expressive thereof, are reducible under the Act 1696, c. 5. 3. The grain in question having been placed, with the knowledge and concurrence of the defenders, under the disposition and control of the bankrupt, after the alleged transfer in their favour, and the bankrupt having publicly and in every respect dealt with the cargo as his own property, it must be held to have passed to the creditors of the bankrupt, even upon the assumption, which is contrary to the fact, that a real transfer had originally taken place; and no acts of the bankrupt done after he had become hopelessly and notoriously bankrupt and insolvent, can defeat the rights of his creditors. 4. The whole transactions are reducible *ex capite fraudis*, seeing that the object and intention of the defenders and the bankrupt was, through the form of a pretended transfer, and the colourable title thereby given, to vindicate the goods intended to be transferred in the event of Allan and Son's bankruptcy, and to withdraw them from the lawful creditors of the bankrupt, while the pretended seller was to remain the true proprietor of these goods, and to sell and dispose of them at pleasure, subject only to a claim on the part of the defenders for a commission or a share of the profits. No act done in completion of such an illegal agreement can legally prevail to affect the rights of the general body of the creditors of the bankrupt. 5. Generally, the transactions complained of, and documents founded on by the defenders, are

illegal, invalid, and reducible, and the petitory conclusions of the action are well founded.

Pleaded by the defenders—1. There is no room in the present case for a reduction under the Act 1696, inasmuch as the transference of the cargo in question, and any appropriation of the same, or of any part thereof, was not in satisfaction or security of any prior debt, but of a present advance or *novum debitum*. 2. There is equally little room for any reduction at common law, in respect that no fraud upon the creditors of James Allan and Son took place, but the transactions complained of were fair *bona fide* transactions, which the parties were entitled to engage in, carry through and complete, according to the true terms of the agreement between them. 3. Generally, there is no valid ground for any of the conclusions of the summons, reductive, declaratory or petitory.

The following issues were adjusted and sent to trial:

"It being admitted that on the 8th day of April 1839, the estate of James Allan and Son, grain-merchants in Glasgow, of which James Allan was the sole partner, was sequestrated under the Bankrupt Statute, and that the pursuer is trustee on the said estate:—

"1. Whether, on or about the 1st day of April 1839, the said James Allan and Son were insolvent, and wrongfully and fraudulently granted the order, No. 20 of process, to transfer to the defenders about 700 bolls of barley, then in the warehouse or granary of one Alexander Galloway, in Alston Street, Glasgow; or wrongfully and fraudulently transferred the said grain, or caused the same to be transferred to the defenders? and whether the defenders are indebted and resting-owing to the pursuer, as trustee aforesaid, in the sum of £1200, or any part thereof, with interest thereon, as the value of the said barley, fraudulently transferred as aforesaid?

"2. Whether, on or about the said 1st day of April 1839, at least within sixty days prior to the said 8th day of April 1839, the said James Allan and Son granted the said order, or caused the said transfer to be made as aforesaid, in payment or security of a prior debt due by them to the defenders, in preference to other creditors, in violation of the enactment of the Statute 1696, cap. 5? and whether the defenders are indebted and resting-owing to the pursuer, as trustee aforesaid, in the sum of £1200, or any part thereof, with interest thereon, as the value of the said barley?

"3. Whether, on or about the 1st, 2d, 3d, 4th, and 5th days of April 1839, or any of them, the said James Allan and Son wrongfully and fraudulently granted the orders, Nos. 21, 22, 23, and 24 of process, and one to Thomas Hill, late maltster in Glasgow, or any of them, ordering the persons therein named, or any of them, to pay to the defenders the price of certain quantities of grain imported in a vessel called the Hope; or wrongfully and fraudulently caused the said payments to be made? and whether the defenders are indebted and resting-owing to the pursuer, as trustee aforesaid, in the sum of £600, or any part thereof, with interest thereon, as the amount of the sum or sums in the orders last aforesaid, fraudulently transferred as aforesaid?

"4. Whether, on or about the said 1st, 2d, 3d, 4th, and 5th days of April 1839, or any of them, at least within sixty days prior to the said 8th day of April 1839, the said James Allan and Son granted all or any of the orders last aforesaid, or caused payment of the same to be made in payment or security of a prior debt due by them to the defenders, in preference to other creditors, in violation of the Statute 1696, cap. 5? and whether the defenders are indebted and resting-owing to the pursuer, as trustee aforesaid, in the said sum of £600, or any part thereof, with interest thereon, as the amount of the sum or sums in the orders last aforesaid?"

The jury returned the following verdict:

"At Glasgow, the first day of May 1841 years, before the Honourable Lord Ivory, compared the said pursuer and the said defenders by their respective counsel and agents, and a

jury having been empannelled and sworn to try the said issues between the said parties, say, upon their oath, that in respect of the matters proven before them, they find for the pursuer £1132. 16s., being the sum in the first and second issues, and £544. 13. 6., being the sum in the third and fourth issues, with interest on both sums from 1st September 1839."

The defenders moved for a rule to show cause why a new trial should not be granted. The verdict was challenged on three grounds: 1. That it was against law; 2. against evidence; and 3. that the Judge did not, in his direction to the jury, state sufficiently and explicitly the effect of the bill of lading. It being objected *in limine*, that no exception to the charge of the Judge had been taken at the trial, it was

Argued, That it was not disputed that the money was advanced, and that the bill of lading was indorsed in security. This, in law, gave right to the defenders to follow and take possession of the grain. A view of the legal character of the bill of lading was necessary to a right inference from the facts; but this was omitted by the Judge. By the Act 55 Geo. III. c. 42, § 6 and 7, it is competent to move for a new trial on the express ground of misdirection; and a bill of exceptions is not necessary; neither is there any authority in the cases for requiring a note to be taken at the trial, so as to form the foundation of a bill of exceptions. This may be a convenient rule, and if it be not observed, it may be difficult to get evidence of the charge; but the presumption is, that the Judge lays down good law, and if the Court can be satisfied that the verdict is contrary to it, the justice of the case requires a new trial: 59 Geo. III. c. 35, § 16 and 17. Anderson, 2 Mur. p. 261. Fisher, 2 Mur. p. 595. Forbes, 3 Mur. p. 51. Scott, 3 Mur. p. 529. Rogers, 4 Mur. p. 31. Adam on Jury Trial, pp. 331, 185, 341, 320. Hosey, 4 Mur. p. 424.

Answered—If there be no remonstrance against the charge of the Judge at the time, acquiescence is to be implied: Allardice, 4 Mur. p. 539. An objection to a verdict as against law, must be not against law generally, but against the law fixed and laid down by the Judge at the trial. Parties ought then to object to the law laid down, and get a note of it taken by the Judge, so that there may be a record by which all must be bound. A Judge is not bound to have, or to preserve notes of his charge. The more recent cases are all in support of the necessity of an exception being taken at the trial: Robertson, 29th June 1838, F. C.; M. and R. App. Cases, 3d June 1839. Campbell, 1st July 1834, F. C. Scott and Gifford, 2d March 1832, F. C.

At advising,

Lord Justice-Clerk.—The issues are said to depend upon matters of fact and law, and a right inference could not be drawn from the facts without the law being laid down. In the full knowledge of the law by the defenders' counsel, the charge of the Judge was given, and no observation was made upon it. With the aid of that charge a verdict was returned for the pursuer, and I am clearly of opinion that the defenders are not now entitled to raise any question upon law which was not objected to at the trial. Jury trial in Scotland rests upon Statute or decisions. We are not bound to adopt any arbitrary rules from England; and we have no benefit from their practical rules. In England, the Courts have received the report of the Judge as to what was stated at the trial and *ex intervallo*. This is hazardous. One word determined the Cromarty cause, in which Lord Cottenham set aside Lord Cockburn's charge. By Sta-

tute we have right to a motion for a new trial, but we have no provision that we shall not make the law stated at the trial matter of record. Being so left at liberty, are we not entitled to make this matter of certainty and precision? As to misdirection, it is said that it is not provided that the objection on that ground must be stated at the trial; but the same clause admits of a motion for a new trial on the improper admission of evidence; and it would be utterly extravagant to hold that this could be taken advantage of, without the objection being taken at the trial. In principle, both cases are alike. There are several principles applicable to jury trial, opposed to the course proposed: 1st, Trial consists of two parts; that which prepares for the verdict, and the verdict itself. Now, there is nothing final as to the Judge's law; and if objected to, he may see cause to alter, omit or supply. But although a verdict may be reviewed, that which is prior to the verdict becomes closed and final by the verdict. What is complained of to the Court must have been complained of to the Judge: Hamilton, Robertson and Campbell. In the 2d place, I am not aware that a Judge can be called on to write out, *ex intervallo*, the law which he charged, and which was not objected to. He may now accompany his notes with remarks—a thing of very doubtful expediency; but he cannot be called on to furnish a certificate of what law he laid down. In such a case there would always be some misunderstanding. The Judge cannot recollect all his expressions; and it is in human nature, that, in framing his report, he should be in favour of correct expressions and correct law rather than the contrary. I cannot therefore understand how a party can object to misdirection when he has no record of it, and can obtain none. The Judge may say, either he does not recollect, or declines *ex intervallo*, or sends what he understands to be what he said. Is this fitting in judicial proceedings? Are the parties to be satisfied when the Judge varies from their own notes; or is the Court to be satisfied? Why should parties bring things to such a pass when they could so easily remedy it by objecting at the trial? It were to place the Judge in a very cruel situation. In the 3d place, whatever charge a Judge gives is to aid the jury, and to enable them to understand facts, or to draw inferences. For this end the law must be correctly stated, and clearly explained; and it is only of importance as addressed to them by the Judge; for it is of no consequence what is stated as law by the counsel. The Judge does not sit to pronounce judgment himself, but to aid the jury; they, therefore, are most materially interested in the correctness of the Judge; and if there be any omission on his part, it is peculiarly incumbent upon the parties to remind him of it. Hence, any system of reviewing a charge, when the attention of the Judge has not been called to its incorrectness before the jury retire, is a most imperfect procedure, and at variance with the principles of jury trial. In the 4th place, from the necessity of the case, a great deal of what passes at a jury trial is matter of conventional arrangement and consent between the counsel and the Judge, both as to the admission of evidence, and as to the law required to be laid down. No record whatever of this is kept till some objection be taken and put on record. Whatever, therefore, is not objected to, I hold to be acquiesced in. As grounds for a new trial, I see no difference between a misdirection not objected to, and the improper admission of evidence not objected to; much less between law not charged, but said to have been omitted. The early cases may be explained; and the conclusion of the matter is stated by Adam, pp. 172, 319 and 339. It being admitted that the verdict is in accordance with the charge of the Judge, this excludes any argument on law not moving for a new trial.

Lord Medwyn.—It being assumed that the law was not fully enough laid down at the trial, can the defenders now object to the verdict on this ground? Adam says, that when there is a misdirection by the Judge, the remedy in England is by moving for a new trial. Here it is very generally done by a bill of exceptions, which may be presented on a Judge refusing to lay down the law. Is the practice in England, then, excluded here by Statute or decisions? The recent cases seem to determine, that where a verdict is to be disturbed on the ground of misdirection, it should be by a bill of exceptions. This secures accuracy,—is fair both to the Judge and the opposite party; and if the cases fix it, I shall be happy to see the practice made conformable.

Lord Moncreiff.—I concur; but in early years there was a strong impression that it was competent to move for a new trial on the ground of misdirection, although no exception was taken, or note required to be taken at the trial, and that this was not matter of favour. But, in examining the later cases for a considerable period, it seems settled, that unless the party raise the objection to the law of the Judge at the trial, it is incompetent to do so in a motion for a new trial. The case of Campbell is not exactly in point; but it is evident that it was there held, that unless the question of law be raised at the trial by appeal to the Judge, either objecting to the law stated or omitted, it is incompetent to get at it in Court. Robertson also is to the same effect; and looking to these cases, I concur with your Lordships. I must, however, interpose one qualification,—that when required to say whether a verdict be contrary to evidence, we must apply our minds to the law applicable to the facts, and keep it in view. Looking to the issues here, while considering whether the verdict be contrary to evidence, we must have in our minds what is insolvency, and what constitutes fraudulent, and must regard also what is put in issue, and what in defence. I cannot raise law in relation to misdirection or omission; but I do not say I cannot regard any law.

Subsequently the pursuer proceeded to show cause why a new trial should not be granted—and *argued*, that although the nature and effect of bills of lading, of insolvency, and the Act 1696, must be considered generally, yet the fact that the law on those heads had been omitted to be laid down at the trial, was now, as a substantive exception to the verdict, entirely out of the question. The real point put to the jury was, whether it was the intention of the parties, as disclosed by the circumstances attending the transactions, that the bill of lading should transfer the property of the cargo? The jury held there was no such intention; and if so, that then the grain stood vested in Allan at his bankruptcy, and belongs to his trustee.

Replied.—That having advanced money, and received the bill of lading in security, that transferred the right to the cargo, and was civil possession: Bell, I. 198, 199. Then, if the defenders had the right, did they waive it? If the jury proceeded on this ground, the verdict was contrary to evidence.

The Court *refused* the motion, and discharged the rule.

Act. Rutherford, Patton; Ritchie and Hill, W.S., Agents.—Alt. Solicitor-General (McNeill), Penney; Simon Campbell, S.S.C., Agent.—[J.W.]

3d February 1842.

SECOND DIVISION.—(J.W.)

No. 114.—CARFRAE'S TRUSTEES, *Raisers*, v. JOHN CARFRAE, *Claimant*, and HARRIET and JANE CARFRAE, *Competing Claimants*.

Trust—Settlement—Heritable and Moveable—Provisions to Children.—A party by his trust-settlement directed his trustees, "if it shall not have been done previously, to lend out on good heritable security the sum of £10,000, as soon after my death as possible, for securing payment of the yearly interest and produce to my widow;" 2d, "As soon as possible after the death of the longest liver of me and my said wife, if not previously done, to lend out the sum of £9000 for the security of provisions to my daughters." Lastly, "As soon after the death of the longest liver of me and my said wife as may be convenient, to convey and make over, in equal portions, to my sons A and B, the free residue of my estate, heritable and moveable." The wife survived the trustor. He himself left heritable securities to the amount of £7400; and the trustees, over and above, took heritable securities to themselves, amounting to £10,184. After the death of the widow,

but before the division of the residue, A, the son, died intestate. In a competition between his heir and executors for the half of the residue—*Held*, 1. That the heritable securities left by the trustor himself were to be imputed pro tanto in making up the investment of £10,000 for the widow: 2. That after her death the said £10,000 was to be kept up to the amount of £9000, for the security of the provisions to the daughters: 3. That the remaining £1000, together with the whole other residue of the testator, was moveable, and that the half destined to the residuary legatee deceased, descended to his executors.

The late John Carfrae, coachmaker in Edinburgh, grandfather of the claimants, died in 1831, leaving a trust-deed of settlement, dated 8th May 1830. By this deed he conveyed certain heritable subjects and bonds, specially described, and generally all his property, heritable and moveable, which should belong to him at his death, to the raisers of the present process.

The fourth purpose of the trust contains the following direction:

"I do hereby direct and appoint my said trustees or trustee, to pay to my said wife, during all the years of her life, in case she shall survive me, the yearly interest and produce of the sum of £10,000, and that half-yearly, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment thereof at the first term of Whitsunday or Martinmas that shall happen after my decease; and for securing the said yearly payment to my said wife, I hereby direct my said trustees or trustee, as soon after my death as possible, if it shall not have been done previously, to lend out, on good heritable security, the sum of £10,000 Sterling, and to make regular payment of the interest thereof to my said wife during her life, at the said two terms, declaring that the half-yearly payments that may be made to her, previous to the money being so lent, shall be at the current rate of interest paid at the time for money lent on good heritable security."

The eighth purpose of the trust is thus expressed:

"I hereby direct and appoint my said trustees or trustee at my death, if my said wife predeceases me, or at her death if she survives me, to set apart the sum of £3000 Sterling for each of my said three daughters, Jean, Margaret, and Isabella, and that over and above the sum of £1000 Sterling, provided to each of them as aforesaid, making together the sum of £4000 Sterling to each; but it is declared that my said daughters shall in no event be entitled to demand payment from my said trustees of the principal sum of the said £3000, to be set aside for each of them, nor to dispose thereof in any way except to the extent after mentioned; And I direct my said trustees or trustee, for the security of the said provision of £3000 to each of my daughters, to lend out as soon as possible after the death of the longest liver of me and my said wife, if not previously done, the foresaid three sums of £3000 each, amounting together to £9000, upon good heritable security, and to take the title thereto to themselves, as trustees aforesaid, and to pay, from and after the death of the longest liver of me and my said wife, the interest and produce arising from the said three sums of £3000 each to my said three daughters during their lives,—each of them receiving the interest corresponding to the sum of £3000, and no more."

The last purpose of the trust provides for the disposal of the residue in these terms:

"I do hereby direct and appoint my said trustees or trustee, as soon after the death of the longest liver of me and my said wife as may be convenient, consistently with the due execution of the other purposes of the trust, to convey and make over in equal portions, share and share alike, to my said two sons Thomas and William, the free residue and remainder of my whole means and estate, heritable and moveable," &c.

To accomplish the purposes of the trust, powers are conferred on the trustees to pursue for and receive "the principal sums, interests, and annual profits of the debts,

heritable and moveable, particularly and generally before conveyed, to take new security therefor, grant discharges thereof, and renounce or dispose the securities held therefor. They are also empowered, if it shall be necessary for enabling them to pay my debts and the provisions and legacies herein after mentioned, to sell and dispose of such part of the said trust-estate and effects as they shall consider proper."

The testator was survived by his widow and his two sons and three daughters; and the condition in which his funds stood at the time of his death was, that independently of the special heritable subjects, to which the present question does not relate, there were £7400 lent on heritable security, while the remainder of his funds, amounting to £15,842, were moveable.

Subsequent to the testator's death the trustees lent upon heritable security the sum of £12,484. 18. 3.; while of the £7400 standing heritably secured when the testator died, there was paid up only £1600,—leaving £5800 of the testator's own investments still heritably secured, and making the whole amount held by the trustees upon heritable security £18,284. 18s. 3d. In this situation of the trust the testator's widow died in January 1838, and in November 1839, Thomas Carfrae also died, leaving an only son and two daughters. Thomas not having left any will, his estate falls to be divided according to the law of intestate succession; and the present process was raised by the trustees of John Carfrae, in part for the purpose of having it determined whether Thomas's share of the residue of the trust-estate be heritable or moveable, or to what extent it is heritable or moveable. The claimants are the tutor-at-law of the son of Thomas, who is a pupil, and the two daughters, claimants competing with him.

The daughters *pleaded*—That no more than £10,000, at the most, of the funds of the testator, can be viewed as having been directed by him to be heritably invested, if it shall not have been done previously; but that, as there stood already £7400 heritably secured at the time of his death, the only portion of the moveable or personal funds left by the testator, which it was incumbent upon the trustees to invest heritably for any purpose, was £2600, the sum requisite to make up the £10,000. There was, indeed, an express direction that £9000 should be heritably secured to meet the provisions of the testator's three daughters; but this was to be done only after the death of the widow, and if not previously done; and thus the investment of £10,000 to secure the widow's liferent interest necessarily exhausted the testator's instructions also as to his daughters' provisions, and satisfied at once the fourth and eighth purposes of the trust. That as, upon the death of the widow, the heritable investment made for her security was to the extent of £9000; specially destined to be kept up for the daughters' provisions, and as the remaining sum of £1000 was not specially destined in an heritable shape to the residuary legatees, but was left by the testator to fall back into the general estate, and to be dealt with as residue,—there is no ground for holding that the *jus crediti* of the residuary legatees was even to that extent made heritable *destinatione testatoris*. As the interest of Thomas Carfrae in the residue was to the extent of one-half, the patrimonial interest depending on the issue of this the only real question between the competing parties, is consequently to the extent of £500. Now, although

this sum had been heritably invested, in conformity with the appointment of the testator, that appointment had reference to a temporary purpose, being the mere securing of the widow's liferent interest. Had the direction of the deed been that there was to be an heritable investment taken by the trustees for behoof of the widow in liferent, and of the sons, Thomas and William, in fee,—then, indeed, the subject-matter to which the *jus crediti* in Thomas and William attached, would have been so far heritable *destinatione testatoris*. But there is no such declaration in this deed. Had the widow predeceased the testator, no temporary investment of the personal funds would have been requisite. The sons would instantly have had right to the whole estate of their father, subject to the special provisions to the daughters and sister. There could have been no question, then, that their *jus crediti* to demand the residue from the trustees was of a moveable nature. In addition to the £7400, such a sum must have been taken from the personal estate, and invested on heritable security, as was requisite to secure the £9000 to the daughters. But the whole remaining estate being personal at the testator's death, the right to it in his sons instantly vested, and was a moveable right, and descendible to their executors.

Pleaded for the tutor-at-law—That to the extent of the heritable bonds left by the truster, £7400, which were not specifically invested for his wife's annuity and his daughters' provisions, and no part of which was necessary to pay the debts, legacies and provisions, the residue must be considered heritable, and Thomas's share of it must descend to his son and heir. It is not to be presumed that money provisions—as those in question, though directed to be heritably secured by the trustees, unquestionably are—were intended to be defrayed out of the heritable rather than out of the moveable funds of the truster. On the contrary, unless it clearly appear to have been the intention of the truster that the heritage should be applied to this purpose, in preference to the moveable estate, it must be presumed to have been intended that those money provisions should be defrayed out of the moveable estate; but these heritable bonds were not invested for this specific purpose; nor does the trust-deed afford the least indication that the truster intended them to be held as invested for this purpose. It is impossible, therefore, to hold, that by the expression, "if it shall not have been done previously," the truster intended to alter the nature of his succession, to make that moveable which he left heritable, and to make that a burden on his heritage which, *sua natura*, was a burden on his moveable estate. Supposing, however, that the truster could be held to have intended this sum of £7400 to constitute part of the £10,000 directed to be invested on heritable security for his wife's annuity, of this only £9000, required for the provisions to the daughters, is specifically disposed of by the deed of settlement. The remaining £1000, freed on the widow's death from her annuity, constitutes part of the residue, and this unquestionably is heritable. It was made so by the truster's own act; and although his object was different, he must be held to have contemplated and intended all the legal results of a change from moveable to heritable; one of which is a descent to the heir instead of the executor. It has been con-

clusively settled by a long series of decisions, that the object of a party in investing money on heritable security, cannot affect the consequences as to succession. It is said, however, that in the present case, the object intended was temporary,—that the investment can only be held to have been intended to last during the widow's life; and that the money was then to be uplifted and paid in cash to the residuary disponees. Now, it is quite true that the purpose was temporary, but there is no ground for maintaining that the truster contemplated that the extra sum relieved from the temporary burden of the widow's life was to be realised before division. On the contrary, it falls under the general direction as to making over and conveying the residue to the two brothers. To the extent, therefore, of £1000 at least, the residue of the truster's estate must be deemed heritable; but it is conceived that it must be so held even to the full extent of £7400, being the amount of heritable bonds left by the testator at his death.

A record having been made up and cases prepared, the Lord Ordinary made *avizandum* to the Court, and accompanied his interlocutor with the following note:

"The Lord Ordinary has reported this case, because the parties are, on both sides, anxious to have the family question that has here arisen authoritatively settled by a judgment of the Court.

"The view which the Lord Ordinary himself would be disposed to take of the case is as follows:—

"1. Apart from the difficulty occasioned by the directions to lend out so much of the trust-funds for securing the widow's and daughters' provisions, there could have been no dispute, as regards the construction and operation of the clause which regulates the disposal of the residuary interest arising under the trust-deed. The trustees would, in this case, have possessed no authority to deal with the trust-estate, so as, in any respect, to alter its character, such as the truster had left it, by changing it either from moveable to heritable, or the reverse.

"2. It seems hardly less clear, that, in dealing with the provisions to the widow and daughters, it was intended, not that the trustees should lend out *two several sums* of £10,000 and £9000, but only that these sums should be lent out *successively*, the one after the other. That is to say, 1st, £10,000 was to be lent out 'as soon as after my (the truster's death) as possible,' for securing payment of 'the yearly interest, and produce' to the widow. 2d, 'As soon as possible after the death of the longest liver of me and my said wife,' £9000 was to be lent out ('if not previously done') for the security of the provisions to the daughters. But,

"3. The original investment for the widow having, by this time, answered its primary purpose, so far as regards *her* security, became, on her decease, available also for this latter or secondary purpose, viz., of an investment for security to the daughters. The different *terms* at which the investments are directed to be made, the one on the truster's own decease, the other not till the decease of the longest liver of him and his wife, point out this as the natural construction. The direction to lend out the second sum, 'if not previously done,' seems to have had in view what would or would not be necessary, according to the contingency of the wife's surviving or predeceasing the truster. If she predeceased, then, her provision lapsing, there would be no room for the primary investment in her behalf; in which case a lending out of £9000 would, as not having been 'previously done,' be required for security of the daughters. If, on the contrary, she *survived* (which was the actual case), then £10,000 having been already lent out, a further lending of £9000 would become unnecessary upon her decease; the burden upon the first investment ceasing by that event, and the trustees being entitled to lend farther, only 'if not previously done.'

"4. But here the question arises, Whether, the truster himself

having left certain heritable securities to the amount of £7400, this £7400 is or is not to be imputed *pro tanto* of the fund which the trustees are directed to hold invested for behoof successively of the widow and daughters? The Lord Ordinary inclines to think that it must be so imputed. For, 1. In directing the primary investment of £10,000 to secure the widow, the trustees are appointed, in words of precisely similar import to those which have just been commented on with reference to the secondary investment for security to the daughters, to lend out this sum of £10,000, 'if it shall not have been done previously;' and thus the same principle of construction, which excluded the necessity of a second lending out of £9000 for the daughters, £10,000 having already been lent out for the widow, would seem equally to exclude the necessity of the trustees lending out £10,000 for the widow, £7400 having already been lent out by the truster, so as to be available *pro tanto*. 2. The trust-deed conferring no further power to lend than is contained in the clauses for securing the widow's and daughters' provisions, the declaration, in another portion of the deed, that they shall not be liable 'for the solvency of any person to whom they may lend out sums of money for answering the purposes of this trust,' would seem, more especially when combined with the allusion to the possibility of sums being already lent out, to infer an implied limitation of their powers to such a lending only as should in strictness be necessary for explicating these trust-purposes. 3. Nor does there seem much force in the argument, that the previous lendings out must be construed as necessarily referring to *that specific form of investment* alone, which would immediately connect the particular security with the individual whose interests were to be secured; because, in no view does the truster appear to have intended that there should be any such specific connection between the security and its object,—the investments being all to be made, not in name of the party to be secured, but in name of the trustees themselves; and thus the title of the trustees, when completed under the securities created by the truster, standing substantially *in pari casu* with their title to any after securities which might be created by themselves, and taken, like the others, exclusively in their own names.

"5. There remains, however, another and more difficult question behind. For, even should it be held that the £7400, left heritably secured by the truster, falls to be imputed *pro tanto* in making up the investment of £10,000 for securing the widow, and so would also be absorbed in the secondary application of that investment for security to the daughters, there is still a difference of £1000 between the investment necessary for the widow, and that required for the daughters, which, in any view, must be dealt with as forming part of a fund which the truster expressly directs to be laid out, and to certain effects held in the shape of heritable security. Now, how far *this* £1000 is to be regarded as heritable or moveable, is a question on which the Lord Ordinary has not been able to form any very decided opinion, nor has he found himself much aided by a consideration of *Dick v. Gillies*, 4th July 1828, to which both parties refer with apparently equal confidence, as supporting their respective arguments.

"On the one hand, if, under the direction to invest upon real security, the matter is to be dealt with in the hands of the trustees, precisely as if the truster himself had made the investment, and thus left his estate so far in the shape of actual heritable, this unappropriated balance of £1000, as not having been reconverted into moveables prior to the death of Thomas Carfrae, the father of the parties here competing, and there being in fact no necessity for such reconversion from the state of the trust-funds otherwise, would, it is thought, fall to be dealt with in *his succession*, as still partaking of the character of heritable. On the other hand, if regard be had to the very specific and peculiarly limited purpose of the direction to invest, viz., in the widow's case, 'for securing the said yearly payment to my said wife' during her life, i. e., the yearly interest and produce of the sum of £10,000; and in that of the daughters 'for the security of the said provision of £3000 to each.' And further, if it be kept in view, that, unless with the burden, and for the purpose of securing these parties, the whole estate of the deceased vested in the residuary legatees *a morte testatoris*, at which period, with the exception of the £7400 of heritable debt (itself exhausted by the after provisions), the entire estate (so far as here

in discussion) was left in a moveable shape : And finally, if it be considered, that not only for the purpose of investing of new, for behoof of the daughters, £9000 out of the £10,000, which had become disengaged by the widow's death, but still more, for the purpose of actually dividing the remaining £1000 between the residuary legatees, it might have been requisite to uplift and turn into money the original investment, there is much to be said in favour of holding it to have been the intent of the truster himself that this portion of the residue should, so far as the residuary legatees were concerned, be regarded and dealt with as moveables.

"The latter view seems to be in substantial accordance with that of the minority of the Court in *Dick v. Gillies*, and is perhaps the result at which the Lord Ordinary would, on the whole, have arrived, but for the apparently conflicting opinion of the majority in that case. How far, as here contended for by one of the parties, there be not room to doubt whether some at least of the Judges composing this majority were not influenced by a certain degree of misapprehension as to the fund, which was in that case set apart for securing the mother's annuity, being identical with the separate provision which was, from a distinct source, settled in fee upon her issue, is a question entitled to the consideration of the Court, but upon which the Lord Ordinary does not feel himself entitled to enter."

At advising,

Lord Medwyn.—The testator, by his trust-deed, directs his trustees to pay to his widow the yearly interest of £10,000, and on her death to lay out £3000 for each of his three daughters, upon heritable security, if not previously done. The testator left £7400 heritably secured at his death; his wife survived; and the last purpose of the trust is, as soon after the death of the longest liver of me and my said wife as convenient, the trustees shall make over the free residue of the estate equally to two sons. One of the sons died before this last purpose was executed, and a competition now arises between his heir and executors as to the heritable or moveable nature of the residue. The wife survived, and at her death the £10,000, secured for her annuity, was kept up to the amount of £9000 for the daughters' provisions. Thus £1000 became disengaged, and I am clearly of opinion that it is moveable. The sons, on the death of the widow, took it between them as residuary legatees. This is different from the case of *Dick*, where the estate was taken up *ab intestato*, and was heritable. But here the estate is not taken up *ab intestato*, but by residuary legatees, and as a personal fund.

Lord Moncreiff.—I am clearly of the same opinion. Nothing can be clearer than that the £7400, heritably secured by the truster himself, was meant to be imputed as part of the investment for his widow's annuity, and the provisions to his daughters. The only point is as to the £1000. The trustees invested heritably £10,000, but the investment was temporary and contingent. If the widow had not survived, things would have remained as they were at the truster's death. The £7400 would have been taken in part of the investment for the provisions to the daughters, and all the rest of the testator's estate would have been moveable. Suppose the trustees had kept the £1000 heritably invested, when they came to divide the residue, they might not have split the bond, but given it wholly to one of the sons as part of his share. One of the sons died early, and before a division; but the residue was moveable. As to *Dick*, it is impossible to assimilate the two cases.

The Lord Justice-Clerk concurred.

Lord Meadowbank absent.

The Court preferred the claim of the daughters. No expenses were asked.

Lord Ordinary, Ivory.—For Executors, Rutherford, Cowan; Dalmahoy and Wood, W.S., Agents.—For Tutor, Solicitor-General (M'Neill), Dunlop; P. Bairnsfather, W.S., Agent.—T. Clerk.—[J.W.]

3d February 1842.

SECOND DIVISION.—(J. W.)

No. 115.—**DAVID KIRKLAND, Pursuer and Advocate,**
v. ADAM CRICHTON and OTHERS (Kirkland's Trustees), Defendants and Respondents.

Trustees—Bona Fides—Personal Liability—Circumstances in which gratuitous trustees were found not to be personally liable for the expense of a process of count and reckoning instituted against them, and in which they were ultimately unsuccessful.

James and David Kirkland carried on business together as tanners, from 1807 to 1814, when the contract expired, and the books, which were kept by James, were marked as correct. Without any new agreement, the copartnership continued until it was dissolved by the death of James in 1826. The defenders, his trustees, having discovered a bill for £200 due to him by David, dated March 1803, demanded payment; and in September 1831, instituted an action against him for recovering its contents. David thereupon brought a counter action of count and reckoning against the trustees, claiming a balance of £900 as due to him on the copartnership concerns. In the Inferior Court, there were no fewer than four reports by accountants given into process successively. The first brought out a balance in favour of the trustees, amounting to £400. This balance diminished in each of the two following reports; and in the fourth, the balance turned in favour of David, to the amount of £91. Decree was pronounced in the Inferior Court in terms of the last report; but David, dissatisfied with the judgment, advocated the cause to the Court of Session. On a remit by the Lord Ordinary to an accountant, he enlarged the balance in favour of David to about £500; and this being objected to by the trustees, he, by a supplementary report, still further enlarged the balance against them to the sum of £612. 14s. The bill, with twenty years' interest upon it, was found to be due by David, but the processes were not conjoined, and the accounts of the copartnership had never been adjusted, further than by the doqueting in 1814. The Lord Ordinary pronounced the following interlocutor :

"7th December 1841.—The Lord Ordinary having heard procurators, Recalls the interlocutors of the Sheriff complained of, and decerns against the representatives, the children and legatees of James Kirkland, for the sum of £612. 14s. Sterling, with interest thereof from the 11th day of November 1839 until paid: Decerns also against the respondents, the trustees of the said James Kirkland, for the said sum of £612. 14s., with the interest thereon from the said 11th of November 1839 until paid: Finds the respondents, as trustees, and personally, liable in expenses of process incurred both in the Inferior Court and in this Court: Allows an account to be lodged, and remits to the auditor to tax and report."

Kirkland's trustees reclaimed. At advising,

Lord Medwyn.—There can be no doubt that trustees may so misconduct themselves as to subject themselves personally to the expenses of a litigation which they may have carried on; and there is no occasion to quote the cases of *Morrison* and *Raeburn*. But if they be gratuitous trustees, and carry on an action for the benefit of the estate, they are not to be made personally liable for the expenses, although unsuccessful. There is nothing here unreasonable in their conduct. The copartnership was dissolved in 1826, and no claim was made by the pursuer till 1831. It is said that the books were in possession of the trustees; but they were in the hands of the pursuer in 1829, and at any time before that, he might have enforced his right of access to them. The books must have been incorrect, judg-

ing from the different results brought out in the accountants' reports; and no doubt they were kept by James; but his co-partner was as much bound as he to see that they were correct. An action was brought upon the bill, and the claim is so clear that it cannot be disputed. The trustees, therefore, had £200, with interest upon it for twenty years, to meet any expense in the count and reckoning; and were they bound to acquiescence in a claim for a sum amounting to £900. There were four reports in the Inferior Court. In three of them the balance was in favour of the trustees, and in the fourth, the balance turns in favour of David to the amount of £91. Still, deducting this from the sum due on the bill, the trustees had sufficient funds to carry on the action. David very properly advocated, as the result shows; but were the trustees entitled to stand by? The first report here was more unfavourable for them, and they stated objections to it, which were repelled. The second or supplementary report which they procured, is the only instance of their litigiousness; but, by the second, the pursuer is bettered to the amount of £100. To subject trustees personally in expenses of process, there must be *mala fides* established against them; and I see no reason for imputing it here.

Lord Moncreiff.—I am of the same opinion, and see no ground for subjecting these trustees personally in the expenses of process. The pursuer speaks of the time since James Kirkland died, and the means he had of calling the trustees to account; but why did not David call James to account during his life? *Non constat* that he could not have explained the deficiency; and the presumption is that David knew this. The trustees lost no time in advertising for claims against the estate. This showed their *bona fides*; and from no claim being then made by David, they had reason to believe that none such existed. It is only in 1831, when they claim upon the bill, that he then says he has a large claim on the copartnership, and which, moreover, he said terminated in 1814. The trustees had funds in their hands: they could know nothing of the accounts personally: they were bound to claim the bill, and David meets it by this action of count and reckoning. An impartial accountant gives in three reports, and in all of them the balance is in their favour. What could trustees do? Could they give it up after the decree of the Sheriff? Had they done so, they would have been personally liable to James's representatives. It would be a rule of extreme hardship, that trustees should be personally liable for all the expenses in clearing up accounts between those partners.

Lord Justice-Clerk.—I am of the same opinion. It is an important principle, that trustees, in entering upon litigation, ought to be sure they have funds to meet the expenses of the opposite parties; but this rule is not trenching upon by the opinions of your Lordships. Every case must depend upon its own circumstances. The interlocutor decrees for the principal sum against the estate; and the trustees, acting gratuitously, are found liable personally for the expenses, without finding those beneficially interested—the children and legatees—personally liable first. They may still be liable; but the interlocutor subjects the trustees first, who have no interest in the estate. Clyne's trustees were held liable personally, but on the ground that two of them were largely interested, and that the litigation was obstinately and pertinaciously carried on. The pursuer says in his count and reckoning, that the partnership terminated in 1814, and he claimed his balance on the ground that it had so terminated, when he knew it went on to 1826. Of all cases, this was the one in which the trustees were entitled to say that the matter ought to be cleared up, and yet so complicated did it turn out, that it required six different reports to bring the accounts to such a state as that the rights of the parties could be determined.

Lord Meadowbank absent.

The Court pronounced the following interlocutor:

"Alter the interlocutor of the Lord Ordinary complained of, in so far as it finds the respondents personally liable in the expenses of process: Find no expenses due upon the discussion raised by the reclaiming note: of new find expenses due from the trust-estate, and allow an account," &c.

Lord Ordinary, Cockburn.—*Act. Maitland, Paterson; Tait*

and Crichton, W.S., *Agents*.—*Alt. Solicitor-General (McNeill). Tait; Menzies and Menteth, W.S., Agents—F. Clerk.—[J.W.]*

3d February 1842.

FIRST DIVISION.—(H. B.)

No. 116.—**BATHIA PETER, Pursuer and Respondent, v. WILLIAM RENNIE'S REPRESENTATIVES, Defenders and Advocators.**

Master and Servant—Wages—Where services are rendered, the presumption of law, in the absence of circumstances sufficient to exclude it, is, that wages are due.

Bathia Peter brought an action before the Sheriff of Aberdeenshire, in which, on the narrative that, in the end of the year 1820, the late William Rennie, tailor in Sandyhillock of Monymusk, had applied to her to enter his service and take charge of his house; that she had accordingly done so from 1821 till his death in 1836; that she had made no specific agreement as to the amount of wages, and that, in fact, none had been paid her,—she concluded against his representatives for payment of the sum of £128, being at the rate of £8 for each year of her service; or, alternatively, for the sum of £30, Rennie's arm-chair and littlest cow, alleged to have been bequeathed by him to herself and her son. In defence, Rennie's representatives maintained, that the proper presumption, in the circumstances, was, that the board and maintenance which the pursuer and her son received in Rennie's house, were understood by the parties to be an adequate remuneration for her services; that, in point of fact, she had never properly acted as Rennie's servant, having been taken into his house, along with her child, in charity, and been allowed to go out to Monymusk and the neighbourhood to earn money for herself, by washing and other work. She had in this way acquired a considerable sum of money. The defenders had handed over to her a bank check in her name for £26, found among Rennie's papers, and also paid her other sums of lent money,—the whole amounting to no less than £56. As to the bequest said to have been left her, it appeared that some paper of a testamentary nature had been impetrated from Rennie the night before his death, but the defenders maintained that it was not of a description to enable any one to claim a legacy under it.

A proof was led, from which it appeared that Rennie, who was a man of some substance, had a croft, and kept cows. A sister lived with him, who for some time was able to undertake the chief management of his house, but she latterly became very frail, and the management, which for some time had devolved chiefly on the pursuer, devolved on her entirely on the sister's death. The Sheriff-substitute pronounced an interlocutor assailing,—issuing the following note:

"The Sheriff-substitute is aware that in certain cases it has been decided that wages are due without any special agreement to that effect, but he does not think this one of those cases. Here the pursuer, and for some time her child, lived with the late William Rennie, and, as she says, without having been promised or paid any wages; but she may have expected the old man to have left her a legacy, or other remuneration for her service; and it appears that, in an improbable writ, a legacy is actually left, and forms the second conclusion of the libel. The expectation, then, may be assumed as the cause of the pursuer's entering into, and remaining in, Rennie's house; and, if her expectation be not realised, it is held she cannot now claim wages

from Rennie's representatives. In regard to the legacy, the pursuer departs from her claim to it, under the writing referred to, and restricts it to £100 Scots; but the Sheriff-substitute is not aware of any authority for such restriction, and it is opposed to the narrative of the libel."

On appeal to the Sheriff this interlocutor was recalled, and an interlocutor pronounced finding the defenders liable to the pursuer "in the sum of £24 Sterling, with interest as libelled, being wages for the last three years during which the pursuer lived with the late William Rennie, and acted as his servant."

Rennie's representatives advocated, and *pleaded*—1. The last interlocutor of the Sheriff-depute, reversing that of his Substitute, and awarding wages to the pursuer, is erroneous, and ought to be recalled, in respect the pursuer has failed to establish that she entered, or continued in the house of the deceased William Rennie, under a contract of service for hire. 2. Because the facts proved or admitted by the pursuer are inconsistent with, and negative of her claim for wages, and more particularly, the facts that she and her child were entertained by the deceased at bed and board, and that she commenced and continued, during all the seventeen years libelled, her residence in the deceased's house, without stipulating for, demanding, or receiving wages. 3. *Separatim*, Not only is the rate of wages allowed extravagant and unreasonable, but any services rendered by the pursuer to the deceased were amply compensated by his maintenance of herself and her child, and from her present claims not having been advanced until after the deceased's death, the defenders, his representatives, ought to be assuaged with expenses.

Bathia Peter *pleaded*—1. The evidence adduced having established that the respondent acted as the servant of the deceased William Rennie, and that he was benefited by her services, the legal presumption is, that she has a good claim for a reasonable and adequate remuneration on account of these services against the advocates, who are the representatives of the said William Rennie, and *lucrati* by his succession. 2. No circumstances sufficient to overrule this legal presumption have been proved, but, on the contrary, the expression of intention on the part of the said William Rennie to leave the respondent a legacy, and the other facts in the case, tend to confirm and strengthen the legal presumption in favour of the respondent's claim for remuneration. 3. The Sheriff's judgment is well founded upon the merits, inasmuch as the respondent has a good claim for remuneration on account of services performed to the said William Rennie during the last three years of his life; and the yearly amount of wages decerned for is fair and reasonable in the circumstances of the case.

The Lord Ordinary pronounced the following interlocutor:

"16th December 1841.—The Lord Ordinary having heard the parties, and considered the process, Finds that the proof establishes, *Imo*, That the respondent served the late William Rennie as a servant during the last three years of his life: *2do*, That it establishes that no wages were paid to her for this service during this period: Finds, *3tio*, That by law an obligation to pay wages is implied in the fact of accepting of service, unless there be circumstances which exclude this implication: Finds, *4to*, That no such circumstances are established by the proof here. And *5to*, That it is proved that £24 for three years is not too high wages according to the custom of the country: Therefore, on these grounds, partly of fact and partly of law, SCOTTISH JURIST.

repels the reasons of advocacy, and remits to the Sheriff *simpliciter*: Finds the advocates liable in expenses; appoints an account thereof to be given in, and when lodged, remits the same to the auditor to tax and to report."

Rennie's representatives reclaimed. At advising,

Lord President.—This case is certainly deserving of attention, for there is a good deal of contradictory proof. On the whole, however, I think there are principles sufficient to authorise us in supporting the interlocutor of the Lord Ordinary. I own I have been much enlightened by the case read from Baron Hume's Decisions, p. 394. Though there are peculiarities in that case which make it differ in some respects from the present, the principle of it applies very strongly to the last three years of the pursuer's service. There are many cases where the Court have felt themselves under the necessity to award wages without any express stipulation. In this case, I think there is satisfactory proof that the pursuer was originally engaged as a servant, under a special covenant or contract between her and Rennie. Then the services which she was required to render were of a very important description. Rennie had a croft and kept cows, and it is proved that his sister, who lived with him, was quite unable, from the state of her health, to take the active management. The view that the pursuer was not sufficiently requited for her services by the lodging given to herself and child, is strongly fortified by the fact that the old man himself endeavoured, by means of a testamentary bequest, to give her a compensation. Though not drawn up formally, the document clearly indicates his intention, and I would have been pleased if it could have been sustained. On the whole, I am clearly of opinion there is sufficient evidence to satisfy us, that the pursuer's claim of wages for the last three years of her service ought to be sustained.

Lord Gillies.—The evidence is circumstantial, and by no means free from contradiction; but on the whole, I am inclined to concur with your Lordship. I feel confirmed in this opinion by the decision in Baron Hume. There some circumstances, perhaps, are more strong; some of them also are less strong than here. After the full statement of your Lordship, I don't trouble the Court with going over the evidence. The material point is, that the pursuer was a servant; that is, that she worked for Rennie as her muster, and was entitled to be paid. On the whole, *tota re perspecta*, I think the interlocutor ought to be sustained.

Lord Mackenzie.—I have arrived at the same conclusion, though I cannot say that the case is free from difficulty. The proof is not very satisfactory either way; but it is probable the pursuer became an inmate in Rennie's house on a general understanding that if she did service she would be fairly remunerated. No doubt she obtained lodging for herself and child, and was occasionally permitted to go out and wash for her own benefit, and for a long time it does not appear that much service was required from her, as Rennie and his sister appear to have managed in a great measure for themselves. This state of matters, however, gradually changed, and she came at last to do very much the work of an ordinary servant. Now, the only claim under consideration relates to the last three years, when her service appears to have been of this description. Both the man and his sister were old and frail, and the pursuer appears to have done all the work that was necessary. In this situation there must have been an understanding, that when she was doing the work of an ordinary servant, she was entitled to ordinary wages, under any qualification arising from circumstances. I admit that, for an ordinary servant, the sum of £8 yearly is not excessive. It is true Rennie's farm was very small; but he appears to have been a man of considerable substance. My only doubt is, whether the pursuer is to be regarded as so completely an ordinary servant as to be entitled to full ordinary wages. If she was permitted to do something for herself, there may be some ground for modification. It is not common for a servant to go away with her whole wages in her pocket; but here she is claiming the whole as clear profit, after lodging and clothing herself and child. There might, therefore, be some room for deduction; but the point is not clear, and I am not inclined to differ. On the whole, I think the claim must be sustained.

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Lord Fullerton.—I concur. I think the principle of liability has been correctly laid down by your Lordship; and as to the amount, after fixing the liability, I am not disposed to interfere with the judgment of the Sheriff.

The Court *adhered*.

Lord Ordinary, Cockburn.—*Act. Dean of Faculty* (Wood), E. Gordon; George Monro, S.S.C., *Agent*.—*Alt.* Hector; John Hunter, W.S., *Agent*.—N. Clerk.—[H.B.]

3d February 1842.

FIRST DIVISION.—(H. B.)

NO. 117.—MISSSES MARGARET AND JANE GRAY FARQUHAR, *Claimants and Advocators*, v. WILLIAM FINLAY HAMILTON, *Claimant and Respondent*.

Entail—Heirs-Portioners—Representation—Service.—*An entail having been rendered ineffectual by the succession of heirs-portioners, while the destination in favour of a series of substitutes remained unexhausted—Held that the heir in possession previous to the succession of the heirs-portioners, was subject to the fetters of the entail,—that the estate was not affectable by his debts,—and that the heirs-portioners (his sisters) had not incurred representation to him by serving to him as heirs of tailzie and provision.*

After the interlocutor of the 15th of June 1841, (*vide ante*, Vol. XIII. p. 451,) the cause returned to the Lord Ordinary, when Mr Hamilton claimed to be preferred to the whole fund *in medio*, on the ground that the Misses Farquhar represented their brother, and were liable for his debts. The estate of Gilmilnscrest had been settled in 1772 under strict entail,—the destination being to Alexander Farquhar (the entailor), and the heirs-male of his body; whom failing, to his daughter, "Jean Farquhar, and to the heirs whatsoever of her body; whom failing, to the heirs-female of my said present or any subsequent marriage, and the heirs whatsoever of their bodies; whom failing, to Dr William Farquhar, physician in New York, America, my brother-german," and a series of heirs, terminating with the heirs and assignees whomsoever of the entailor. On the entailor's death his daughter, Miss Jean Farquhar, succeeded, and made up titles under the entail. She was succeeded by her son, Colonel Gray Farquhar, who also made up titles as heir of entail, and died in 1828, leaving a son, John Gray Farquhar, and two daughters, the present claimants. John Gray Farquhar possessed under the entail till his death in 1836. As he died without issue, the succession opened to his sisters as heirs-portioners. At first, Miss Margaret Farquhar, the eldest sister, attempted to make up a title to the estate by serving as heir of tailzie to her brother; but Miss Jane Gray Farquhar having brought a reduction of this service, and the infetment following upon it, concluded to have it found and declared that she had an undoubted right "to make up titles as heir-portioner and of provision to her deceased brother in special, to her *pro indiviso* portion of the said lands and tenantry of Gilmilnscrest," &c.; and farther, that the succession "having opened up to the heirs whatsoever of the said Jean Farquhar, and under that character to the heirs-portioners of the late John Gray Farquhar, the fetters imposed to the late tailzie have now become inoperative, and the pursuer and the other heir-portioners are entitled to possess and enjoy the estate in fee-simple, free from the restrictions and limitations imposed by

the said deed of tailzie." Decree having been pronounced in terms of the libel, the Misses Farquhar were served heirs-portioners and of provision to their brother, John Gray Farquhar, as the person last infest in the lands, and have made up titles to the estate of Gilmilnscrest in fee-simple.

Mr Hamilton maintained that the Misses Farquhar, by entering into possession of the lands, and drawing the renta, had incurred a representation to their brother, and had therefore no right to compete with him as their brother's just and lawful creditor.

The Lord Ordinary pronounced the following interlocutor:

"3d July 1841.—The Lord Ordinary having heard the counsel for the parties, and considered the process—Repels the fifth plea for the Misses Farquhar, viz., that William Finlay Hamilton is barred by the letter of his deceased father, of 8th August 1836, from claiming on the estate of the late John Farquhar: Ranks and prefers the claimant, Margaret Gray Farquhar for the sum of £22. 10. 6., being the funeral expenses of the deceased John Farquhar: *Quoad ultra*, ranks her and the said William Finlay Hamilton *pari passu*; and appoints the cause to be called, in order that it may be settled how they are to proceed towards the ascertainment of the amount of their debts: Finds no expenses due to either party.

"*Note*.—The Lord Ordinary has found that Mr Hamilton is not barred by the letter of 8th August 1836: he nevertheless thinks this plea by no means free from doubt.

"Hamilton's claim for a preference is founded on the proposition, that whenever an entail is brought to an end by the succession of heirs-portioners, the estate must be considered as having been a fee-simple in the person of the immediately preceding substitute,—that the portioners take in this view as heirs of that unfettered substitute,—and that they are thus liable for his debts. The Lord Ordinary has not given effect to this plea, because, though an entail may practically terminate when the succession actually opens to heirs-portioners, he sees no principle or authority for holding that the fact of their succession operates backwards, and compels us to hold that the fetters were dissolved before they succeeded, and while the estate was possessed by the immediately previous heir.

"It may be true that when the whole line of the substitutes is exhausted, the last one having nothing but heirs whatsoever before him, is free. But heirs whatsoever and heirs-portioners are *quoad hoc* essentially different, especially where, as is the case here, the substitution extends beyond the heirs-portioners. So long as John Farquhar, the substitute, who stood just before the heirs-portioners, was alive, it could not be known whether that distribution of the estate, which is the practical result of the succession of such heirs, was to take place or not. John Farquhar might have had a son, or his sisters might have died or been reduced to one. In this situation, is it the law, that because the succession of heirs-portioners was *probable*, the heir in possession was unfettered? It is maintained for Mr Hamilton, that an heir may be fettered or unfettered *contingently*, and that John Farquhar was at least free *quoad* his sisters, because no one can enforce fetters, merely that he or she may get the estate unentailed. But contingent fettering seems to be a novelty in our law; and it is surely competent to the last substitute of the series to purgane an irritancy against any previous possessor, although the clear consequence of his enforcing the entail is, that it brings the lands to him free. It is very difficult to believe that two sisters, to whom an estate is in the course of descending, under the destination in an entail, are obliged to submit to see it sold in contravention of that entail by a prior substitute, merely because, being heirs-portioners, the tailzie must become inoperative when the succession reaches them. There is no case to warrant this. And in the case of Mure, 16th February 1837, the Court in its reasoning adopts the principle of Lord Corehouse (the Ordinary), as expressed in his note, that the estate becomes a fee-simple 'as soon as the succession opens to the heirs-female.'

"The Lord Ordinary has found no expenses due, because the parties, in point of success, have been about equal."

Mr Hamilton reclaimed on the merits, and Miss Margaret Gray Farquhar for expenses.

When the cause came to be advised, the Court, after hearing parties, ordered minutes of debate.

Pleaded by Mr Hamilton—

By our early law, a service as heir of provision to a particular estate rendered the party universally liable for the debts of his predecessor. It was afterwards thought that a title limited to a particular estate ought not to infer a general responsibility, and it was accordingly held that the representation incurred by a service as heir of provision, should be limited to the value of the succession. To this extent it never has been doubted that service as heir of provision necessarily infers representation. In this instance, John Gray Farquhar was the heir *aliouqui successoris* to the maker of the entail, and when he dies without issue, his sisters, as his heirs-portioners or heirs-at-law, were entitled to succeed to all his heritable and moveable property not otherwise destined. Having served to him in this character, it seems impossible, according to the well-known rules of law, to deny that they have rendered themselves liable for their brother's debts, at least to the extent of the value of the succession. It is true that a party, who makes up a title as heir of tailzie and provision under a strict entail, incurs no representation by a service to the heir last in possession. This is the well-known statutory exception introduced by the Act 1685, as essential to give a validity to entails. It is obvious, however, that the Misses Farquhar cannot claim the benefit of it, as they have expressly repudiated the entail, and made up their title in fee-simple. Nothing can show more strongly the effect of a service as heir of provision, in establishing a passive title, than the proviso in the Act 1685, as to the mode in which an heir of entail is directed to make up his titles in case of contravention. He is to pass over the contravener, and serve to the party last infeft who did not contravene. The Legislature saw no other way of enabling the heir to escape from liability for the contravener's debts, than by sanctioning a marked deviation from feudal principles, and allowing him to make up his title by passing over the person last infeft in the fee. It is said that John Farquhar could not contract debts which could be made to affect the estate,—that his sisters, or even any remoter substitute, could have prevented him from doing so by a declarator of irritancy; but it is clear that the only effect of such a declarator would be, not to preserve the entail, but to bring it immediately to an end, by giving the estate to the heirs-portioners in fee-simple. And it is difficult to believe that a court of law would ever give effect to a penal irritancy, of which this was to be the necessary result. It is said that John Farquhar might have left a son or a single heir-female—that there was a possibility that heirs-portioners might not have succeeded. Admitting this, it does not affect the argument in the case which has actually occurred. There is no inconsistency in holding that a party, who is prohibited from contracting debt in a certain event, may yet be entitled to contract debt which will affect the estate, if the entail should come to an end by the succession of heirs-portioners. The prohibition against contracting debt remains effectual so long only as the entail is in force. This doctrine is well illustrated by the case of *Henry v. Watt*. Even supposing John Farquhar had been a fettered proprietor during his life, the entail having come to an end at his death, the estate remained in his *hereditas jacens* as an unfettered fee, and was consequently liable to be affected by his debts; for the question is not, whether the debts, when contracted, were struck at by the entail, but whether they can be made effectual against the estate, now that the entail is at an end? The present claimant is confident that this question must be determined in the affirmative.

Pleaded by the Misses Farquhar—

The true question to be decided is, whether the property of Gilmilnscroft was a fee-simple in the person of the late John Gray Farquhar, or continued an entailed estate in him until it was vested in his sisters? It is of importance to observe, that the clause calling the Misses Farquhar as the heirs whatsoever of Jean Farquhar, occurs in the middle of the destination, and immediately before a long series of postponed substitutes,—that the fetters of the entail are complete, and directed against

all the substitutes without exception,—and that, in regard to the character in which the Misses Farquhar made up their title, it was as heirs of tailzie and provision to their brother under the destination,—the heirs whatsoever of Jean Farquhar being in fact the precise character in which both their brother and their father made up their titles. The only difference is, that in consequence of the entail's omission to exclude heirs-portioners, notwithstanding of his intention to keep up the entail throughout a long series, the succession of heirs-portioners destroyed the entail, and necessarily made the estate a fee-simple. The argument on the other side derives all its plausibility from confounding the case of heirs-portioners succeeding to an estate under a destination to heirs whatsoever, having a long series of substitutes called after them, with the case of heirs whatsoever of the last substitute called at the end of a long destination. No two cases can be more unlike. Where the last substitute of a series, to whom, and to whose heirs whatsoever, an entailed estate is destined, takes up the property, he is a fee-simple proprietor, because the clause in favour of heirs whatsoever is merely a clause of style, originally introduced to prevent the estate from falling to the Crown or superior, and used without any intention of fettering the last special substitute, or benefiting his heirs whatsoever at his expense. But if it be admitted that Gilmilnscroft was effectually entailed on Jean Farquhar and her descendants, so long as they were males, or if females not heirs-portioners, it follows necessarily that John Gray Farquhar was under the fetters of the entail; because heirs-portioners are only presumptive heirs till their immediate predecessor dies. Their succession may be disappointed at any time by the birth of an heir-male; or, when the succession opens, only one of them may be alive. It was therefore impossible, before John Farquhar's death, to know whether the succession of heirs-portioners was to take place or not. The thing, therefore, truly pleaded on the other side is, that there was a contingent fettering of John Gray Farquhar—that in one event he was to be regarded as an entailed proprietor, and in another not,—and that his real character, which it was impossible to determine in his life, was to depend on his being succeeded by one heir, or by heirs-portioners. The strangeness and novelty of such a doctrine is sufficient for its condemnation.

At advising,

Lord Mackenzie.—The question comes to this, whether the brother held the estate free, or under the fetters of the entail? If he held it free, the Lord Ordinary's interlocutor is wrong,—if not, it is right. It is said that he held it free, because the heirs next in succession to him were heirs-portioners. Now, when an entailed estate comes to the heirs whatsoever, and assignees of the granter, in the end of the destination, I understand the fetters not to affect these. But, further, I understand the fetters to be held not to be imposed in favour of them. They are viewed as thrown in merely to exclude the Crown's taking as *ultimus hæres*, or as a declaration, that after the entail is ended, the ordinary legal succession is to revive again, without fetters by, or privileges from the entail. In this way the heir of entail who is last before such heirs whatsoever, is regarded as the last heir of entail, and so is free of the fetters, because there is truly no heir of entail intended to be protected by fetters after him. But this is not a case of that kind at all. To come nearer to the present case, when an entailed estate actually comes to heirs-portioners, then, also, I understand the fetters to be at an end, because the Statute gives no warrant for the division of an estate, entailed and registered as one, into an indefinite number of small entailed estates. There is no provision for such a division, nor can we suppose it contemplated and intended by any entailer. It is inconsistent with the whole frame of an entail. How could the fetters work if an entailed estate were held in common property or divided into half-a-dozen shares, and these again divided without limit? Or how could this preserve a family, or estate, or name? I therefore admit an entail to be at an end when the estate actually comes to heirs-portioners. But I cannot see why an entail should be at an end because it has come to the heir of entail next to heirs-female, and where there is no exclusion of heirs-portioners, but where these are not the mere heirs whatsoever at the end of the des-

tionation, but have other heirs of entail substituted after them. For, 1st, the division may never take place; there may be but one female heir, or none: 2d, We cannot, in such case, say that the entail did not regard these contingent heirs-portioners as fit to be protected by the entailing fetters. We are sure of the contrary by the extension of the destination after the heirs-female, and the general application of the fetters to these after heirs. I cannot therefore hold the heir of entail next to presumptive heirs-portioners to be free. The entail may go on. It may overleap the heirs-portioners, and last for ages one and indivisible. And in any event, it goes to those that we cannot say were not ranked among the heirs, and protected by the entail, or that were to hold it merely as under ordinary legal succession. It is said to be a general rule, that whenever it appears that an heir of entail will be free of the fetters, the heir next before him is also free, because the after heir cannot pursue for irritancy, so as to hold the estate himself in fee-simple. But under that rule, all entails would be unavailing. The last heir is free, therefore the next to him is free, and so the next to him, back to the first in the destination. They would in this way all go free in succession,—just as in a child's game at cards, when one is knocked down, they all fall in their turn. But we can never adopt that rule. We may adopt the rule, that the heir immediately before the heirs whatsoever, and assignees of the grantor, is free; but we can do no more. We can never adopt the general rule pleaded.

Lord Gillies concurred with *Lord Mackenzie*.

Lord Fullerton.—This is a case of nicety and difficulty, and after hearing the opinions just delivered, I must, of course, express mine, which is different, with great hesitation. But I think that the heirs-portioners do represent their brother, which is in result the same as holding that he was the unfettered proprietor of the estate at the period of his death. There cannot be a doubt of the intention of the entailor. He made over the estate to the heirs-male of his own body; whom failing, his daughter, Jean Farquhar, and the heirs whatsoever of her body; whom failing, the heirs-female of her present or any subsequent marriage, and the heirs whatsoever of their bodies; whom failing, to Dr William Farquhar, &c.,—the line of succession being protected by all the prohibitions of a strict entail. He evidently considered that heirs-portioners were excluded. There was a special power to alter the succession, wherever the apparent and presumptive heirs were female, so as to "*settle the estate upon a younger daughter in preference to an elder daughter*." Accordingly, in the former case, depending between the eldest sister and the youngest, it was maintained that there was enough in the deed, by implication at least, to exclude heirs-portioners. But this argument was unsuccessful. It was held that heirs-portioners were not excluded; and that, consequently, the fetters had become inoperative, and the entail had come to an end. The younger daughter thus succeeded in her action, declaring that she and her sister were entitled to the estate as heirs-portioners of the late John Gray Farquhar; and titles were made up by them accordingly. The question now is, whether they represent the preceding heir, their brother; or, whether they have a right to plead the fetters of the entail against his debts. I do not think this question is solved by what the Lord Ordinary says about contingent fettering. That is no novelty. It happens in every case in which the deeds or debts of the last substitute come in question. The last substitute under an entail unquestionably holds the estate under its fetters; and it is not known until his death, whether he has the uncontrolled power of disposal or not. The true way of stating the proposition is, not that he holds the estate in fee-simple, but that, in the event of his not leaving heirs of his body, or proper heirs of entail, there is nobody in existence who can plead the fetters against him or his debts. Now, this is a thing which cannot be known till his death, just as in the present case it could not be known till the death of the late proprietor, whether he left two sisters heirs-portioners of provisions, or one a fettered heir of entail. But again, I do not mean to hold that it necessarily follows, from the circumstance of a party's not being fettered, that he cannot plead the fetters against a prior heir. I can suppose the case of fetters being laid upon one heir, for the express purpose of giving the fee-simple of the estate to another. This was the case in *Henry v. Watt*, where the destination was to

Robert Henry, and the heirs-male of his body; whom failing, to Robert Watt, and the heirs-male of his body; whom failing, to his heirs and assignees whomsoever; while the fetters were laid only on Henry, and the heirs-male of his body. There it was clear that Watt, though not subject to the fetters of the entail, might have pleaded them against Henry; because such was clearly the intention of the entailor. But I cannot think that, although under the terms of *that* destination this could be done, the same principle applies to this. I think it would require some clear expression of the entailor's intention, that a party is to be so favoured as to be able to plead fetters to which he himself is not liable. Such a case as that just mentioned is really an exception from the general rule; according to which it may be fairly held, that as the fetters are imposed in order to preserve the estate, they come to an end when that object is no longer attainable. The analogy of the case where the heirs whatsoever and assignees of the grantor succeed, is clearly in favour of the general proposition. There it is held that such heirs cannot plead the fetters against the immediately preceding heir. When the estate devolves upon them, it is said to have been held in fee-simple by the last substitute, because they—the heirs whatsoever—are not persons in whom the entail is to subsist, and in whose favour the entailor intended the fetters should operate. Now, in the present case, I cannot think the heirs-portioners stand in a different situation. It is said that they are favoured persons, because they are called as heirs of entail, and followed in the destination by various other substitutions. That would be conclusive if they took in that character—if they took as heirs of entail; i. e., as parties through whom the estate would go, under the fetters, to the next heirs in the destination, according to the terms of the deed. But they take in a totally different character: they take in consequence of the legal inefficacy of the entail, for the purpose of the entailor, and under a character clearly not favoured, or even contemplated by the entailor, viz., as *heirs-portioners* entirely free from the fetters. If they had taken as fettered heirs—as the channel of transmitting the estate in the succeeding line of descent,—the only character in which they are called,—there could have been no doubt that they were not bound by the deeds of their predecessor. But they do not take under that character; and I therefore doubt whether they can be held out as being favoured parties entitled to plead the fetters. They stand in the same situation as heirs whatsoever and assignees, in the general case. The circumstance of there being substitutes of entail called after them, so far from being favourable to them, is against them. It shows that the entail was not intended to come to an end in their persons; and that event was a contingency not contemplated by the entailor. It is undeniable, that by the terms of the entail, the fetters are imposed on these ladies as the heirs whatsoever of Jean Farquhar, as expressly as on the other substitutes;—just as, in the ordinary case, the fetters bear to be imposed on the heirs-general called in the last clause of the destination. But in the present case, as in the latter, these parties plead, and have established, that the fetters cannot affect them; because, by the operation of law, the entail has come to an end in their person; and that being fixed, I do not see why, in the one case more than in the other, parties who, on that ground, have got rid of the fetters, should be entitled to urge them against the debts or deeds of their predecessor.

Lord President.—After having heard *Lord Fullerton*, I cannot say that I do not feel difficulty in this case; but I am, nevertheless, still inclined to concur with the majority of the Court. I have hardly any thing to add to what *Lord Mackenzie* said. There is a manifest distinction between this case and that of the heir immediately before the destination to the entailor's heirs and assignees. Here the clause under which the heirs-portioners succeed, is followed by several special branches. And if there had been a single daughter instead of two, she would have made up her title as heir of entail. It was impossible to predict that this would not be the case. One of the daughters might have died. It has been found that the entail is not effectual against the heirs-portioners. Still they took under the destination of the entail; and the question is, whether they are liable for the debts of the last heir? For the reasons stated by *Lord Mackenzie*, I think they are not.

The Court adhered.

Mr Hamilton's Authorities.—Ersk. B. III. t. 8, § 32, 50, 51, 69 and 82. 1 Bell's Com., p. 658-9. *Henry v. Watt*, 13th June 1832. Ersk. B. III. t. 8, § 70, 92.

Misses Farquhar's Authorities.—Craig de Feudis, Lib. II. Dieg. 17, § 11 and 12; Lib. I. D. 10, § 6; Lib. II. D. 14, § 2, 3. M'Kenzie, B. III. t. 10. *Dirleton v. de Limitation*. Stair, B. II. t. 3, § 43; B. IV. t. 18, § 8. Ersk. B. IV. t. 18, § 1; B. III. t. 8, § 32. *Earl of March v. Kennedy*, M. 15,412. *Leslie*, 15th December 1710, M. 15,358. *Henry v. Watt*, 13th June 1832. *Mure v. Mure*, 16th February 1837. *Mowat*, 6th February 1823.

Lord Ordinary, Cockburn.—For Misses Farquhar, Solicitor-General (M'Neill), Christison; E. and A. M'Millan, W.S., Agents.—For Mr Hamilton, Dean of Faculty (Wood), Mackenzie; John Bowie, W.S., Agent.—N. Clerk.—[H.B.]

4th February 1842.

FIRST DIVISION.—(H.B.)

No. 118.—ANDREW WAND and CURATORS, *Pursuers and Respondents*, v. CHARLES STEWART and JAMES GIBB, *Defenders and Advocators*.

Landlord and Tenant—Sequestration—Pro indiviso Proprietors—*Circumstances in which sequestration of the whole crop and stocking on certain lands, at the instance of a proprietor, pro indiviso, of two-thirds, with the concurrence of a party holding right by decree of maills and duties to the rent of the other third, held not incompetent.*

Alexander M'Call let to Charles Stewart, for nineteen years from Martinmas 1818, at a yearly rent of £66, all and whole the fourth part or quarter of the lands of Westertown of Pitgobar. During the currency of the lease the property of the lands was transferred from M'Call to Andrew Wand (a minor) to the extent of two-thirds, while, by decree of maills and duties, the right to the rents of the other third was acquired by Mrs Agnes Sawers or Howden. The original tenant having died, was succeeded in the lease by his son, Charles Stewart, against whom Wand, with the consent of his curators, presented a petition to the Sheriff of Perthshire, in which, on the narrative that the rent of the lands let amounted to £66, under an annual deduction of £16 for the want of fences (which deduction for 1836 and 1837 Mrs Agnes Sawers or Howden had, with her husband's consent, agreed should be retained by the tenant out of her third of the rent), and under deduction also of 10s. annually, from 1829 to 1836, for ground resumed for plantation, leaving rent to the amount of £40 past due for crop 1836, and to the amount of £43. 10s. about to become due for crop 1837, he, with consent of the said Agnes Sawers, and under deduction of such public burdens as the tenant should prove to have paid by producing vouchers, craved the Sheriff to decern against him

“for the sum of £40 aforesaid, being for the rent of crop 1836, which fell due as aforesaid; and also for the sum of £43. 10s. Sterling, being for the rent of crop 1837, to become due as aforesaid, with the interest that may be due on these sums at payment, and full expenses; and in the meantime, in security of the said sum of rent due for crop 1836, and of the said sum of rent to become due for crop 1837, to grant warrant for inventorying and sequestrating the whole crop, stocking, bestial, implements of husbandry, household furniture, goods, gear, and other effects on said possession, for the rents they are respectively liable for; and, on an inventory being reported, to grant warrant for selling as much of the sequestrated effects as will satisfy and pay the sum already due and incurred, together with

the expense of sequestration and roup, and all other procedure to follow hereon.”

Among other preliminary defences, Stewart, founding on the case of *Ritchie*, 17th December 1830, pleaded specially, that “the application is incompetent, as the conclusion for decree for payment of rent cannot be entertained in a summary form, and the other conclusions are merely subsidiary, and made dependent upon the first one for decree.”

The Sheriff-substitute, by interlocutor 11th September 1837, repelled “the objection to the form of the action,” adding in a note:

“The practice in this Court of concluding for ordinary decree for arrears, and for deficiency after application of the hypothecated effects, is not usual in other inferior courts, and is very much opposed to the train of recent decisions in the Supreme Court; nevertheless, it has the advantage of saving a multiplicity of actions.”

The Sheriff, on appeal, having affirmed this interlocutor, Stewart pleaded on the merits, that there was “a *pluris petitio* to a considerable amount,” more especially as the petitioners, by their own confession, had right only to two-thirds of the rent, and were not entitled, under an alleged agreement to which he was no party, to throw the burden of the deduction to which he was entitled, on a party having right to only one-third of the rents: Ersk. B. II. t. 6, § 56. *Paxton v. Hunter*, Mor. 16,121. *Wingate*, 17th February 1809, F. C. *Brown*, 23d February 1826. Stewart had previously consigned the rent of 1836, under reservation of his claims for abatement, and obtained a recal of the sequestration—the petitioners not opposing it; and he now lodged a bond of caution by James Gibb for the current rent (1837), as the amount might be ascertained. In respect of this consignation and caution, the petitioners lodged a minute departing “from the demand made in the petition for a personal decerniture” against the defender.

Thereafter the Sheriff-substitute, before closing the record, appointed parties “to lodge minutes on the state of the action in point of form,” and issued the following note:

“The action was one of sequestration, and for decree for rents. The sequestration has been recalled, and the conclusion for payment has been passed from, and nothing, therefore, remains for decision but the expenses. The bond is not one conditional to pay what might be fixed in this process, but one absolutely to pay the fixed rent of a certain year. The other year's rent is nowise secured. In these circumstances, there appears no *termini habiles* for a decision. The parties are permitted the opportunity of being heard before closing the record, that it may be amended, if necessary. A supplementary ordinary action for payment of the rents might be the best mode of extricating the case, to which the cautioner might be made a party, but the terms of the bond appear to have precluded any discussion as to the rent of the year 1837.”

The petitioners and Mrs Howden adopted the suggestion of the note, and, after repeating the statements contained in the original petition, and narrating the procedure which had taken place under it, stated, that they had “deemed it necessary to bring the present supplementary action against the said Charles Stewart, and also against the said James Gibb as his cautioner.” They accordingly concluded against Stewart for payment to Wand of £6. 3. 4. as balance of rent due for crop 1836,—against Stewart, and Gibb as his cautioner, for payment also to Wand of £43. 10s., under certain

deductions, as rent of crop 1837,—and farther, against Stewart for payment to Mrs Howden of £3. 19. 2., as the balance of her third of the rent of 1836, and of £6 as her balance of the rent of 1837, under certain deductions.

In defence to this action Stewart and Gibb *pleaded*—1. This action, being brought as supplementary of a previous one, which, in so far as regards its merits, has been sopited or abandoned, and brought to an end, it is an incompetent and irregular proceeding, and will fall at once to be dismissed as incompetent, with costs. 2. This action is, in various important and substantive particulars, totally dissimilar to the previous one; and upon this ground also it is incompetent, and will fall to be dismissed, with expenses. 3. Even if the action could be taken up and regarded as a separate one, it is incompetent and irregular, in so far as the instance of the pursuers, Mrs Howden and her husband, are concerned, seeing they already hold a decree of the Supreme Court for what is here concluded for in their name. 4. In so far as the action is directed against the defender, Mr Gibb, upon his bond of caution, the action is incompetent and irregular, seeing the bond was judicial, and merely an accessory of the previous process, and any decree that might be pronounced in that process could not be competently made the ground of a separate action; and the conclusions of the previous action having been passed from and abandoned, the bond has fallen. 5. The pursuer, Mr Wand, cannot competently maintain any new action for recovery of the rents sought to be recovered under the previous process, until the previous action have been dismissed with full expenses, and until he have paid the whole expenses of that previous process. 6. *Quoad* the rent of crop and year 1836, the pursuer, Mr Wand, has been more than paid his just proportion of that rent, and he had no ground whatever for making it the subject either of a supplementary or a separate suit. 7. In reference to the whole subject-matter of the present suit, the action is groundless, because unnecessary and uncalled for; seeing that, whilst the defender, Mr Stewart, was always ready to pay the balance of rent for crop and year 1836, due to Mrs Howden and her husband, payment never was demanded at their instance, and that payment of the moiety of the rent for crop and year 1837, due at Candlemas last, was offered to be paid on the pursuers' granting proper receipts for their respective proportions, and that long before this action was raised. *Lastly*, In the shape and situation in which matters are now placed, and stand between the parties, the defender, Mr Stewart, is entitled to retain the rent in his hands, especially that proportion of it in which the pursuer, Mr Wand, is in the right, until his claim for the expenses of this and the previous process be determined, and his claim for abatement on account of ground taken off and planted be adjusted, and that in security of these claims.

The Sheriff-substitute pronounced the following interlocutor:

"25th July 1838.—Having advised this process, Repels the objections urged against the same being conjoined with the original action of sequestration, and conjoins the actions accordingly: Allows parties to make such additions to their revised papers, and to meet the additions of each other, so that the record may be thereon closed in these conjoined actions, reserving

always the effect of the defenders' objections, as bearing on the title to sue, and otherwise, on the merits."

"HUGH BARCLAY."

"*Note*.—There is no disputing but what the case has got much involved. But there does not appear any well-founded objection against the mode adopted by the pursuers. In all the cases founded on by the defenders, it will be observed that the original action was inept, and of course incapable of being supplemented. Here there is no question as to the competency of the sequestration, whatever objection lay against the personal conclusion. By recal of the sequestration, the action by no means fell. It was only the act or execution of the sequestration that was recalled on caution. The action itself remained unaffected. As well might it be argued that recal of arrestments used on the dependence, occasions the action on which the precept issued to perish. The cautioner stood (or at least was meant to stand) in room of the subjects placed under sequestration. Had the pursuers chosen to argue the point, the Substitute thinks now that he would have been brought to see the competency of prosecuting in the action, to the effect of ascertaining the rents, and thereby warranting execution on the bond (if judicial) to the extent of the sums found due under the sequestration. But as no decree could have been given against the tenant himself, there is no advantage in bringing this new suit; and, besides, the cautioner has now an opportunity of seeing that no greater burden is laid on him than what he can, under his bond, be justly subjected in. Several of the preliminary objections appear directed against the former action rather than the present, and so may be too late. But the objections to the title are reserved,—28th November 1826, Cargill; 29th January 1829, Scott; 25th February 1829, M'Dougall; A. Murray v. Wallace, in this Court; *Act. Moncreiff—Alt. Gardiner and Spottiswood*."

This interlocutor was affirmed, on appeal, by the Sheriff, who added the following note:

"It is no doubt true, that, when a summons is radically inept, its conclusions cannot be aided by a supplementary one; and this, for the plain reason, that there is no competent process in Court to which it can be made supplementary. But this is not the case here. The sequestration was unquestionably a competent process; and, although the respondent, by lodging a bond of caution, gave rise to some embarrassment as to the power of the Court to extricate the rights of parties in that process, the Sheriff is of opinion that the process was not put an end to by the proceedings that took place in it. It was just a case in which a supplementary action was warranted and advisable. The other points of the case also have been properly disposed of. There has, surely, been much unnecessary litigation where the sum substantially in dispute between the parties is so very trifling."

After a variety of procedure in the conjoined actions the Sheriff-substitute pronounced the following interlocutor:

"18th March 1840.—Having advised this process, Finds that the defender does not now insist in these actions for any further allowance, in respect of ground taken for planting, than the sum credited by the pursuers, which sum appears farther to have been agreed on and allowed in previous settlements between the parties: Finds, in reference specially to the defence founded on the irregularity of the sequestration, now mainly pled for the defender, that the contract of lease was made between the defender and one party proprietor, and the rent made payable was not the subject of division: Finds that subsequently the rent suffered a division in the persons of the creditors: Finds, in reference to the annual deduction awarded to the tenant, that it was immaterial to him from what party he obtained relief of the same, provided he got such relief: Finds that the defender was informed extrajudicially, and in front of the action, that he was to obtain the benefit of his awarded deduction in the manner agreed on between the creditors: Finds that he has shown no interest to object to such arrangement—no damage that he can thereby sustain—and no third party has appeared to challenge the same: Finds nothing in the correspondence of parties and their agents to render the institution of these actions improper and unnecessary, or to prevent the pursuers recovering their expenses occasioned thereon by reason of the pleas and

defences repelled: On the merits, appoints the cause to be enrolled, that parties may state what order they crave in reference to the rents consigned, or what decree the pursuers farther crave under their summons: Finds the pursuers entitled to their expenses, but subject to modification, in respect of the mode in which the actions have been conducted, which has resulted in a mass of litigation on a matter of small importance: Appoints an account thereof to be lodged and taxed, and decerns."

Again, on the 1st April 1840, he pronounced the following interlocutor:

"Having resumed consideration of the process, with the reclaiming petition of the defender, reserves entire all claim competent to the defender in reference to the ground taken for planting; sustains the sequestration, as, under the circumstances, not incompetent; refuses the prayer of said petition; adheres to the judgment reclaimed against, and decerns."

"*Note.*—The rent was payable in one sum, and to one party. Subsequently a change took place in the proprietorship. One party got right under an absolute title to two-thirds of the rent, and another party got a right in security, or rather as an heritable creditor, to the remaining third. The tenant remained equally bound for the whole. A deduction was awarded him from the gross rent. This deduction the heritable creditor agreed to take wholly on himself, so as to give the absolute proprietor his right to the full two-thirds of the rent. In a question between the creditors of these parties, or even between the creditors of the tenant and the landlord, there might be some room for a question of competition of diligence and right of preference. The Sheriff-substitute, however, cannot perceive where is the title or the interest of the tenant to thrust himself into the matter, and to insist that the deduction shall, like the rent, be shared in equal proportions."

This interlocutor was affirmed by the Sheriff, who added in a note:

"There has been in this case a very wanton abuse of litigation. The defenders had no legitimate interest to interfere in the matter as they have done; and, as they were not only the originators of the discussion, but also the leading movers in it after it commenced, they have been properly found liable in expenses."

Ultimately the Sheriff-substitute pronounced the following interlocutor:

"25th September 1840.—Approves of the state of accounts as amended under directions of the Court: Allows the pursuers to uplift from the sum consigned the sum of £47. 12. 9., with the interest which has arisen thereon: Allows the defender to uplift the residue: Finds the expenses of the pursuers, as taxed, amount to £60. 9. 11½., which modifies to £50; and for that sum, and the expense of extract, decerns against the defender."

The defenders advocated; and a note of additional pleas in law having been lodged by the pursuers, these, with the record of the Inferior-court, were held to be the record.

The pursuers' additional pleas are as follows:—1. The petition for sequestration and sale was well founded, in respect that the advocator, Stewart, was owing and liable for the rents therein set forth; and that, in such circumstances, a landlord is legally entitled to have his tenant's effects sequestrated and eventually sold, in security and payment of the rent. 2. The ordinary action also was well founded, in respect that the advocator, Stewart, in virtue of his lease, and his cautioner in virtue of his bond of caution, were respectively owing the sums claimed from them. 3. The advocator was not entitled to other or larger deductions than were allowed to him in these actions, in respect, (1.) That the £16 which was claimable by Stewart under the decret-arbitral was deducted from another part of the rent which was payable by him, but not included in

either of these actions: (2.) That the claim for the small piece of planted ground was illiquid, but, notwithstanding, deduction was given for a sum which not only was the full value, but was the value agreed on by the parties; and, (3.) That deduction was claimable by Stewart for public burdens, only on his producing vouchers, and deduction thereof was always offered and given to him, on his complying with that condition. 4. The advocator, Stewart, having, in the process of sequestration, consigned part of the rent in dispute, and found caution for the remainder, it was competent in that process to have pronounced decree for the sums consigned in the bond; although, *ob majorem cautelam*, and to save the discussion of the advocators' objection to the competency, the summons, which was instituted for rents, included those for which these sums were owing.

The Lord Ordinary pronounced the following interlocutor:

"14th December 1841.—The Lord Ordinary having heard parties, and considered the process, repels the reasons of advocacy, and remits to the Sheriff *simpliciter*, and decerns: Finds the advocators liable in expenses; allows an account thereof to be given in, and remits the same to the auditor to tax and to report."

"*Note.*—The Lord Ordinary is clear that the justice of the case is entirely with the respondents; and he agrees with the Sheriffs, depute and substitute, that the advocator has been straining points of form very groundlessly, and apparently for no object except litigation."

"The Lord Ordinary must say, however, that he is not to be understood as approving of the practice of the Sheriff-court of Perthshire, mentioned in the Sheriff's note of the 11th of September 1837. If the case had turned on an adherence to that practice, the preceding interlocutor would not have been pronounced."

The advocators reclaimed. At advising,

Lord President.—I am decidedly of opinion that there has been here a great deal of unnecessary litigation; and I am also free to say, that the practice of the Sheriff-court of Perth, of introducing a personal conclusion for payment of rent in the summary petition for sequestration, could not have been sanctioned. That question, if raised *tempestive* and insisted in, would have been fatal to the petition. It is said that the practice is most expedient; but however expedient it may be thought to be, it has received no countenance from the recent Act of Sederunt. The defender, however, instead of insisting on this preliminary objection, has pleaded the merits, and it is by these that the case must now be decided. Now, in the *first* place, I cannot think there is any foundation for the plea, that the two proprietors had no right to make the arrangement by which the deduction to be given to the tenant was thrown entirely on one of them. The petition was not presented in the name of Wand alone, but with the consent and concurrence of Mrs Howden; i. e., it was presented by the proprietors of two-thirds, with the concurrence of the party in right of the rents of the other third. Wand, from the nature of the holding, was not entitled to sequestration in his own name, but the deficiency of title was cured by the concurrence of the other party. Then I am satisfied that there was nothing irregular in the arrangement as to the deduction, and that the tenant had no interest to object to it. But then it is objected, that the original petition and supplementary action were conjoined after there had been a complete recal of the sequestration. The recal was merely to the effect of liberating the thing sequestrated; and the interlocutor of the Sheriff accordingly, after recalling the sequestration, "requires the parties, within seven days, to state, in terms of the Act of Sederunt, whether they hold their pleadings as containing their full and final statements of fact." It is clear from this interlocutor that the Sheriff understood that the recal had done nothing more than remove the *nerus* which the sequestration had laid on. The process

did not go out of Court. The defenders are obliged to admit that it remained in Court to the effect, at least, of obtaining a decision on the expenses; but I think it remained to the effect of determining, on the merits, the whole sums that were due. On this point I don't see any difficulty. The Sheriff then suggests a supplementary action, but afterwards alters his mind, and thinks the original action would have been sufficient. The second opinion appears to me the more correct one. The pursuers might have gone on without entering into a new and expensive litigation. Their having done so, though at the suggestion of the Sheriff, may affect the question of expenses; but as to the merits, I cannot see any objection to the competency of the supplementary action and its conjunction with the original petition. The length of the process is truly monstrous, and the Sheriff complains—as he well might—of the flood of litigation. The justice of the case, however, is clearly with the pursuers, who only obtained decree for the sums fairly due under the lease. The only question is, whether the pursuers ought not to be made answerable for parts of the litigation as having been unnecessary? On this ground the expenses have been modified; and, on the whole, I am inclined to adhere to the Lord Ordinary's interlocutor.

Lord Gillies.—I am not able to adopt the view of the case now explained by your Lordship, though, as opposed both to your Lordship and the Sheriff, I must give my opinion with great diffidence. At the very outset of the process an objection was taken to the regularity of the petition in concluding for payment of rent, but the Sheriff pronounced an interlocutor repelling this objection and the other preliminary defences. Perhaps it was competent for the defender to have advocated at this stage; but for not having done so, is he to be subjected to the penalty of not being entitled to obtain redress afterwards? This seems harsh, and I cannot assent to it. But this is not the only point as to which I have doubts. It appears that the lands under lease belonged to two *pro indiviso* proprietors—one having right to two-thirds, and the other to one-third. A process is brought by one of them, with the concurrence of the other. It is necessary then to attend to the nature of this process. What is the prayer? It is for sequestration in security of rent for crop 1836 and 1837; and the thing sought to be sequestrated manifestly included the whole goods and gear of the tenant, subject to the right of hypothec. Now, I would here stop *in limine*. What right had Wand thus to ask sequestration of the whole? The objection was fatal: he was not proprietor of the whole. What right had Howden to ask for sequestration? She had no feudal right, and could not, by her concurrence, give a right to Wand which was not in herself. I cannot get over this preliminary difficulty. There was here a sequestration of property, of which the party sequestrating was not proprietor. Is this agreeable to the law of Scotland? It is a new doctrine to me, that sequestration is competent to any one but the proprietor. Then, what follows on this irregular sequestration? I don't go over the whole procedure, but it appears that sequestration was awarded, and afterwards, on the 15th November 1837, was recalled. Then a bond of caution for the rents is lodged. And what takes place? The pursuers gave in a minute, stating, that they depart from the personal conclusion against the tenant; and then the Sheriff says that nothing now "remains for decision but the expenses." It is true he afterwards says that "a supplementary ordinary action for payment of the rents might be the best mode of extricating the case." I cannot explain the meaning of this. To me it appears absolutely unintelligible. The petition mentioned the rents only of 1836 and 1837. No other years were litigated or referred to. When, therefore, the sequestration had been recalled, and the conclusion passed from, the Sheriff was certainly right in saying there were "*no termini habiles* for a decision"—no ground for further litigation or dispute. The expenses remained to be decided; but *quoad* the merits they were passed from. On these grounds, I think the supplementary action was unnecessary. Your Lordship also thinks so, and I don't see how we can give decree in favour of the pursuer for unnecessary litigation. This, however, only affects the question of expenses. On the merits, I am unable to get over the objection to the competency of the sequestration.

Lord Mackenzie.—There has been a monstrous amount of litigation for nothing. In this we must all agree, whether the practice of the Sheriff-court of Perth be right or wrong. As to the merits, I am inclined to concur in opinion with your Lordship. It is said the petition was objectionable, and, notwithstanding of the practice, I think it was objectionable; but the objection applied only to the personal conclusion. In so far as it prayed for sequestration, the petition was not incompetent. Admitting the irregularity of the personal conclusion, there was nothing to prevent the Sheriff, without dismissing the petition altogether, from limiting it to an ordinary sequestration. When the Sheriff says that "the conclusion for payment had been passed from," his meaning must have been that the personal decerniture had been passed from. To give his words their literal meaning would be, to hold that the petitioners had abandoned their claim to the money altogether, and of course, were never to obtain payment of it by any form of application. This could never be the meaning; and if the words used bear this meaning, it must obviously be from mistake. But then, if the mistake was of any consequence, the defenders, who objected to further procedure, might have advocated. They did not do so; and it is said that, notwithstanding, the objection may still be pleaded. Perhaps it may be true that advocacy is not necessary in all cases, when a point is wished to be kept open. But here a supplementary action was brought, to which the defenders pleaded, and the litigation went on. If by this supplementary action the original flaw was mended, it would be too much for the defenders to say, that an advocacy having at length been brought, all the previous procedure must be overturned, and the original objections to the form of the action discussed over again. On this point I can't differ from the opinion expressed by your Lordship. Then, as to the objection that the petition prayed for the sequestration of the whole effects on the lands, while the petitioner was proprietor only of a part, I don't think it well founded. There had been no division of the property. It was held *pro indiviso* as a joint interest,—the lands and moveables forming only one estate. Each *pro indiviso* proprietor had thus a right to sequestrate the whole moveables, though only to the extent of the rent due to himself. Now the objection here is, that certain deductions were due to the tenant from the whole rent, and that one proprietor prayed for sequestration of the whole rent due to him, without reference to the deduction, on the ground that he had obtained the concurrence of the other proprietor, to throw the whole burden of the deduction on that proprietor's share. I can't see anything to prevent the two proprietors from making this arrangement. If they chose to lay their heads together, and the one who had the worse remedy says, "I will extinguish the claims for deduction out of the share of rent due to me, and the rest will be divided between us according to our respective rights," what title or interest had the tenant to object to such an arrangement? That is my view, and I therefore cannot see that the tenant's objection ought to be sustained. But then, it is said that the action was brought to an end in consequence of the sequestration having been recalled, and the conclusion for payment having been passed from. Now, I must confess that this statement by the Sheriff is altogether beyond my comprehension. If the action was at an end, it is plain that not one farthing of the consigned money could ever be obtained. It was consigned in that process, and if got up at all, must have been by an order in that process. If any right remained to issue such an order, the action was not ended. The same thing may be said as to the bond of caution. It was not for an absolute sum, but for a sum to be afterwards ascertained. Of course it was competent to dispute the amount of the sum, but how could this be done in an action that was ended? I don't think it was possible to put an end to the action, or prevent the pursuers from going on as they did. Having gone on, they got a judgment which I think correct, and I therefore can't see that we would be warranted in overturning the interlocutor of the Lord Ordinary.

Lord Fullerton.—The case is so perplexed and complicated that it is not easy to come to any satisfactory decision upon it. I am inclined to adopt the view of Lord Gillies, and I do not regret that the Court will thus be divided, as it will give us a further opportunity of considering the points of law involved in the case. The action was brought in the form of a summary

petition, praying, 1st, for a personal decerniture, and 2d, for sequestration. The tenant consigns in process the amount of rent due, and in consequence, applies for the recal of the sequestration. The Sheriff accordingly pronounces an interlocutor recalling it. Here he did not say the action was at an end, for the other conclusions of the petition were sustained as competent. Of course the action goes on, but afterwards a bond of caution is lodged, and the petitioners, in consequence, give in a minute, in which they "depart from the demand made in the petition for a personal decerniture against the said defender." Now, after this, I don't know what remained to be discussed. I think the Sheriff was right in saying that nothing remained for decision but the expenses, though I also think he was unfortunate in suggesting a supplementary ordinary action. To this action there is an objection to which I am unable to see an answer. If all was out of Court but the expenses, what could be the use of a supplementary action, when there was nothing to supplement? But then it is said, that because the litigation went on, the defenders are not now entitled to plead this objection in the advocacy. I am not prepared to adopt this view. Though the fact that the defenders allowed the litigation to go on, may be a good ground for affecting the expenses, I don't think it has subjected them to the penalty of not being permitted now to plead the objection. Then, as to the other point, which I regard as of importance in principle, viz., whether, in the case of two proprietors, the whole of the deductions claimable by the tenant from the *cumulo* rent could, by arrangement without the tenant's concurrence, be thrown upon one of them? and whether the other could sequestrate for the whole rent? It appears to me a difficult question. It was found by arbitration, that the true rent was just the nominal rent of £66, subject to a deduction of £16—in other words, £50. Now, when there is a divided right of property—one holding two-thirds and the other one-third, each was entitled only to draw the proportion of rent effecting to his share, minus the deduction. Now, the amount due to each being thus fixed, was Mr Wand, by agreement with the other proprietor, entitled to sequestrate for his whole share without deduction? I have great doubts of this. What was the effect of the arrangement? It was just to operate as an assignation by Mrs Howden of part of her rent in favour of Wand. This is the true view of the matter. But I don't see any thing like an assignation. I see only a private arrangement; and besides, even if there had been an assignation, the assignee must have taken it under the qualifications of the cedent. If the cedent could not sequestrate for the whole without deduction, neither could the assignee. On the whole, the case is attended with so many difficulties, I am glad that our difference of opinion will give us an opportunity of reconsidering it.

The Court being equally divided, the case was allowed to lie over; and being again advised,

Lord Gillies.—I don't mean to give any other opinion, but to explain. This property is held *pro indiviso*, to the extent of two-thirds by one proprietor, and of one-third by another. In these circumstances, this action is brought by only one of them. It is said to have been brought with the consent of the other, but it is a consent of a particular description, and at most, amounts to nothing more than a *non repugnantia*. The only pursuer is Wand, and he concludes—for what? For sequestration of the whole crop, &c., on the lands, including both his own two-thirds, and the other one-third. To me this seems altogether inept. What is the process of sequestration? It is merely the legal mode of rendering the landlord's hypothec effectual; and, of course, is competent only to the landlord, who has the hypothec. In short, the hypothec is the measure of the sequestration. Here, however, the proprietor of two-thirds sequestrates for the whole. It is said there was a difficulty of sequestrating otherwise, as the lands were held *pro indiviso*. I can't see this difficulty. What was there to prevent the proprietor of two-thirds from sequestrating to the extent of two-thirds? Attend to the consequences of his being allowed to sequestrate for more. If the Sheriff had granted warrant of sale, could he have sold more than was covered by his own hypothec? I think there have been great faults on both sides;

and that neither party is entitled to the whole expenses; but I cannot see the competency of this sequestration.

Lord President.—I admit that great weight is due to the observations of Lord Gillies. Where there are two proprietors, one having right, say to one-half, and the other to the other half, it is clear that one is not entitled to sequestrate for the whole. But then, I take a different view from his Lordship as to the nature and extent of the concurrence, which I think amounted to much more than a limited consent, or mere *non repugnantia*. I am aware that a party having only a decree of mails and duties, is not like a proprietor; but he has a substantial interest sufficient to make his consent and concurrence available. I am clear, with Lord Gillies, that neither party is entitled to the whole expenses. They must, at all events, be very greatly modified. Indeed the question is, whether any expenses ought to be given at all.

Lord Mackenzie.—This is a most absurd case altogether. It has given rise to a most expensive litigation, involving nice points of law, some of which never occurred to me till this moment. A new *crux juris* has been suggested by counsel. It is pleaded, that where property is held jointly, none of the proprietors can sequestrate for his own share without the consent of the others. I am rather inclined to adopt a different view, and think that a joint proprietor is entitled to sequestrate for his own share, though perhaps the proper course would be for all the proprietors to sequestrate for their joint hypothec. In the present case, though there is a difficulty in admitting that the one proprietor could sequestrate for the whole, I am still inclined to think the answer sufficient, that the objection was removed by the concurrence of the other; and that as the sum was due, the tenant had no interest entitling him to object to the arrangement of his landlord.

Lord Fullerton.—I believe there never was a more senseless litigation. No interest of importance was involved. The original dispute appears to have arisen in consequence of the tenant insisting that his receipts should contain a general reservation of his claims. Then, in consequence of this dispute, comes a process of sequestration. That process is objected to as incompetent—first, as craving a personal decerniture against the tenant; and, secondly, as craving sequestration for a greater amount than the share of the party sequestrating. I am inclined to admit that the consent of the party having right to one-third, was sufficient to authorise the proprietor of two-thirds to crave sequestration of the whole. Still this did not remove the other objection, that as the true rent was only £50, the proprietor of two-thirds was not entitled to sequestrate for two-thirds of £60. The point, however, was of little practical importance. The sequestration was for crop 1836 and crop 1837. The rent of 1836 was consigned, and a bond of caution granted for the rent of 1837. Then the defender obtains a recal of the sequestration, and the pursuer passes from the personal decerniture. The question then was, how to get at the rent of 1837. There was no doubt a bond of caution, but it was blundered, as it contained no reference to the sequestration. To remedy the blunder a supplementary action is brought. I have changed my opinion, that the whole process of sequestration had been brought to an end. I think it still remained to certain effects, and that, when the ordinary action was brought—not by Wand himself, with Mrs Howden's concurrence, but also by Mrs Howden herself for her own interest—it was perfectly good, as, on Howden's part, there was not only concurrence, but instance. This action, whether or not properly called supplementary, goes on, and the pursuers are allowed to uplift the money. The only question now is, if the Sheriff's interlocutor ought to be supported? On the merits I think it ought, but I have great difficulty as to the expenses. There was great irregularity in the original proceedings. The sequestration appears to have been applied for without any reasonable purpose, and, at last, the very point which gave rise to it was decided in favour of the advocates. I cannot think the modification allowed by the Sheriff is sufficient.

The Court adhered, except as to the expenses, which they found due to neither party.

Lord Ordinary Cockburn, for Jeffrey.—For Advocators,

Solicitor-General (M'Neill), Maitland; Wotherspoon and Mack, W.S., *Agents*.—*For Respondents*, Rutherford, Marshall; John Gibson, W.S., *Agent*.—*B. Clerk*.—[H.B.]

8th February 1842.

FIRST DIVISION.—(H. B.)

No. 119.—JOHN CHAPLIN and MANDATORY, *Pursuers*, v. WILLIAM ALLAN, *Defender*.

Process.—Proof.—Parole.—Bond of Presentation.—*Held incompetent to prove by parole, or remit to trial by jury, an alleged promise by a party to present a debtor on a certain day or pay the debt.*

A bill for £275, dated 18th July 1839, accepted to Robert Hume of Berners Street, London, by Richard Lechmere of Steeple Aston, Oxford, was protested for non-payment. Immediately thereafter, Mr Hume, on behalf of himself and John Chaplin of Great Marlborough Street, to whom he had indorsed the bill, transmitted it, with the protest, to Mr Thomas Baillie, S.S.C., with instructions to sue Lechmere, the acceptor, for payment forthwith,—informing him that he was to be one of the knights in the tournament at Eglinton Castle on the following week, and that there was no time to be lost; that he had two fine horses with him—the one a grey, the other a bay; but that if he had not the cash, a bill of one or two months might be taken. Mr Baillie, after registering the instrument of protest, went to Eglinton Castle, and on making inquiry for Mr Lechmere, was informed that his two horses were then in Lord Eglinton's stables, but that Mr Lechmere himself had apartments at the Eglinton Arms inn, Irvine. Mr Baillie, on going to the inn, did not find Mr Lechmere, and left the following letter for him:

"I beg to acquaint you that your bill to Mr Robert Hume, Berners Street, London, for £275, now past due on the 21st instant, has been transmitted to me (at my house, 4, Baxter's Place, Edinburgh), for the purpose of obtaining payment. Being here, and unwilling to adopt any unpleasant measures without previously seeing you, I called to-day at Eglinton Castle for that purpose, but was unable to obtain any proper information, which renders necessary, in the meantime, the precautionary steps now adopting. I have no desire, however, to adopt any ultimate proceedings if they can be avoided, and therefore I have now addressed you to say, that if you wish to see me, I will be found at the Eglinton Arms at six o'clock this afternoon, or half-past nine to-morrow morning; and when we meet I hope we will be able to arrange the business without incurring any further trouble or expense."

In the afternoon of the same day, Mr Baillie saw Mr Lechmere, who told him it would not be in his power to pay the bill for eight days, but that he expected remittances by the 6th September, when he would be in Edinburgh and punctually settle the bill. Mr Baillie explained, that his instructions did not allow him to grant any indulgence in point of time, without a guarantee from some responsible person, and that without this he would be under the necessity of arresting Mr Lechmere's two horses, and also the armour, dresses and accoutrements. Mr Lechmere stated, that the only gentleman then in Irvine with whom he was acquainted was Mr Allan, president of the Royal Scottish Academy of Painting, and that he thought Mr Allan would have no objection to stand good for his appearance in Edinburgh. On coming to this understanding, the parties went to Mr Allan's apartments, which were in an adjoining house, but not finding

him, an appointment was made to meet at the inn next morning at half-past nine o'clock. Mr Baillie's statement was, that on going to the inn according to appointment, he found Mr Allan and Mr Lechmere waiting for him. Mr Lechmere introduced Mr Baillie to Mr Allan, and stated that he had shown Mr Allan Mr Baillie's letter to him, and had explained how he was situated, and that Mr Allan had kindly acceded to his request to guarantee his appearance at Edinburgh. Mr Baillie further stated, that Mr Allan assented to Mr Lechmere's statement, and that Mr Baillie thereupon said, that for the sake of accuracy, and preventing any mistake, it would be proper for Mr Allan to give a written memorandum of the understanding come to, but when Mr Baillie was about to read the draught which he had prepared for that purpose, Mr Allan drew himself up, saying, that writing was quite unnecessary; that he trusted his word was as good as his bond. Mr Baillie then said, it would be sufficient for him that Mr Allan distinctly understood the precise terms of the guarantee, which was, that Mr Lechmere would attend at Mr Baillie's chambers that day week, namely, Friday the 6th day of September next, at twelve o'clock noon, to settle the debt mentioned in Mr Baillie's letter to him the preceding day. Mr Allan upon this stated, that all mistakes would be sufficiently prevented by Mr Baillie giving him a note of his address in Edinburgh, and the time agreed upon for Mr Lechmere's attendance. Mr Baillie accordingly took a card from his card-case, and having written in pencil under his printed name on the card, "4, Baxter's Place, Edinburgh, Friday, 6th September, 12 o'clock," handed the card to Mr Allan, who, after reading it, put it in his pocket. On the day fixed for Mr Lechmere's attendance, Mr Allan made his appearance punctually at twelve o'clock; but one o'clock having arrived without the appearance of Lechmere, Mr Baillie drew up a short minute of the facts, and having read it over to Mr Allan, and two witnesses who were present, was handing it to the witnesses to sign, when Mr Allan snatched the paper and tore it in pieces, and, taking up his hat, left the house.

Mr Chaplin, the indorsee on the bill, and Mr Baillie as his mandatory, brought the present action, in which, after narrating the above statement, and stating that in consequence of relying on Mr Allan's verbal promise to produce Mr Lechmere, Mr Baillie had been induced to stop proceedings when the schedules of arrestment were in the hands of the messenger to be executed,—he concluded against Mr Allan for payment of the amount of the bill with interest, on the pursuer granting him, for his relief, an assignation to the bill, and the diligence which had been used upon it.

In defence, Mr Allan denied that he ever undertook any conditional obligation to pay Lechmere's debt if he failed to present himself at Mr Baillie's office on the day mentioned; that it was not explained to him; and that he had no idea that Mr Baillie had refrained from doing diligence against Lechmere's effects in consequence of what passed on the occasion referred to. He therefore *pleaded*—1. An obligation of the description alleged to have been undertaken by the defender, could in law be constituted only by a perfect writing, or by an informal writing fortified by *rei interventus*; and no writing being libelled on, there is no competent

or relevant ground of action. 2. The pursuer's averments can in any event be admitted to probation by the writ or oath of the defender only. 3. The defender having neither made any promise, nor undertaken any obligation of the nature and description libelled on, and the pursuer's averments being unfounded in point of fact, there is no claim competent against the defender.

Lord Moncreiff, before whom the cause came to depend, in appointing the cause to be enrolled with a view to close the record, issued the following note:

"The Lord Ordinary, attending to the suggestion of counsel when avizandum was made, has considered this record very particularly. The only observation he has to make on the form of it, is, that the defender has not met the demand in article 10 of the condescendence, for production of the card referred to in that and the 8th article, though in the 4th article of his own statement he admits that he received it.

"It would not be proper that, in the present state of the cause, the Lord Ordinary should intimate any opinion on the merits of it, even in point of relevancy. It is a very singular case; and if there be any truth in the pursuer's averment, it is too plain that both he, and especially his agent, Mr Baillie, have been very unjustly treated, and some part of the case certainly admits of proof, by the messenger's execution of the charge and other documents. But the case of the defender may be difficult. He evidently means to maintain that it is not competent to prove the averment as to his personal undertaking, however articulately set forth, by parole evidence. It is an important question, on which the Lord Ordinary can at present give no opinion. He will only observe, that there are exceptions to the general rule, that cautionary obligations cannot be proved by parole. This case may not fall under any of these exceptions. But the reasoning and ground of decision in the case of *Campbell v. McLachlan*, 4th June 1752, as reported by Kilkerran and Elchies, may deserve consideration, as also the observation of the late Lord Meadowbank in the case of *Bell*, 13th November 1812. The cases of *Watt*, 10th December 1828 and *Hunter*, February 1824, which went to a jury trial and was decided on a special verdict, may also be considered, and the case of *McEwan*, 13th July 1816, on the other side, may be attended to.

"The Lord Ordinary must own, that though it may be so found, it will only be on very clear conviction of the state of the law that he can withhold this case from a fair investigation of the facts of it, however it may be in the end decided."

On the removal of Lord Moncreiff to the Inner-House, the cause came to depend before Lord Ivory, who, after ordering mutual cases, and advising them, made avizandum with the cause to the Court. His Lordship at the same time explained his views in the following note:

"The Lord Ordinary, after giving much anxious attention to this case, has been induced to take it to report—1. Because of the great importance of the question; and 2. Because, feeling strongly that the case is wholly with the pursuer in an equitable point of view, and concurring therefore as he does in all the disinclination originally expressed by Lord Moncreiff, to withhold this case from a fair investigation of the facts of it before a jury, he is afraid that, were he himself to decide, his present leaning, as regards the law of the question, might compel him to exclude parole evidence as incompetent, and so, however unwillingly, to pronounce in favour of the defender. He cannot help thinking, with Lord Moncreiff, that 'if there be any truth in the pursuer's averment, it is too plain that both he, and especially his agent, Mr Baillie, have been very unjustly treated;' and altogether he holds the case to be one eminently deserving the consideration of the Court.

"If the Lord Ordinary had felt at liberty to deal with 'the card,' referred to in article 8 of the pursuer's condescendence, and admitted (minute, No. 20 of process), to have been received by the defender, and received, too, specially with a view to fix the time and place at which he and Mr Lechmere were to wait

upon the pursuer's agent, as a sufficient written memorandum of the entire agreement alleged to have taken place between the parties, he should certainly have been disposed (notwithstanding the imperfect note of Bill's case in the report of *Dunmore Coal Company*, 1st February 1811, to hold that there was enough of *rei intervenus* averred by the pursuer to exclude *locus penitentie* on the defender's part. For, as the Lord Ordinary understands *Bill's* case, there was nothing there beyond 'the mere allegation of intention' to use arrestment, without any overt act of the creditors to show that such intent had been in the actual course of execution. Whereas here there was already *parata executio*. The diligence was in the messenger's hands, and the messenger on the spot. And the very thing that the parties had in view, and which was the express subject of the alleged agreement between them, was the abstaining from further execution of the arrestment, not merely as a threatened, but as an already inchoated diligence.

"The Lord Ordinary's ground of hesitation lies deeper. For, 1st, If writing was essential as a basis of evidence to make out the defender's obligation, he scarcely thinks that the card in question (unsatisfactory as the defender's account of it otherwise unquestionably is) can be received as sufficiently embodying the essentialia of such an obligation, even after making every allowance for it as an informal writing: And, 2d, The case comes thus to be narrowed to the simple question, whether writing was necessary at all? Now, in so far as the writing founded on was essentially defective, its defects could not competently be supplied by parole evidence—*McLean*, 1st July 1834. And, in the total absence of writing (or what comes to be the same thing, where, from defects in *essentialibus*, the writing cannot be regarded), the Lord Ordinary—in face of the express authority of *Tassie*, 24th July 1764 (*Monboddoo*, 5 Br. Supp., 899), and the less direct, though still important inferential bearing of *Dunmore Coal Company* (*supra*)—*McNeill*, 7th June 1814 (*Baron Hume*, 103), and other cases—would not feel himself warranted to decide that a cautionary obligation like that in the present question (which was to all intents equivalent both in its character and objects to a bond of presentation) falls within any of those exceptions that have from time to time been made from the general rule, that 'cautionary obligations, correctly speaking, can be proved only by writing duly executed, according to the requisites of the Statutes, or recognised as a privileged writ.'—(*Bell's Principles*, § 248, and see also § 249, where the various exceptions from the above rule appear to be correctly enumerated.)"

At advising,

Lord Gillies.—This is a very singular case. It appears that Mr Lechmere was indebted to Mr Hume, in London, in a sum of £275. Hume sends down the bill to an agent in Scotland, and informs him of circumstances which would enable him to secure, by arrestment, what would be equivalent to payment. Steps were accordingly taken by Mr Baillie, the agent, who acted in the matter with great propriety and becoming delicacy. He finds the information which he received true, and that Lechmere, the debtor, has horses and accoutrements of a value greater than the debt. In these circumstances he writes to Mr Lechmere the letter quoted in the appendix, and than which nothing could be more proper; not having seen him, he proceeds to make out a schedule of arrestment, and execution of charge, with the view of carrying his instructions into effect. In these circumstances, Lechmere brings forward the defender, Mr Allan, who undertakes that Lechmere shall appear in Edinburgh, in Mr Baillie's office, on a day named, viz., 6th September. The day came, and Allan came, but not Lechmere. In these circumstances the present action is brought against Allan; and the defence is, that no such promise had been made at all, or if there was, it amounted only to a verbal obligation, whereas, in order to be effectual, it must have been constituted by writing. I cannot receive this defence. When a party, by a sort of promise, makes another believe that he has come under a proper obligation, and so induces that other to abstain from using means by which he would have secured payment, he makes himself liable;—he makes the promise for the purpose of inducing the other to delay; and, in fact, does induce him. Here is both an obligation and a *rei intervenus*. On this point, the

two cases mentioned by Mr Bell in his Illustrations are instructive, and also the opinion of the late Lord Meadowbank, as quoted in the papers. His Lordship's observation appears to apply exactly to the present case. The promise may be proved or not, but it is evident that Allan acted so as to prevent Baillie from proceeding with his *parata executio*. The question here is, has Mr Allan acted so as to make himself liable for the debt? As to the form of the action, some doubts have been stated; but if it be true that he prevented execution from proceeding, and if it be true, that but for his having so prevented it, the debt would have been recovered, then I think there is a good claim against him in equity and at common law. I don't, however, deny that the case is attended with considerable difficulty.

Lord Mackenzie.—The case is no doubt one of difficulty. The case has been before two Lords Ordinary, Moncreiff and Ivory, and their Lordships are inclined to take opposite views. I am afraid we must also have a difference of opinion here, for I am unable to concur in the opinion which has been delivered by Lord Gillies. The view in which the case presents itself to me is this:—There was room here for a bond of presentation being given. Now the common way in which that is done is by a formal deed, of which the ordinary style is well known. Accordingly, the agent here proposes that such a bond should be granted, but the other party objects, and the agent, not from want of knowledge, but induced by strong gentlemanly feeling,—stronger it would seem from the event than there was any occasion for,—instead of the regular bond of presentation, accepts of an oral bond, accompanied, it is said, with a card, which however proves nothing, for it bore no date. Then the arrestment was given up, and when the day of presentation came, the debtor failed to appear. I hope some contingency occurred to prevent him; but be that as it may, he did not appear, and Mr Allan is now sued on his oral bond of presentation. The defence is, that the obligation was cautionary, and not being in writing could not be enforced. It is said, however, that there was a *rei interventus*. I cannot say that there was such an *interventus* as could support an oral obligation of this kind. No doubt *rei interventus* may support an improbative writing; but I am not sure that witnesses, by attesting that a party had, by an oral obligation, as in the present instance, effected a delay of execution, could make that obligation effectual. It would be dangerous to go that length, for it would be impossible to know where to stop. In fact, all cautionary obligations, though unaccompanied by writing, might be rendered effectual in the same way. I rather incline, therefore, to the view of Lord Ivory, that the present action cannot be sustained, though I am sorry to do so; for there can be no doubt that Mr Baillie has been very ill used.

Lord Fullerton.—The case is attended with considerable difficulty, but on looking at the form of the action, I am inclined to concur in the opinion just delivered. The action is founded on an obligation said to be constituted by an oral bond of presentation, and to which it is sought to give the effect of a bond of presentation in common form. Whatever effect the obligation might have in another view, I don't think that there is here enough to go before a jury. A bond of presentation is a document of a very peculiar kind. It not only contains an obligation that the debtor shall appear on a certain day, but expressly stipulates, that if he does not, the granter of the bond shall pay or perform his obligation. I don't see it distinctly averred in the record, that there was an obligation by Allan to pay, if Lechmere did not appear. The point does not seem to have been brought under his notice. The question then is, if, under the present summons, the pursuer is entitled to a proof, on the allegation of a bond of presentation constituted without writing, and unaccompanied with an obligation to pay if the debtor failed to appear. I think this would be extremely hazardous, and I know of no authority for it. I give no opinion on the other view, that the obligation, such as it was, induced Mr Baillie to act upon it, and that there was thus a *rei interventus*. I think it very likely that great loss and damage has been sustained by having been so induced; and whether this may afford good ground for an action of damages, I don't know. That point is not properly here; for the only question is, whether an oral bond of presentation is fit to go before a jury, with the additional proviso that it does not appear the granter of the bond undertook

to pay, if the debtor failed to appear. I agree with Lord Mackenzie, that it is not fit to go before a jury; but as to the other question of damages, I give no opinion.

Lord President.—I feel all the difficulty of this case, and its importance as involving a nice point of law; and I confess I would not have been unwilling to take a little more time to consider it. From the time when I saw that the point turned on the validity of an oral bond of presentation, I had great doubts of the competency of the action; and though I have felt the force of the observations of Lord Gillies, I must confess that my doubts are not removed. The state of the case is just this:—A party with *parata executio*, in consequence of a transaction by which another party undertakes to present the debtor on a certain day, desists from following out his diligence, thinking himself safe with the verbal obligation which he had received. He is now seeking to give full effect to this obligation, as if it were equivalent to a regular bond of presentation. The question then is, can there be a valid bond of presentation which is not written? or can we allow a proof at large, by means of which this oral bond is to be made as effectual as if it had been constituted by writing? This would be hazardous indeed. The observations of Lord Mackenzie appear to be of great force. We must beware of breaking in upon the rules of law as to the necessity of writing. It is easy to foresee the abuses which would arise from admitting oral proof of cautionary obligations. We are here tied down, as Lord Fullerton has observed, by the particular form of the action. I don't anticipate the result of an action of damages regularly brought; but as the action now stands, I am not able, with all respect for the opinion of Lord Gillies, to get over the difficulties which seem to me to make it impossible to sustain it.

The Court pronounced the following interlocutor:

"Find it is not competent to prove the alleged promise by parole evidence, or to remit the case to trial by jury; assolzie the defenders from the conclusions of the libel, but find no expenses due, and decern."

Pursuers' Authorities.—Clackmannan v. Nisbet, 6th February 1624; Brown's Sup., and Bell's Illustrations, Vol. I. p. 2. Hunter v. Carson, 17th February 1824. Bell, 13th February 1812. Lord Meadowbank's Observations, F. C. Porteous v. M'Beath, 9th June 1812; Hume's Decisions, p. 98.

Defender's Authorities.—Bankton, B. I. t. 23. § 35. Erskine, B. III. t. 3, § 61. Bell's Principles, § 277. Erskine, B. IV. t. 2, § 20. Bankton, B. I. t. 11, § 3. More's Stair, Vol. I. p. 144. Bell's Principles, § 248 and 249. Edmonstone v. Lang, 22d June 1786; Mor. 17,057. Hailes, p. 995. Brown v. Campbell, 28th November 1794, and Sinclair v. Sinclair, 3d November 1795; Bell's Fol. Cases. M'Ewan v. Crawford, 13th February 1816; F. C. Porteous v. M'Beath, 9th June 1812; Hume's Dec., p. 98. Tassey v. M'Lintoch, 24th July 1764; Brown's Sup., Vol. V. p. 899. M'Neill v. Black; Hume's Dec., p. 103. M'Gowan v. Nelson, 27th November 1829. Campbell v. Munro, 15th November 1815; Hume's Dec., p. 106.

Lords Ordinary, Moncreiff and Ivory.—Act. Solicitor-General (M'Neill), Pattison; Thomas Baillie, S.S.C., Agent.—Alt. Robertson, Cook; Nairne and Bertram, W.S., Agents.—[H.B.]

9th February 1842.

SECOND DIVISION.—(J.W.)

No. 120.—ALEXANDER AINSLIE, Pursuer, v. The TRUSTEES for the CREDITORS of the CITY of EDINBURGH, and OTHERS, Defendants.

Superior and Vassal—Burgh—Retention—Relief.—In a feu-charter granted by the magistrates of a royal burgh, the subjects were to be held free of all public burdens. The affairs of the burgh having been put under trust in terms of a Statute, by which the magistrates were authorised and required to compound for all and every debt due, and obligation contracted by them, by granting bonds of annuity at the rate of £3 Sterling for every hundred pounds of such debts—Held, 1. That the

vassal was entitled to retain all feu-duties and casualties, whether payable on account of the property in question, or on account of any other property held in feu of the magistrates, until he shall be relieved of all the taxes within the obligation of exemption, which he may have been compelled to pay since the constitution of the statutory trust: 2. That for the whole sums on account of taxes or other burdens as aforesaid, which the vassal may have paid before the constitution of the trust, the magistrates are bound to deliver an annuity-bond corresponding to the amount, in terms of the Statute: 3. That the vassal is not bound to accept of annuity-bonds, at the rate and in the terms of the Statute, for the sums paid, as above expressed, since the constitution of the trust; but that, as to such sums, the magistrates, as superiors, are bound in full exemption and relief to the vassal, both for what he has paid and for what may be exigible from him in all time coming.

Continuation of case, 19th November 1839, Vol. XII. p. 179.

This cause having gone back to the Lord Ordinary, under a remit from the Lords of the Second Division to hear parties on the extent of the claim of retention pleaded by the pursuer, the interlocutor now under review was pronounced by his Lordship:

"20th May 1840.—The Lord Ordinary having resumed consideration of the record and proceedings in this cause, with the interlocutor, and remit by the Court, and having further heard parties' procurators in terms thereof, and made avizandum, Finds of new, that the pursuer is entitled to retain all feu-duties and casualties, whether payable on account of the property in question, or on account of any other property held in feu of the Magistrates of Edinburgh, which became payable to the original defenders, the statutory trustees, or which are now payable, or may become payable to the Magistrates of Edinburgh, as now reinstated in their own rights, or vested in the rights, and subject to the obligations of the statutory trustees, until he shall be relieved of all the taxes found, by the Lord Ordinary's former interlocutor of the 28th November 1837, to be within the obligation of exemption and relief libelled on, which he personally, or any tenants to whom he may be bound in relief thereof by the warrantice of their leases, may have been compelled to pay since the constitution of the statutory trust, or may hereafter be required or compelled to pay: And in respect of the findings in the said interlocutor, and of the interlocutor of the Second Division of the Court of the 19th November 1839, and of the finding above expressed, Finds and declares that the Lord Provost, Magistrates, and Town-council of the city of Edinburgh, as representing the said city and the community thereof, are bound to exempt or relieve the pursuer and his successors in the subjects libelled from all town's burdens, burgh and county cess, stents, taxations, and all other public burdens of whatever kind, now imposed, or hereafter to be imposed upon the subjects libelled, or upon the proprietors and occupiers thereof *qua* such, subject to the qualification as to tenants above expressed, and in particular, from the special impositions libelled, with the exception of the improvement tax, without prejudice to any question arising from the peculiar nature of any new tax which may be hereafter imposed: And further, Finds and declares that the pursuer is legally entitled to retain the whole feu-duties or other casualties exigible from him on account of the subjects libelled, as well as all other feu-duties or casualties exigible from him for any other subjects held by him of the city of Edinburgh, and that in payment and security not only of the whole taxes and burdens already paid by him, excepting as aforesaid, but of all taxes and burdens which may be hereafter paid by him on account of the said subjects: And further, Finds and declares that the said Lord Provost, Magistrates, and Town-council, and all others coming in the room and place of the city trustees, appointed by the Statute libelled, are bound to rank the pursuer, as creditor of the said city, for the whole sums paid by the pursuer before the constitution of the trust in the persons of the said city trustees (on account of taxes or other burdens as aforesaid), and of the interest of the said sums from the respective dates of payment thereof; and also, in so far as such ranking may be necessary to give him full relief for the

sums paid, as above expressed, since the constitution of the trust, and that they are further bound to deliver to the pursuer an annuity-bond corresponding to the amount of the said sums, and interest at the rate and in the terms specified in the Statute of 1st and 2d Victoria, cap. 55: Decerns and declares accordingly: Finds additional expenses due, and remits the account, when lodged, to the auditor to be taxed.

"*Note.*—The Lord Ordinary again heard the parties very fully on the question remitted by the Court. It does not very clearly appear, from the terms of the remit, what was the particular point regarding the extent of the right of retention on which the Court thought that there should be farther bearing. But the case was argued by the defenders, to the full effect of maintaining that the pursuer has no right of retention at all of the available feu-duties of other property, in relief either of the taxes already paid, or of those which may become exigible. The Lord Ordinary cannot accede to a proposition which would be the same thing in effect as to declare, that by the execution of the statutory trust, and the subsequent reinstatement of the Magistrates, the rights of the pursuer, by his charter, have been substantially extinguished, or changed into a very limited and undefinable claim of ranking.

"It is impossible that the situation of the pursuer can have been rendered *worse*, or that the present defenders can have required any stronger right against him by the force of the Statute 1st and 2d Victoria, c. 55. The defenders founded very particularly on some of the clauses of that Act, particularly the 61st, as vesting a real right, equivalent to infeftment, in favour of the creditors. But every idea of any change being thereby effected to the prejudice of the pursuer, is excluded by the express terms of the 80th section of that Statute, bearing, 'that nothing herein contained shall affect any action or suit *now existing or depending* in any Court, relative to any estate, writ, property, or effects, heritable or moveable, real or personal, mentioned in this Act, or in the schedules hereunto annexed, either belonging to, or claimed by any other person or party; but such actions and suits shall be, and the same are hereby fully saved and reserved to all persons and parties, to the effect of establishing such rights and interests as if this Act had not been passed.' As this action was not only in Court, but actually heard and decided by the Lord Ordinary before the last Statute was passed, it is impossible that the rights of the pursuer can be in any manner impaired by the particular provisions of that Act. It is possible, certainly, that the state of the question as to the extent of the right of retention, may be in some measure simplified by the fact, that the statutory trust is now at an end, the Statute being repealed by the 40th section of the new Act, and that the Magistrates are now reinstated in all their rights, subject only to the provisions in favour of the general creditors.

"The Lord Ordinary will not enter into the subtleties of the argument, which he has now fully considered for the second time. The last discussion was somewhat clearer than the former, being freed from the other points in the case. But although he is sensible that difficulties may be raised by abstract reasonings, he is still of opinion that the pursuer's right of retention was, upon very simple principles, good against the trustees, and must still be good against the Magistrates.

"The Magistrates were, and are superiors of the subject in question, and also of the other subjects for which feu-duties are payable. The obligation in the feu-charter has been found binding, and the nature of it has been defined. It gives a negative security by relief, not depending upon any act of the Magistrates. Apart, therefore, from any question about the trust, the right to retain the feu-duties of other property is clear, upon the most ordinary principles of the law of retention, and does not at all depend on any question of real right. What would be the situation of a proper singular successor in any of these other feus, it is not necessary to inquire. But the obligation and the claim of relief are, by their nature, *continuous*; the claim of relief emerging upon the payment of taxes in each successive year, while the feu-duties are also payable to the superior for each year. In this situation, the whole property of the Magistrates was transferred into the management of the statutory trustees. They were not put in the situation of a trustee in a sequestration; and they neither got nor could have acquired any feudal title in any particular sub-

ject. They could sell the property, and then the *Magistrates* were required to execute dispositions. But though the distribution among creditors claiming was to be by the rules of sequestration, the trustees were in a very different situation from a trustee holding as singular successor or adjudger. *Quoad* third parties having rights in feudal subjects, or connected with them, the trustees came into the place of the *Magistrates*. Taking the whole property together, they stood for the time *superiors* in their place. Among the feudal subjects they took this particular property to which the obligation of relief is attached, and both they and the present defenders have admitted, that in so taking it they became subject to the personal obligation for relief of taxes. Now, so far as a debt may have been contracted under that obligation before the constitution of the trust, the pursuer has only been found entitled to a ranking. But after the trust was constituted, when, on the one hand, an obligation of relief emerged against the trustees, and on the other, an obligation for feu-duties emerged in their favour as superiors against the pursuer, how can it be that he should not be entitled to satisfy the one obligation by retaining the feu-duties due under the other? The defenders put cases of singular successors or adjudgers obtaining a title in one property for which feu-duties are due, and then say that the vassal could not retain those feu-duties for satisfaction of a personal claim of relief arising upon another subject. This is all very intelligible where the adjudger or singular successor gets a special title in the one subject, and is not liable to the personal obligation in the other. But how that can apply to the case of a party who, while he holds the active right in the one, only taken as a part of a *universitas*, is liable to the personal obligation in the other, it is not easy to understand. To make any thing of the case, there must have been a special title taken in the other subjects, and this feu must have been entirely rejected, in so far as such a thing might have been competent. But here it is admitted that the personal obligation of relief was binding on the trustees, and is now binding on the defenders. And how, then, can it be held that the pursuer shall be obliged to pay the feu-duties on the one hand, without getting implement of the obligation of relief on the other, both emerging between the same parties in the same years? The Lord Ordinary cannot see any legal ground for the plea.

"The statutory condition of the defenders, though it enables them to raise a puzzle in the question, does not really improve their argument. The first Statute stands repealed. The second was passed pending this litigation. A certain part of the estate is made subject to a security for the creditors, and is made adjudgeable for the annuities. This could not hurt the pursuer. But the *Magistrates* are still the proprietors of all, subject to the securities. The creditors are not here at all,—neither has any part of the estate been adjudged. The *Magistrates* pay the annuities from the general produce of their estate and funds, and then they appropriate all the rest of the produce to themselves. And what they now maintain is, that the important obligation of relief in the pursuer's charter shall be substantially extinguished in all time coming, or reduced to a mere claim of ranking, as a consequence of the proceedings under the trust now at an end, while yet he shall continue liable in all future years for full payment of the feu-duties of all the other subjects. The Lord Ordinary cannot think that there is either law or equity to warrant such a conclusion."

Both parties reclaimed; and on the 4th December 1840, the Court, before answer, appointed cases to be prepared and boxed on the points arising out of the interlocutor.

Pleaded by the pursuer—1. That he is entitled to retain the whole feu-duties and other casualties exigible from him by the *Magistrates*, on account of all the subjects held by the pursuer from the town, in payment and security of taxes and burdens already paid, or which may yet be levied from the pursuer on account of the said subjects. 2. That the pursuer is entitled to be ranked upon the city funds, and to receive an annuity-bond for the whole sums due to him on ac-

count of taxes and burdens paid for the period anterior to the trust. 3. As the *Magistrates* have taken up the whole superiorities of the subjects held by the pursuer from the town, they must now implement the obligation of relief contained in the charter to the Prince's Street subjects, by satisfying that claim of relief in full, in so far as concerns taxes or burdens paid by, or exigible on account of said subjects, since the constitution of the original trust—the pursuer not being bound to submit to a ranking, or to take an annuity-bond for that part of his claim.

Pleaded by the defenders—1. That the pursuer, before applying his right of retention at all, must submit to have his whole debt diminished twenty-five per cent., by acceptance of an annuity-bond, being only entitled to pay or secure himself through his right of retention, so far as that security may afford the means of satisfying his diminished claim; and, 2. That he must farther accept of an annuity-bond for any balance which may remain due to him of his reduced debt, unpaid through his right of retention, and that without reference to whether the balance arises on account of years prior or subsequent to the constitution of the original trust.

At advising,

Lord Justice-Clerk.—There are two matters involved in this case, which must be kept quite distinct—the right of retention and the right of relief. The interlocutor, dated 28th November 1837, gave complete relief to Mr Ainslie of all taxes, whether exigible before or since the constitution of the trust; and to this interlocutor the Court adhered, 19th November 1839, excepting as to the point of retention. The argument seems to have gone beyond the remit. The first interlocutor fixed that the *Magistrates* must give full and complete relief to Mr Ainslie, and therefore excludes any question as to the sums for which annuity-bonds must be granted. These must be framed so as to meet the claim for full relief. The interlocutor of 1837 did not give a right of retention for taxes paid before the constitution of the trust; and the second interlocutor does not go beyond this, and there is no complaint; but the first gave complete relief of all taxes, whether paid before or after the constitution of the trust. This interlocutor is now final; and it appears to me that any argument upon that head is beyond the remit to the Lord Ordinary. This is a question between a superior and vassal; and creditors taking up a right of superiority must implement all the obligations contained in the feu-contract.

Lord Medwyn.—I was not prepared for this view of the first interlocutor. I never thought the pursuer was to rank so as to get full payment of what was due prior to the constitution of the trust. For any taxes which he had paid before the trust, he must have ranked as an ordinary creditor, and got an annuity-bond. Free relief is a term of doubtful meaning in bankruptcy. When a creditor gets 5s. or 10s. of composition, it is said he gets full relief. The argument maintained by the defenders is, that the pursuer must claim as a contingent creditor; but they undertook to relieve the vassal of all taxes: clearly this was not one of the debts to be ranked in terms of the Statutes. The debts appointed to be compounded were sums of money borrowed; but this is an obligation attaching to the *Magistrates* as superiors; and if they had sold their right of superiority, it must have been under this burden. If the feu-duty payable had been equal to the taxes the vassal had a right to be relieved of, can it be doubted that he was entitled to retain it on the bankruptcy of the superior? Although the obligation was contracted prior to, and was existing at the time of the bankruptcy, it was an inherent condition of the contract, and was annual and continuous. There is no warrant to commute any other than ordinary debts. The *Magistrates* are again reinvested in both properties, and there can be no doubt of the vassal's right to retain the feu-duties.

Lord Moncreiff.—If it were not for what seemed to be understood at the last advising, I would have been much impressed with what your Lordship said as to again entering upon the question of relief. Nothing was remitted but the point of retention; but if the whole cause is to be gone over again, I remain of the same opinion as before. A claim for taxes which had been paid by the vassal emerged both before and after the constitution of the trust; and for the first of these, the interlocutor finds he is only entitled to a ranking: it could not mean more, or why say ranking at all? But, for taxes emerging during the subsistence of the trust, the vassal is entitled to full payment. The trustees having taken up the feus as superiors, must give complete relief for taxes emerging during the subsistence of the trust.

Lord Meadowbank absent.

The Court pronounced the following interlocutor:

“Recal the said interlocutor, and of new find that the pursuer is entitled to retain all feu-duties and casualties, whether payable on account of the property in question, or on account of any other property held in feu of the Magistrates of Edinburgh, which became payable to the original defenders, the statutory trustees, or which are now payable, or may become payable, to the Magistrates of Edinburgh as now reinstated in their own rights, or vested in the rights, and subject to the obligations of the said statutory trustees, until he shall be relieved of all the taxes found, by the Lord Ordinary's interlocutor of the 28th of November 1837, to be within the obligation of exemption and relief libelled on, which he personally, or any tenants to whom he may be bound in relief thereof by the warrandices of their leases, may have been compelled to pay since the constitution of the statutory trust, or may hereafter be required or compelled to pay: And in respect of the findings in the said interlocutor, and of the interlocutor of this Division of the Court of the 19th of November 1839, and of the finding above expressed, find and declare that the Lord Provost, Magistrates and Town-council of the city of Edinburgh, as representing the said city and community thereof, are bound in all time coming to exempt and relieve the pursuer, and his successors in the subjects libelled, from all town's burdens, burgh and county cess, stents, taxations, and all other public burdens of whatever kind, now imposed, or hereafter to be imposed upon the subjects libelled, or upon the proprietors and occupiers *qua* such, subject to the qualification as to tenants above expressed; and, in particular, from the special impositions libelled, with the exception of the improvement tax; without prejudice to any question arising from the peculiar nature of any new tax which may be hereafter imposed: Find and declare that the pursuer is legally entitled to retain the whole feu-duties or other casualties exigible from him, or on account of the subjects libelled, as well as all other feu-duties or casualties exigible from him for any other subjects held by him of the city of Edinburgh, and that in payment and security not only of the whole taxes and burdens already paid by him, excepting as aforesaid, but of all taxes and burdens which may be hereafter paid by him on account of the said subjects: And further, find and declare that the said Lord Provost, Magistrates and Town-council, and all others coming in the place and room of the city trustees appointed by the Statute libelled, are bound to rank the pursuer, as creditor of the said city, for the whole sums due and payable before the constitution of the trust in the persona of the said city trustees (on account of taxes or other burdens as aforesaid), which the pursuer may have paid, and of the interest of the said sums from the respective dates of payment thereof; and that they are further bound to deliver to the pursuer an annuity-bond corresponding to the amount of the said sums and interest, at the rate and in the terms specified in the Statute 1 and 2 Victoria, cap. 55: Find that the pursuer is not bound to accept of annuity-bonds at the rate and in the terms specified in the aforesaid Statute, for the sums paid, as above expressed, since the constitution of the trust, or for the interest thereon: Find that, as to such sums, the principles of ranking as a creditor are not applicable; and that the said defenders, as superiors, are bound, as above expressed, in full exemption and relief to the pursuer, and his successors in the subjects libelled on, of all

burdens and impositions above specified, which have been exacted from him since the constitution of the trust, or may be exigible in all time coming: Decern and declare accordingly: Of new find additional expenses due, and remit to the auditor to tax the account, and report in common form.”

Lord Ordinary, Moncreiff.—*Act. Solicitor-General* (M'Neill), G. G. Bell; *Dalmahoy and Wood*, W.S., *Agents*.—*Alt. Rutherford, Cowan*; *Graham and Anderson*, W.S., *Agents*.—*T. Clerk*.—[J.W.]

9th February 1842.

SECOND DIVISION.—(J. W.)

No. 121.—ELIZABETH M'KINLAY, *Petitioner and Respondent*, v. STEWART MITCHELL, *Respondent and Advocate*.

Catholic Creditor—Heritable Security—Assignment—Payment.—A creditor made a loan to a widow, on an assignment by her of her liferent interest in an heritable subject vested in family trustees. He then made another advance to the trustees themselves on an heritable bond, with a power of sale, over the same subject, to which the widow was a direct party as the holder of the liferent. The creditor having proposed to sell, the widow tendered payment of the second advance by her son-in-law, one of the beneficiaries under the trust, and insisted on an assignment to the bond—Held that the creditor was not bound to grant the assignment to the prejudice of his first security.

By a trust-disposition and settlement, dated 1st February 1816, the late Walter M'Kinlay disposed his whole heritable and moveable estate in favour of the respondent, and the other persons therein named as trustees, with power to them

“to borrow money upon the heritable subjects for answering the purpose of the trust,”—“to sell and dispose thereof by public roup or private sale, as they should think most advantageous,—to receive the prices, and grant conveyances;”—to “uplift the rents, mailles, and duties of said heritable subjects, and to output and input tenants, and let houses.”

But subject to the free liferent use and right of the petitioner, his wife.

The truster died in 1818, and the trustees accepted of the trust, and were infest in the subjects. The petitioner was also duly infest in her liferent right, and in 1828 executed a disposition and assignment in favour of the respondent, proceeding on the narrative, that she having built a tenement of land on the steading conveyed by the deed of settlement,

“did, in order to complete the erection of said buildings or otherwise, borrow from the respondent the sum of £500; that he had no security for repayment of the said sum of £500 so lent to her, and that as it was a duty and obligation incumbent on her to secure him accordingly, she made and constituted the respondent, his heirs, assignees, and successors whomsoever, her lawful and irrevocable cessioners and assignees, not only in and to the whole rents and duties of the said subjects to which the petitioner was provided in liferent, as aforesaid, during her life, with all action and execution competent to her for the same, but also in and to the said disposition and deed of settlement, and the sasine thereon, in so far as were expressed in her favour, with all that had followed, or was competent to follow thereupon.”

But it was thereby provided that the respondent should apply the proceeds of the rents, 1*st*, in payment of the interest of the principal sum; 2*d*, in payment of an annuity of £40 yearly to the petitioner; and, 3*d*, in extinction, *pro tanto*, of the principal sum borrowed. In 1829, a policy of insurance was also effected on the petitioner's life in favour of the respondent. And in

1831, a decree having been obtained in the High Court of Admiralty against the trustees, for payment of the sum of £150, with expenses of process, they borrowed from the respondent the sum of £320, to be applied in payment of the sum decerned for, and of the expenses incurred in the management of the trust. In security they granted a bond and disposition of the trust-subjects, with the special advice and consent of the petitioner, for all right of liferent, or other right or title which she had in or to the said subjects. The bond contained assignments to the writs, rents, mails and duties, from and after Whitsunday 1831, power of entering into possession of the property and uplifting the rents, powers of sale, and various other clauses. The respondent was infeft in the subjects on the bond, conform to instrument of sasine in his favour, dated and recorded in the Register of Sasines kept for the burgh of Glasgow the 14th June 1831. No interest having been paid on the bond for several years, the respondent, after the necessary intimation, requisition and protest, proceeded to advertise the subjects for sale. Thereupon the petitioner procured her son-in-law, one of the fiars in the subjects, to offer payment, on receiving a valid assignment to the bond and disposition in security. The respondent offered a *discharge* of the bond, but refused to grant an assignment, on the ground that he was a catholic creditor, and could not be compelled to assign a right to his own prejudice. He also made offer,

"on receiving payment of all his claims, principal, interest, and expenses, under his disposition and assignment to Mrs M'Kinlay's liferent, and the bond and disposition in security for £320, to grant assignment to these, with his whole claims, grounds of debt and securities (excepting and excluding always the personal obligation in the last-mentioned bond.) On receiving payment of the whole sums, principal, interest, and expenses contained in, or incurred in relation to the bond and disposition in security for £320, to grant an assignment thereto, but always on the express condition that there shall be inserted therein valid and sufficient clauses, to the effect that until Mr Mitchell's claims under the disposition and assignment to Mrs M'Kinlay's liferent be satisfied and paid, or until Mrs M'Kinlay's liferent interest shall determine by her death, the assignee shall not be entitled either to sell the subjects (except under the burden of Mrs M'Kinlay's liferent as a real and preferable burden), or to raise any action of poinding of the ground, or mails and duties against the tenants, or any other process to defeat Mrs M'Kinlay's liferent vested in Mr Mitchell as a real and preferable burden, until his claims be extinguished."

The petitioner refused compliance with either of these offers, and presented a petition, craving the Sheriff of Lanarkshire

"to decern and ordain the said Stewart Mitchell to grant to the said Samuel Wilson, and at his expense, or to any third party whom the petitioner may name, but always at the expense of such third party, a valid and effectual assignment to the said bond and disposition in security, to the extent of the sums paid to the said Stewart Mitchell, to the effect of enabling the assignee to recover the contents of the assignment, as accords,—such assignment being only granted by the said Stewart Mitchell free of any personal obligation against him, and upon payment to him of the principal sum, and whole consequences, contained in the said bond and disposition in security;" "and, in the meantime, to interdict, prohibit, and discharge the said Stewart Mitchell, and all others acting under his authority, from selling or disposing of the subjects and others in question," &c.

Interim interdict having been granted as craved, the petition resolved into a summary action; and a record

having been made up and closed, the Sheriff-substitute pronounced the following interlocutor:

"15th January 1841.—Having advised the closed record, Finds that the pursuer has a sufficient title and interest to insist in this action; but finds that, in the whole circumstances of the case, and for the reasons stated in the subjoined note, the defender, Mitchell, is not bound to grant to the proposed assignee, Samuel Wilson, or to any other assignee, an assignment to the bond and disposition in security, referred to in process, and held by the said defender; therefore, sustains the defences, assolizies the defender, and recalls the interim interdict formerly granted: Finds the pursuer liable in expenses; allows an account thereof to be lodged, and when lodged, remits the same to the auditor to tax and to report; and decerns."

(Signed) "HENRY GLASSFORD BELL."

"Note.—It is true that, in the ordinary case, where payment is tendered to a creditor by one who is not the proper debtor, the creditor is bound to accept of that payment in preference to doing diligence against either the person or estate of his debtor, and is also bound to grant an assignment to the party paying, of any separate security he may hold for his debt. But there is an express exception to this general rule, when the creditor, by assigning, would weaken the preference of any other debt vested in himself affecting the subject sought to be assigned,—it being in all such cases held that no creditor can be compelled to assign a right to his own prejudice. The question therefore here is, whether the assignment sought for would prejudice the defender? He holds an assignment in security to the liferent of the same subject, impignorated to him by the bond and disposition. The pursuer argues, that the pledge for the sum in the assignment to the liferent, and the pledge for the sum in the bond, are two different things, and so far she is correct,—the one pledge being the *ipsam corpus*, and the other merely its fruits. But it by no means follows, that, were the pursuer to assign away his bond, his own assignment to the liferent would not be affected. In the first place, the trust-estate, to which he stands in the relation of trustee, would remain burdened with a debt, instead of being cleared of debt, according to the will of the trustor, and a personal responsibility might thus be incurred by the trustee. In the next place, the assignee might bring the estate to sale at any time, and, provided the purchase-money covered the amount in his bond, he would have little or no interest to put such a value upon it, as would compel the purchaser to keep the rental as high as possible; whilst the defender, on the other hand, has a direct interest that nothing be done to dilapidate the rental, or incur a risk of its being lowered. These considerations clearly bring the present within the category of those cases referred to by Erskine, B. III. t. 5, § 11. It may be added, that there appears to be also a specialty in favour of the defender, in respect that the only obligation incumbent upon him by the terms of the bond is, on redemption being made, not to assign, but 'to execute all writings necessary for disencumbering the said subjects of this security.' Were the defender to assign, this obligation would become imposable on him. Neither can the defender be accused of acting captiously, seeing that he has a right to protect his own interests, and has made various alternative proposals to the pursuer, all of which appear reasonable."

On an appeal to the Sheriff, he pronounced the following interlocutor:

"15th February 1841.—Having considered the interlocutor appealed from, and reviewed the whole process, for the reasons stated in the following note, alters the interlocutor complained of; decerns in terms of the prayer of the original petition, under this limitation, that the whole rights vested in the defender under his £500 bond are reserved entire, as therein constituted, and that the assignee in whose favour the respondent is ordained to denude is the pursuer's son-in-law, Wilson, mentioned in the pleadings; declares the interdict perpetual; finds the pursuer entitled to expenses; appoints an account thereof to be given in, and remits the same to the auditor to tax and to report; and decerns." (Signed) "A. ALISON."

"Note.—It is not without some hesitation that the Sheriff has altered the interlocutor in this case, as, although he differs

in opinion from the Sheriff-substitute, yet he fully appreciates the distinct interlocutor by him. In fact, he concurs in all the legal positions laid down in that interlocutor, and it is in their application to the special circumstances of this particular case, that he alone sees grounds for altering it. The view he takes of the case is this: By the settlement of the deceased, the respondent was, *inter alios*, constituted a trustee for behoof of the pursuer, as liferentrix, and the parties mentioned in the trust-deed as fiars. This character of trustee he still bears, and it forms an important feature in the present case. The trust-deed, however, conferred a power upon the trustees to borrow money, which the testator foresaw, as the result has proved, might be necessary for the amelioration or preservation of the property, and therefore, any sum borrowed by the trustees in the exercise of a sound discretion under that power, must be held to be within the powers conferred by the trust. £500 was borrowed by the pursuer from the respondent, one of the trustees, and as she had only a life interest in the property, the mode of securing the respondent, as lender, was necessarily very expensive. The premium upon the policy of insurance effected on the pursuer's life was £30. 2. 11. a-year, interest at 5 per cent. was charged, amounting to £25, a commission of 5 per cent. was charged for factor fee, and interest at 5 per cent. was charged on all disbursements, making the total interest or expense against the pursuer for this loan of £500, little less than £60 a-year. The Sheriff does not say there was any thing wrong in these charges, only they prove that the respondent amply secured his own interest in the transaction, as the bond and disposition contained a power to intrude with the rents until these several charges were defrayed. Thereafter it became necessary for the trustees, as representing the deceased, to borrow a sum of £320 to meet a demand which was made upon the trust-estate, and the respondent, still the trustee on the estate, again lent this sum of £320, upon receiving a bond and disposition in security, containing a power to sell, from the trustees, with consent of the pursuer as liferentrix. The respondent, it appears, was taking, or threatening to adopt measures to sell the property under these powers, which had greatly risen in value, in consequence of the general rise in the value of property at the Broomielaw, where it is situated, and the present application is presented, at the instance of the widow, to interdict that proceeding, and to have the respondent ordained, upon receiving payment of the £320 last borrowed, to grant an assignation to the security which he holds therefor, and also its powers, in favour of the petitioner's son-in-law, who tendered the full sum in the bond, and who, in right of his wife, one of the fiars in the property, has a reversionary interest in the trust-estate after expiry of the pursuer's liferent interest. The respondent says he is willing to grant a discharge of the £320 bond, but he will not grant an assignation, because, he says, it would prejudice his security under his prior disposition; and the question now is, can he be compelled to grant such an assignation? Now, the legal position is, no doubt, well founded, that a catholic creditor cannot be compelled to grant an assignation instead of a discharge, where that assignation is calculated to injure any other rights vested in his person; that is to say, the law will not compel a catholic creditor to part with a right which makes a *prior right* worse. But, can any such injury arise from an assignation being granted to the £320 bond as the pursuer requires? The Sheriff cannot see that it will. The security which the respondent enjoys under the £500 bond, and relative insurance, will just remain where it was, as if the subsequent £320 bond had never been granted. The respondent says, that the party to whom the assignation of the £320 bond is granted may sell the property, and that he, the creditor, has no security that it will be brought to the most advantageous sale, and, therefore, that his security for ultimate payment of the £500 may be lessened. If there is any truth in this statement, it arises from the respondent, a trustee on the estate, consenting to undue powers being conferred upon himself as a creditor on the property, and he has no right to complain of what he himself was instrumental in producing. But it is impossible to see how the respondent's security is lessened in this way, when it is recollected that the pursuer of this action is the widow, who is vested, under the settlement of the deceased, with the liferent of the property, and is infeft therein, and that the party who

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tenders the money, and proposes to become assignee, is her son-in-law, and now, in right of his marriage, one of the fiars. It is impossible to conceive how these parties, interested as liferenter and fiar in the residue of the estate, will sacrifice the property at an under-value. But, even if they should be disposed to do so, the respondent has himself to blame for it; because it was *he*, contrary to his duty in that respect as trustee, who burdened the property in his own favour with rights of a more extensive nature than he, as trustee, should have consented to. The respondent's original character as *trustee* attaches to him throughout the whole transaction, and he cannot shake himself loose of it, and law will not permit him to scruple at divesting himself as creditor of a right, which, according to his own showing, he, as trustee, should never have consented to burden the property with. What he is now striving to do is, not to preserve his rights under the £500 bond, but to secure to himself additional advantages, which, contrary to his duty as trustee, he had acquired under the £320 bond."

The respondent advocated the cause, and the Lord Ordinary pronounced the following interlocutor:

"2d July 1841.—The Lord Ordinary having heard the counsel for the parties, and considered the process, advocates the cause: Recals the interlocutor of the Sheriff of 15th February 1841: Sustains the defences against the original petition: Assigns the defender, and decerns: Finds the advocator entitled to expenses both in this and in the Inferior Court; appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same and to report.

"*Note*.—The case of the respondent rests almost entirely on a misapplication of the judgment of the Court in *Sligo* against *Menzies*, 18th July 1840. It was there found that a creditor who had a real security, and a cautioner for a first loan, and who, without consulting his cautioner, had afterwards made a second advance on the security of the same subject, could not deal with the last security in such a way as to violate his implied contract with the cautioner, by rendering any assignation that he might get useless. Erskine's doctrine,—"that in equity no creditor can be compelled to assign a right to his own prejudice," was not disowned by the Court; for all that was determined was, that a creditor could not protect his own interest by destroying that of another party; and least of all, when that party was a cautioner who had only interfered on a reliance that his privileges would be given effect to.

"The present is a quite different case. The creditor here made a loan to a widow on an assignation by her of her liferent interest in an heritable subject. He then made another advance on an heritable bond, with a power of sale over the same subject, which bond was not merely consented to by the widow, but she was a direct party to it as the holder of the liferent. In this situation the creditor proposes to sell under his bond. But she objects, and tenders payment by her son-in-law, the fiar. The creditor is ready to take the money, and to grant a discharge, but she insists on his assignation.

"The Lord Ordinary is of opinion that she has no right to insist on this, because it is injurious to the creditor's interest under the first loan to this very person. His security for this first loan consists solely on his holding her authority to uplift the rents under her liferent right. But if he assigns, the assignee may sell or deal with the property in such a manner as to render the rents less valuable. It is said that this is improbable, because it must be the interest of the liferenter and of the fiar to keep them up. But after getting the assignation, they may transfer to a stranger; and moreover, the creditor's right under the assigned liferent, being purely personal, might be superseded altogether by the real right of any party to whom, under the assignation demanded from him, the property might be conveyed. What would the assignation of the liferent be worth against an action of mails and duties? The creditor, besides, is one of three private trustees over this property, and the widow has dealt with him in this character. Can she then insist on an assignation, the effect of which is, that, instead of clearing the subject, which is the duty of trustees, it would be kept encumbered?

"In short, this is nearly the reverse of *Sligo's* case. It is the case of a debtor, in two obligations to one creditor, trying

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to make the power of defeating the first of them a condition of his fulfilling the last; and the true design is disclosed by the important fact, that the creditor's offer to assign, as required, provided only his prior right was made safe, was rejected, or was at least not accepted of by the party insisting for an assignation in addition to the discharge.

"All that is said about the bardship of the terms on which the loans were made, and about the incorrect conduct of the trustees as such, is irrelevant."

The petitioner reclaimed. At advising,

The Lord Justice-Clerk observed,—this application looks very like a declarator, and not a petition for interdict. It is admitted that the creditor is properly selling, but you say he must grant an assignation of his bond and disposition in security. The Sheriff also decerns in terms of the prayer of the petition; and although no objection is stated on this ground, it is right that the Court should notice it.

Buchanan.—It is a summary application presented on the exigency of the occasion; the main question is as to the interdict; and we only ask the Sheriff to cognosce the grounds on which it is asked.

Lord Medwyn.—The real question is as to granting the assignation.

Lord Moncreiff.—Could you set forth such grounds in a summons before the Sheriff?

Rutherford, for the advocator, consented to waive the objection.

On the merits,

Lord Medwyn.—There can be no doubt that a creditor is not bound to assign a right to his own injury. The creditor here has a right in security both to the liferent and to the fee of the subjects, and he cannot be compelled to assign his right in the fee, without protection for his first security. The son-in-law, though fiar, might assign to a third party, and so injure or defeat the right of liferent. A fair offer is made, and not accepted; while an action of mails and duties, or a poiding of the ground, involves a competition. The general reservation in the interlocutor of the Sheriff is of no consequence without a specific clause. I agree with the interlocutor of the Lord Ordinary.

Lord Moncreiff.—I am of the same opinion; and unless there were some object in view, in order to prevail over the liferent security, there could be no objection to the offer made by the creditor. Mitchell is a friend of the family, and waits before he sells; the debtor offers payment, on condition that he shall grant an assignation to his bond and disposition in security, which is to be used against his liferent right, and made troublesome to him. The case of Sligo is totally different.

Lord Justice-Clerk.—I have looked somewhat narrowly into the Inferior Court record, and think that Mr Mitchell has been hardly used. As a friend, he advances £500 on adequate security, and upon a speculation he gets a security on a life policy, and then, when there comes a large claim against the estate, he pays it, lest some one else should make the advance, and injure his security. There is no objection to his power of sale; but it is said that he is bound to grant an assignation. It is a mistake, however, to suppose that the primary obligation on a creditor is to assign on payment. The primary object of the security is, that he is to be paid; and it is only held in equity, that he is not to sell if any one come forward and offer payment. He is entitled to payment absolutely, and without assignation; and it is not necessary that there should be a certainty, but only a reasonable prospect of risk to entitle him to refuse to assign.

Lord Meadowbank absent.

The Court *adhered*, with additional expenses.

Lord Ordinary, Cockburn.—*Act. Solicitor-General* (M'Neill), Buchanan; John Cullen, W.S., *Agent*.—*Alt. Rutherford*, Maitland; Wotherspoon and Mack, W.S., *Agents*.—*T. Clerk*.—[J.W.]

TEIND COURT.

9th February 1842.

No. 122.

The following augmentations were awarded:

Nigg—Presbytery of Tain—Old stipend, 24th January 1821, 15 chalders, and £8. 6. 8. for communion elements.—Stipend modified of this date, 16 chalders, and £8. 6. 8. for communion elements,—being an augmentation of 1 chalders.

Langholm—Presbytery of Langholm—Old stipend, 19th June 1816, 15 chalders, and £10 for communion elements.—Stipend modified of this date, 18 chalders, and £10 for communion elements,—being an augmentation of 3 chalders.

10th February 1842.

FIRST DIVISION.—(H. B.)

No. 123.—MRS ELIZABETH M'EWEN or MUNNOCH, Pursuer, v. DANIEL M'EWEN, Defender.

Aliment.—Pupil—Where a pupil, seven years of age, had a free income of about £490, arising from the interest of money left him by his father, who had lived in a comparatively humble station, the sum of £150 yearly was awarded to his mother as his aliment during pupillarity.

Alexander Munnoch, merchant in Stirling, died in April 1835, leaving a widow, Mrs Elizabeth M'Ewen or Munnoch, and their only child, Alexander Munnoch, a mere infant. He left property to a very considerable amount; but in terms of an antenuptial contract of marriage, the widow was entitled only to the liferent of £2000 at four per cent., and the legal interest of her tocher of £300—making her whole annual income £92. At first, Archibald Munnoch, the pupil's uncle, was served his tutor-at-law, and in 1836, on the application of the widow, was decerned by the Court to pay her at the rate of £60 per annum as aliment for the pupil till he should be seven years of age. In 1837, the tutor-at-law was allowed to resign the office, and the Court, on his suggestion, appointed Daniel M'Ewen as factor *loco tutoris*. The pupil having attained the age of seven years, the period for which the previous aliment was decerned, Mrs Munnoch raised the present summons, in which, on the statement that the present fortune of the pupil might be fairly estimated at between £14,000 and £15,000, yielding an annual return of nearly £490, and might be expected to amount at his majority to at least £20,000; and that, considering the age of the pupil, the additional outlay in his clothing, education, and otherwise, and the present and apparent future extent of his fortune, the aliment of £60 was altogether inadequate, she concluded that Mr M'Ewen, the factor *loco tutoris*, should be decerned to make payment to her of £150 yearly in name of aliment to the pupil, besides the expense of medical attendance if necessary.

M'Ewen lodged defences, in which he admitted the accuracy of the pursuer's statements, and his unwillingness to object to the sum proposed, provided it did not seem to the Court excessive.

At advising,

Lord President.—It is impossible to object to the conduct of the factor in lodging defences. It is clear, however, that we cannot lay out of view the improvement which has taken place in the pupil's circumstances since the former aliment was granted, and the additional expenses which his clothing and education will now require. I don't think the sum asked is ex-

travagant. We will fix it for a limited period, and when it expires it will be in our power again to modify it according to circumstances.

Lord Gillies.—I am of the same opinion. It is true the father appears to have been in a humble station: that, however, is not permanent in this country. Rank is hereditary, but the want of it is not hereditary. The pupil should be treated like a young man who, at his majority, will probably have a fortune of £20,000.

Lord Mackenzie.—I am of the same opinion. The funds are substantial, and seem to justify the aliment concluded for, though I should certainly be unwilling to grant such an aliment as would prevent future accumulation. To do so would be in effect to lower, or at least prevent the improvement of the pupil's station.

Lord Fullerton concurred.

The Court decerned for £150 of aliment during pupillarity, with expenses to both parties out of the estate.

On the following day, the pursuer's counsel stated that the aliment formerly granted, and that now prayed for, were exclusive of medical attendance, and moved that the interlocutor should be framed accordingly. The Court did not see the propriety of the alteration, but left it open to the pursuer, in the case of any extraordinary illness, to bring it under their notice.

Act. Solicitor-General (McNeill), Neaves; Horne and Rose, W.S., Agents.—*Alt. Marshall; J. F. Wilkie, S.S.C., Agent.*—*N. Clerk.*—[H.B.]

11th February 1842.

SECOND DIVISION.—(J. W.)

No. 124.—*GEORGE ANDERSON and OTHERS (Anderson's Trustees), Pursuers, v. CLAUD RUSSELL and OTHERS (Campbell's Trustees), Defendants,—Et à contra.*

Superior and Vassal—Obligation—Feu-Contract—Implement— By certain articles of roup two lots of ground were feued in 1813, and in 1825 a formal contract of feu was entered into by the superior and vassal, varying essentially from the articles of roup. The contract provided, that "when the stances shall be built upon, the buildings shall be in a line pointed out by A B, and be constructed conform to a plan approved by an architect to be appointed by the superior: Further, that the vassal shall be at one half of the expense of making the common sewers opposite to the stances, and also of one half of making the streets, lighting and cleaning the same, &c.; and in so far as the said drain, &c. are already finished, the vassal becomes bound to pay the expense thereof." The stances remained unoccupied, and in 1840, the trustees of the vassal raised an action to have the superior ordained to furnish an elevation plan, to make streets, &c., the vassal being willing to pay one half of the expense of making the same opposite the two stances feued; and in the event of the superior failing so to do, to have the feu-right declared at an end; and in any event, to have repayment of the feu-duties already paid, or at least relief from the payment thereof in future.—Held that the demands made upon the superior could not be maintained either as conditions of the feu-contract or as independent rights: 2. That the feu-contract could not be controlled by the articles of roup.

These counter actions relate to the interpretation to be put on a contract of feu, entered into between the late John Campbell, W.S., and the late John Anderson, ironfounder, Leith Walk. The one is an action at the instance of Mr Anderson's trustees, claiming implement of certain stipulations under which, it is alleged, the superior came to the vassal by the feu-contract, and demanding a judgment from the Court, that, in the

event of these stipulations not being fulfilled, the feu-contract has become null and void. The other is an action at the instance of Mr Campbell's trustees, with concurrence of certain heritable creditors who obtained deeds of security over the subjects from Mr Campbell, concluding generally for payment of the feu-duties, and implement of the other obligations undertaken in the feu-contract by the vassal. It was not disputed that decree should be pronounced in the latter action, unless Mr Anderson's trustees should succeed in the counter action at their own instance.

On the 12th June 1811, there were exposed to sale by public roup, "all and whole the areas on the north and south sides of Prince Regent Street, which belongs to John Campbell, W.S., and is part of a park situated at the back of the Citadel of Leith." Previously to the roup, there had been prepared by Mr Gillespie Graham, architect, a sketch of the ground, showing its position, and the direction of the streets and some other particulars. This plan was the only one exhibited or referred to at the time of the roup. The defenders maintain that it is a ground plan sufficient for the purpose of building; while the pursuers aver that it is useless as a working plan.

The second clause in the articles of roup provides,

"that each purchaser shall be obliged, within five years from Whitsunday last, to build a house upon his purchase;—and the houses, in as far as the same respects Prince Regent Street, shall run in the line pointed out by the said plan, and shall be built conform to an elevation plan to be approved of by James Gillespie, architect in Edinburgh, or some other architect to be appointed by the said John Campbell, but shall not exceed three storeys in height above the level of the street."

The third clause provides,

"that each purchaser shall be obliged to pay a part, in proportion to the extent of front of his purchase, of the expense of paving and causewaying the whole street, and also the meuse-lane after mentioned, and keeping the same in repair, and also of making and repairing the common sewers; and each purchaser shall have relief of one-half of the said expenses from the feuar on the opposite side of Prince Regent Street, when the same shall be feued."

The sixth clause is as follows:

"The purchasers shall be obliged not to erect, or cause to be erected, on their respective purchases, any thing that can be deemed a nuisance; and they shall also be obliged to pay a part, in proportion to the extent of front of their purchases, of the expense of lighting and cleaning the said street, which it is hereby stipulated shall be formed agreeably to a section corresponding as nearly as may be convenient to the level of Great Junction Street, which intersects Prince Regent Street, at the sight of the said James Gillespie, and John Paterson, engineer for the Leith Docks; as also to pay their proportion of the expense of bringing in water, and of any other general plan of police which may be adopted by the majority of the feuars of the said street, or which may be enforced by law; and also to concur in any general regulations to be made by a majority of the said feuars, as said is."

At the time of the roup, the late Mr Anderson appeared and purchased a building lot at the end of Prince Regent Street, "with a return of forty feet alongst Great Junction Street." He also purchased the area of Great Junction Street adjoining to the preceding lot; and it was declared that this purchase was made "under all the conditions and stipulations in the foregoing articles which relate to Prince Regent Street, but which are hereby expressly agreed to be binding also with regard to this street."

For a number of years after 1811, Mr Campbell was unable to give his feuars entry to the purchases, owing to disputes between him and the magistrates of Leith as to the level of certain streets, and the want of plans, streets, common sewers, &c. These disputes were at last settled, and a feu-contract was executed between Mr Campbell and Mr Anderson on 29th and 30th November 1825, and 3d January 1826, making the first term's feu-duty payable at Whitsunday 1820 instead of 1813 (the period specified in the articles of roup), and containing the following declaration:

"That when the foresaid two stances shall be built upon, the front of the houses shall run in the line of the said streets, as shall be pointed out by Mr James Gillespie, architect; and the fronts of them, if at any time they shall be rebuilt, shall run in the same line, and the said houses, with every thing else connected therewith, together with the levels of the street, the front pavement, the back ground, the causeway, and the common sewers, in so far as they are not constructed or built, shall be built and constructed conform to a plan and elevation to be approved of by an architect to be appointed by the said John Campbell or his foresaids. And further, the said John Anderson binds and obliges himself, and his foresaids, to be at the one-half of the expense of making and keeping in repair the common sewers opposite to the said subjects, and also of one-half of paving and causewaying the said streets, making iron railings, lighting and cleaning the said streets, and in so far as the said drain, &c., are already finished and built, be becomes bound to pay the expense laid out thereon by the said John Campbell to the said Claud Russell, his trustee foresaid."

Long before the date of the feu-contract the feuing speculation had entirely failed. Mr Anderson, however, continued to pay the feu-duty down to the period of his death in 1834. An action was thereafter raised against his trustees for payment of the feu-duties from Martinmas 1833 to Martinmas 1836, amounting to £108. 2s. Sterling. In this action the Lord Ordinary decerned in terms of the libel, and the Court adhered, reserving to all parties their respective claims and rights under the articles of roup and relative feu-contract as accords—(*vide ante*, Vol. XII. p. 220, 5th December 1839).

Notwithstanding the judgment pronounced against them, Mr Anderson's trustees, whilst paying the feu-duties for which decree was obtained, refused to pay those which subsequently fell due. It became, therefore, necessary to raise the present action against them, in which a running decree for the feu-duties is sought, and a judgment for implement, generally, of the feu-contract is claimed.

Anderson's trustees raised the other of these two processes; and their conclusions against the defenders are the following:

"Therefore, the said defenders ought and should be decerned and ordained, by decrees of the Lords of our Council and Session, to furnish and exhibit to the pursuers a good and sufficient feuing and building plan, and a good and sufficient elevation plan, not merely in regard to the said two stances feued by the said John Campbell to the said John Anderson, but also embracing, and which should be binding on the defenders and their vassals, and all others, in regard to all the remaining areas in Prince Regent Street and Great Junction Street; and they ought and should be further decerned and ordained to make and complete, in a good and substantial manner, according to proper levels and sections, and of the stipulated width, the said road or street called Prince Regent Street, so far as not already formed or completed, and also the said road or street called Great Junction Street, and to get the same opened, levelled, formed, causewayed, and paved in a proper manner, the pur-

suers being ready to pay one-half of the expense of making and keeping in repair the common sewers opposite the two stances feued to the said John Anderson as aforesaid, so far as not already made and paid for, and also one-half of paving and causewaying the said streets, and making iron railings opposite to the said two stances. And, in the event of the defenders failing to implement said obligations between and the 1st day of January next, or whatever other day our said Lords shall be pleased to fix and limit for such purposes, it ought and should be found and declared, that the said feu-right, and all obligations incumbent on the said deceased John Anderson under the said articles, conditions, and minutes of roup and feu-contract, or otherwise, in regard to said subjects, have ceased and determined, and become totally void, and that they are, and shall be of no effect in future."

The summons further concludes for repetition of the feu-duties, or otherwise, to have it found and declared that the superior has no claim for feu-duties till these obligations are performed by him; and that the pursuers are entitled to damages.

The processes having been conjoined and a record made up,

The pursuers *pleaded*—1. By the articles of roup and feu-contract in favour of the late Mr Anderson, the defenders, as representing the original superior, are bound to point out the line of Prince Regent Street and Great Junction Street, and they are also bound to furnish a plan and elevation showing the design of the houses to be built in these streets, and every thing connected therewith, together with the levels of the street, the front pavement, the back ground, the causeway, the common sewer, and whatever is necessary for a complete working ground and elevation plan. 2. The superior, according to the proper construction of the articles of roup, and of the feu-contract, is bound to make the common sewers, foot pavements and streets, to introduce water, and generally to do whatever is necessary for rendering the pursuers' buildings accessible and habitable, according to the intention and views of parties when they entered into the feu-contract,—the vassals being only bound to pay their proportion of the expense. 3. The defenders are at all events bound, especially as almost the whole building ground in question remains their property, and is unfeued, to contribute, along with the feuars, to the expense of the works referred to in the last plea, in proportion to the extent of ground not feued. 4. The defenders having refused, after a formal requisition served upon them, to furnish the pursuers with ground and elevation plans, and having by that refusal rendered it impossible for the pursuers to erect any buildings, have now no longer any claim under the feu-contract, and are liable in repetition of the feu-duties and other outlay libelled, or in damages; and at any rate, can have no claim for future feu-duties till such time as proper plans are furnished by them. 5. As the defenders have also refused, after formal requisition by the pursuers, to be at the expense of, or to contribute towards making the roads, sewers, and other common works above mentioned; and as any houses which might be built while the ground is in its present state must be inaccessible and uninhabitable, the pursuers are not bound to build in terms of the requisitions upon them by the defenders' agent, but, on the contrary, are entitled to have it declared that the feu-contract is, on that ground, at an end, or alternatively, to have decree for implement of these obligations upon the su-

perior, and for repetition of the feu-duties and outlay already paid, as well as relief from the feu-duties becoming due in future, till such time as the superior has made the roads, and performed his other obligations.

The defenders *pleaded*—1. The judgment pronounced in the previous process between the parties forms *res judicata*, at all events to the extent of the matter set forth in that judgment. 2. Independently of that judgment, there are no good grounds on which the pursuers can maintain any of the demands made in their summons, whether these are set forth as conditions of the feu-contract remaining in validity, or as independent rights in their own part. 3. More particularly, in regard to plans, all has been done on the superior's part which is requisite. It remains for the vassal, if he shall think fit, to exhibit a plan to be approved of by the superior. 4. Farther, there is no obligation on the superior to pave and causeway the streets, or to make drains, or do any of the other things demanded in the summons. The obligations, in these respects, are all laid on the feuars, with a mere mutual relief *inter se*. 5. Generally, there is no good ground for annulling the feu-contract, or suspending its operation, the defenders having fulfilled, or being ready to fulfil, all that is incumbent on them as in room of the superior. 6. The pursuers are bound to make payment of the feu-duties in arrear, and to fulfil the other obligations of the feu-contract; and to this end, effect ought to be given to the conclusions of the counter action at the instance of the defenders.

The Lord Ordinary appointed mutual cases, and made *avizandum* to the Court, accompanying his interlocutor with the following note:

"The present action is raised upon articles of roup and a feu-contract, which were very recently under consideration of the Second Division of the Court, in an action between the same parties, brought by the trustee for the superior's creditors against Mr Anderson's heirs, for payment of the feu-duties of two lots of ground near Leith Docks, feued by the deceased John Anderson (predecessor of the pursuers) from Mr John Campbell, senior, W.S., in 1813. The Lord Ordinary (Moncreiff) and the Court gave decree for these feu-duties, chiefly on the ground that they were constituted by *liquid* obligation binding on the feuars, and that the latter could not set off illiquid claims for breach of the (alleged) counter obligations of the superior, which were held to be illiquid, by way of *exception*, against feu-duties then long past due. At the same time, the Lord Ordinary reserved the claims of the feuars, so far as his Lordship thought them *prima facie* competent, to be constituted in a separate action; and the Court afterwards, in still more ample terms, made a similar reservation, when they decreed against the feuars' heirs.—See reports, 5th December 1839.

"The claims thus reserved are brought forward in the present action, and as the Lord Ordinary is of opinion that, to a certain extent, they are founded in law and in material justice, while his views may possibly interfere with those expressed by the Court, though from the form of the action, not embodied in the previous judgment, he thinks it most suitable to report the present question to their Lordships, upon the full exposition of the argument of both parties contained in the revised cases.

"The chief claims of the pursuers, stated to arise as counter obligations against the superior under the articles of roup and contract of feu libelled on, are—1st, That the defenders, as representing the superior, shall furnish the pursuers with proper and correct ground and elevation plans of the street in which the areas feued are situated, and which the pursuers are bound to erect on the grounds libelled on. And, 2d, That the defen-

ders shall form and complete the street along which the areas feued by the pursuers' predecessor were represented to lie, as well as the other street called Great Junction Street, as a necessary road of ingress to, and egress therefrom, and that they shall construct a proper common sewer, and bring in water, in terms of the obligations said to be implied on the superior, from the nature of the contract, and particularly from the sixth clause of the articles of roup,—the pursuers, as feuars, paying the proportion of the expense of these operations, laid upon their predecessor by the same articles. The questions thus raised may not, at first sight, appear of difficult extrication, but some of the points are of considerable importance in the law of superior and feuar in the neighbourhood of large towns.

"I. With regard to the pursuers' demand for additional plans which they call upon the superior to furnish, it is thought that that demand, at least to the extent made by the pursuers in their summons, is scarcely now an open question. It was fully considered by the Lord Ordinary and the Court, when the petitory action for feu-duties was before the Court in 1840; a clear opinion was then expressed, that it was the duty of the vassals themselves, under a sound construction of the articles of roup, to present for the approbation of the superior's architect, an elevation plan of the houses they intended to erect on the lots feued; and with deference, even if the Lord Ordinary were entitled to give an opinion on that question, he could not depart from the views expressed on this point in the interlocutor and note of Lord Moncreiff, under the state of the facts, assumed, when the case was formerly before the Court. To these it is sufficient to refer.

"It seems clear, both upon the articles of roup and contract of feu, that the feuars were entitled and bound to provide, at least, their own elevation plans, and present them to the superior's architect for approbation. This was probably intended to give some latitude to the feuars. They were taken bound to build houses not exceeding three storeys in height, but apparently, if placed within proper lines, the houses might be of such lower height, and after such fashion as were required for the business and views of each feuar. The opinion of the Court on this point seems to have coincided with that of Lord Moncreiff. Accordingly, the pursuers' demand for an elevation plan seems quite out of the question.

"But the pursuers urge a special plea with regard to the ground plan, which may deserve consideration. They state that by the second clause of the articles of roup, their predecessor was bound to build houses on his lot, which, 'in as far as the same respects Prince Regent Street, shall run in the line pointed out by the said plan.' Now the pursuers state on record (revised condescendence, art. 11), that the superiors 'have never provided any working ground plan of the stances for building, showing their area, angles, &c. &c., and in illustration of that averment, they add more specially in their revised case (p. 17), 'their readiness to go to proof upon their statement, that the engraved plans (in process) are perfectly useless as working ground plans.' To the eye of any individual unacquainted with scientific land surveying, the ample plan, No. 36 of process, appears to be quite sufficient to delineate the site of each lot. At the same time, if the ground is not at present in a situation to enable any architect for the feuar to prepare an elevation plan applicable to his lots, the Lord Ordinary is not prepared to say that the superior must not either furnish such ground plan, or so form and construct the street upon which the lots are situated, as to enable any architect forthwith to prepare an elevation plan for the feuar. In that view, the first claim of the pursuers seems in some measure to be connected with the second, which presents the most important question for the consideration of the Court.

"II. The pursuers' next claim therefore is, that the superiors are bound to form and complete the street called Prince Regent Street, in which the lots feued by Mr Anderson are situated. The pursuers' plea resolves into this, that their predecessor feued these lots as areas situated upon a street; that the seller came under an implied, if not an express obligation that a street should be made, and the necessary accommodations of water, common sewers, &c., therewith connected, afforded to the feuars, on their paying a proportion of the expense thereof, corresponding with the breadth of their feu, and that the superior must

fulfil that obligation; or otherwise, that the feuar is entitled to be liberated from the contract, and to claim damages from the superior. The Lord Ordinary must own that he does not see any satisfactory answer to that claim on the part of the feuar in the present case.

"He is humbly of opinion that the articles of roup and contract of feu must, like other instruments of agreement between man and man, be construed *secundum subjectam materiam*. They relate, in so far as the feuar was concerned, to very small and valuable areas of ground, in close contiguity with a great town. They were represented as lying along a street, and the prices offered were those of high priced urban subjects. A feu-duty of 9s. 6d. per foot for areas of ground such as those here delineated amount to some hundred pounds per annum for each acre. Hence, before resorting to the written contract, the presumption *ab ante* is very strong, that a proprietor feuing and letting out such ground as part of a street, shall at least furnish the street along which it is represented that the houses to be built will be situated.

"But the implication arising from the written contract, as constituted by the articles of roup and contract of feu is, in the Lord Ordinary's mind, decisive of the present question. By clause 3d of the articles of roup, it was provided that 'each purchaser shall be obliged to pay a part, in proportion to the extent of front of his purchase, of the expense of paving and causewaying the whole street, and also the meuse lane after mentioned, and keeping the same in repair, and also of making and repairing the common sewers; and each purchaser shall have relief of one-half of the said expenses from the feuar on the opposite side of Prince Regent Street, when the same shall be feued.' It is apprehended that no plain man reading the preceding article, could suppose that only a part of the street was to be formed, when it was expressly provided that the whole street should be paved and causewayed.

"In like manner, the completion of the street was parenthetically held out in the 6th article, which enacted that the feuars 'shall also be obliged to pay a part, in proportion to the extent of their purchases, of the expense of lighting and cleaning the said street, which, it is hereby stipulated, shall be formed agreeably to a section corresponding as nearly as may be convenient to the level of Great Junction Street, which intersects Prince Regent Street, at the sight of the said James Gillespie, and John Paterson, engineer for Leith Docks, as also to pay their proportion of the expense of bringing in water.' Here it was provided that the street 'shall be formed,' and each party asks, by whom? and of course answers the question in his own favour, by alleging that the burden was not laid on him. But while the street must be completed by some party, it will be carefully marked that no more in any case is to be advanced by any feuar than a proportion of the expense of the street corresponding to the front of each feu. The contract, too, contemplates the very event which has occurred, of the whole street not being feued. The feuar on one side, is to advance the expense of paving the whole breadth opposite to his own lot; his relief from a part of that limited advance being secured when the opposite lot comes to be feued; but more is not required of him, whatever other portions of the street may be unfeued. How then can a Judge called to enforce these articles, find, first, that the whole street shall be formed, paved, and causewayed, and next, that one or two feuars shall advance the whole expense thereof, when the contract expressly provides that the feuars shall only advance a part of the expense, in proportion to the extent of their own area? Farther, when it was provided that a street shall be formed, and when each feuar's expense thereof was limited and defined, on whom was the remaining expense to be laid? It could fall on none else but on the other party to the contract—the superior,—who expected to reap a great advantage from these feus, and did obtain a most lucrative offer from the feuars who acquired any of the lots exposed under these contracts. In fact, if the superior was not to undertake this burden, the whole transaction must fall to the ground, as the articles would be inextricable, and inapplicable to the situation of parties if no street was ever made,—the formation of which was precedent and essential to the possession of the feuars, so as to bring their areas within the description, and to adapt them to the uses contemplated by the articles of roup.

"It is humbly thought, also, that there are other peculiarities in the present case, well entitled to weight in a court of justice. When the 6th clause, so often referred to, provides that the street shall be formed, without saying by whom, it must instantly occur, that if there be any vagueness and ambiguity in the clause, the exposer, from whom the articles flowed, should, in all conscience and law, be answerable for it. If it be a just and salutary rule of law in general, that obligations in *dubio* are to be interpreted *contra proferentem*, the maxim seems peculiarly entitled to effect in the case of a party inviting purchasers to a sale of his property exposed by public roup; and still more clearly ought it to be enforced when the articles have been promulgated by a proprietor who was an experienced practitioner of the law like Mr Campbell, and who, moreover, stipulated (articles of roup, art. 1,) that the whole rights, titles, and securities to be prepared in favour of the purchaser and his successors, 'are all to be expedite and executed, or taken by the said John Campbell and his foreaids, or their ordinary man of business for the time.' As it appears from the writs produced that the deceased Mr Anderson, the feuar, acted on this clause, and reposed exuberant trust in the superior, by employing no other man of business than Mr Campbell when he bid for these feus, his representatives are entitled, on the highest grounds of law as well as of equity, to the benefit of any ambiguity, if such can be traced, in the contract now under consideration.

"It is said that the present question arises from the failure of an extensive building speculation, which the feuars wish to throw upon the superior. But though the fact here stated be true, the inference of the defenders does not seem just. Unquestionably the hope of all parties as to the expected value of this ground has failed; and it is supposed that even if the whole of Regent Street had been completed, the speculation would have failed, and the feuars would still suffer a great loss, as their areas, instead of being worth 9s. 6d. per foot, might still not be worth half-a-crown. But the question is, if the feuars are bound to bear a greater share of loss? To hold that they, and not the superiors, are bound to advance the expense of paving the whole street, would be to throw on the feuar a part of the loss which naturally falls on the superior. In fact, if any feuars pave any other part of the street than that opposite to their own areas, the articles of roup contain no clauses, and provide no machinery for their reimbursement when the lower or higher parts of the street are ultimately feued.

"Farther, it is plausibly remarked by the defenders, that it is impossible to look round a great town without seeing numerous instances of single houses built along unformed streets, which remain for years as examples of the failure of feuing speculations in these districts, from which it is inferred that no superior ever undertakes the formation of streets. But it is obvious to answer, that no argument applicable to the present question could be drawn from these instances, unless the contracts or agreements were examined under which the lots were feued, and under which the houses have been afterwards held. The records of the Court attest that every different proprietor of feuing property has his own rules for the attraction or regulation of builders,—as in the neighbourhood of this city, Lord Moray has one set of rules, Heriot's Hospital another, while other proprietors of suburban ground about Stockbridge, Leith Walk, Newington, &c. &c., act upon their own views of what is most expedient and advantageous. The present case must obviously be decided on the contract libelled on, and on its own circumstances, which have been now brought fully into view.

"On these grounds, the Lord Ordinary would be inclined to hold that the second plea or branch of the pursuers' libel is substantially well founded. This is limited to the constitution of the superior's obligation to form and complete Regent Street, so far as not already formed and completed, and also the road or street called Great Junction Street, and to get the same opened, levelled, formed, causewayed and paved in a proper manner. No doubt the defenders have argued, that on the same principle on which the pursuers urge this plea, they might be called on to complete the whole of the numerous streets and lanes represented on the feuing plan. But while the pursuers urge no such demand, it is thought that as the pursuers'

areas are situated both in Regent Street and Great Junction Street, they have a direct connection with, and interest in those streets, which they do not possess in any other streets. Then as the articles of roup (art. 6) provided, that Regent Street shall be 'formed agreeably to a section corresponding as nearly as may be convenient to the level of *Great Junction Street*,' the formation of Junction Street seems to be a preliminary operation indispensably necessary to the proper construction and completion of Regent Street. No doubt the fifth article provided that the feuing plans should be binding on the said John Campbell, 'only in regard to Prince Regent Street, where the same intersects Couper Street, and not in regard to any of the other streets therein laid down.' That clause may exempt the superior from any obligation to finish at present these other streets: but the minute of sale, entered into when Mr Anderson made his offer at the roup, specially declared, 'that that part of *Great Junction Street* which relates to the above-stance' (i. e. Anderson's area), 'is to run in the line pointed out by the before-mentioned plan.' And therefore it seems plain that the pursuers have pleas relative to the completion of Prince Regent Street and Great Junction Street, which do not apply to the other streets, and which, accordingly, are not maintained in the present action.

"There are other conclusions of a very important nature in the pursuers' summons, into which it is unnecessary to enter till the extent of the superior's obligations is ascertained. The pursuers seem to have been subjected to heavy claims, and to a severe loss, which can hardly be laid entirely on them, if it shall be found that the superior and those in his right have failed, for the great length of time which has elapsed since the date of the feus, to fulfil specific obligations incumbent on them by their contract. But it is plainly impossible to discuss these till the pleas of the parties as to the legal construction of the original contract are disposed of."

At advising,

Lord Justice-Clerk.—The summons at the instance of Anderson's trustees is founded upon the articles of roup and the feu-contract. I don't understand how any presumptions *ab ante* can arise between a superior and vassal as to the formation of streets, or such like. I know no other measure of the rights of parties than the contract, and any such presumptions are pre-eminently hazardous. The feuar held under the articles of roup for a number of years—the speculation failed; and in 1825 a feu-contract was entered into containing obligations different from those in the articles of roup. The superior, wishing to lighten the burden on the vassal, relieves him from the obligation to build within a certain period, and gives up his claim for feu-duties prior to 1820. The contract being thus concluded, it is incompetent to look back upon the articles of roup, which are materially different. The contract mentions them only narratively, and is not in implement or pursuance thereof. It is in itself a substantive deed. The summons says the contract was entered into in pursuance of the articles, with the view of making them regulate the construction of the contract; but there is no warrant for this. Any reference to the articles is excluded by the completed bargain; and this is a rule which cannot be too rigidly enforced. The case is very short. We have only to compare the conclusions of the summons with the clauses of the contract. It provides, that when houses are built, they shall be in a line such as shall be pointed out by Mr Gillespie; but how can he be required to point out the line before the vassal is prepared to build? Then it provides that the houses shall be conform to a plan and elevation to be approved of by an architect appointed by the superior. This is no obligation on the superior to furnish a plan. Lastly, the vassal binds himself to be at one-half of the expense of making the common sewers, paving and causewaying the streets, &c. This is to be done by the vassal, and implies that he must pay one-half of the expense. No obligation is laid upon the superior. It is said that he must furnish the street, and he must pay in proportion to the ground not feued. I cannot agree to this view of the relative rights of parties. There is no demand made upon the vassal to build. In the action at the instance of Anderson's trustees, I would sustain the second defence and assolzie; and in the other ac-

tion, repel the defences, and decern in terms of the conclusions of the summons.

Lord Medwyn.—The respective rights of the parties arise under the articles of roup and the contract; but it is a common rule, that prior minutes and communings cannot control a concluded contract. The contract here is different;—the articles are narrated, and may be used in explaining any obscurity; but we cannot import the one into the other. If a superior feus ground for houses, he must provide access to them, or he could not insist on payment of the feu-duties. But the feuar is not entitled to retain his feu-duty by merely insisting on access, if he has no occasion for it, and has not begun to build. The obligations are mutual, and it were unreasonable to insist on fulfilment by the superior, while the vassal has not put himself in a condition to insist upon it, by fulfilling his own part of the obligations by building. Till the pursuers do something to fulfil their own obligation, they can't insist on these accommodations. They do not say they intend to build; their object is to get quit of the contract. Matters are still in the same situation as when Anderson entered into the contract; and he continued to pay the feu-duty down to his death, without making any demand upon the superior for implement of these conditions.

Lord Moncreiff.—The case is to be decided on the special contract, and not on loose general law. Every question must be determined by a reference to the contract, which was entered into in the full knowledge of all the circumstances at the time,—which altered the articles of roup,—was implemented by Anderson, who took possession of the ground, and paid the feu-duties without objection till his death. A contract so entered into, and acted upon by the original parties, cannot be set aside by trustees. The contract is the *regula regulans* for determining the rights of parties, and the trustees wish to effect a total avoidance of it. The same pretensions were set up in defence against the former action; but it was determined that the contract was subsisting and binding on both parties. I have just compared the conclusions of the summons with the clauses in the contract, as has been done by your Lordship, and have come to the same conclusion, so that it is unnecessary for me to go over what I have written. The obligations are laid upon the vassal, and not upon the superior. True, the superior had done something before the contract, and the obligation on the vassal is to pay the expense laid out. I can see no ground on which the case can be maintained. There was considerable speculation on both sides; if successful, it might have turned out of vast profit to the vassal; as it is, the risk may have fallen upon him;—but seeing that the transaction stood upon the articles of roup for fourteen years—that the original party then entered into a feu-contract, and went on paying the feu-duty till his death,—is it tolerable, that after the superior has been tied up all the while from doing any thing with the ground, that the vassal can now turn round and ask the contract to be set aside, unless this and that be done,—not one word in relation to which is in the contract?

Lord Meadowbank absent.

The Court sustained the second defence, and assolizied in the action at the instance of Anderson's trustees; and in the other action, repelled the defences, and decerned.

Lord Ordinary, Cuninghame.—*Act.* Christison; Renny and Webster, W.S., *Agents.*—*Alt.* Penney; Thomas Ranken, S.S.C., *Agent.*—*T. Clerk.*—[J.W.]

12th February 1842.

FIRST DIVISION.—(H.B.)

No. 125.—PETER GREIG and OTHERS, *Petitioners*, v. JOHN MILLER and JAMES NORMAND, *Respondents*.

Burgh, Managers of.—*Lease.*—Statute 3 Geo. IV. c. 91.—*The managers of a disfranchised burgh are bound, in letting the burgh property, and in all their other proceedings, to conform themselves to the rules and regulations that would be binding on the Magistrates and Councillors.*

The burgh of Dysart having been placed under the

charge of three managers, Peter Greig, one of them, and certain of the burgesses, presented a petition to the Court, in which, on the allegation that Messrs Miller and Normand, the other two managers, had "pursued a system of managing the affairs of the burgh on their own individual authority, or by private concert between themselves;" that they had taken many steps "detrimental to the interests of the burgh," and, by these irregular proceedings, "involved its affairs in litigation and expense for objects of no public importance;" that they had "even, in some instances, taken upon them to dispose of the property of the burgh on lease, and otherwise," without complying with the provisions of Act 3 Geo. IV. c. 91, to which they, as judicial managers, were as much bound to conform as the ordinary magistrates and council would have been,—they prayed the Court to find

"that the said John Miller and James Normand, jun., have been guilty of malversation in their said offices of managers of the said burgh of Dysart, or have acted irregularly and illegally therein, and to remove them from their said offices accordingly, and nominate other persons as managers in their room; so that the affairs of the said burgh may be fairly and efficiently administered; and to find and declare that the managers now and hereafter administering the affairs of the said burgh, are bound to conform themselves to the rules and restrictions that would be binding on the legal Magistrates and Councillors of the burgh, and that they are only entitled to act or interfere in the administration of the affairs of the said burgh, at regular meetings of the managers duly called, or in consequence of resolutions previously adopted at such meetings, and to enjoin the said managers to conduct themselves accordingly; or to afford the petitioners such further or other remedy in the premises as to your Lordships shall seem fit, and to find them entitled to expenses."

Messrs Miller and Normand denied the allegations of the petition, but admitted that, in terms of a resolution entered in the minutes of a meeting of managers, to which the petitioner, Mr Greig, had been regularly summoned, though he did not attend, certain premises of the burgh had been let without public advertisement for a term of years, of which the rent was to be highest at first, with a fall afterwards. They maintained, however, and offered to peril their defence on the fact, that the lease was most beneficial to the burgh, and the rent as high as any public competition could have obtained.

At advising,

Lord President.—The main objection to the conduct of the respondents is, the granting a lease of the burgh property without due advertisement. I cannot entertain a doubt that managers appointed to manage the affairs of a disfranchised burgh cannot be possessed of powers superior to those with which the law has intrusted the Magistrates and Council. The mode of procedure in letting the property of the burgh has been expressly declared on the authority of the Legislature; and without entering into the question, whether managers failing to comply with the terms of the Act incur its penalties, the point we have to consider is simply this,—seeing the clear line which that Act has drawn as to the letting of burgh property, can we possibly sanction the course which these managers have taken? I see no ground whatever to impute improper motives to them. I am not at all inclined to interfere with their petty squabbles. I look merely to this one transaction, and ask, whether a lease of burgh property so granted can be sustained? I have the greatest doubt of this. "These managers ought clearly to have acted as the Town-council must have done." At the same time, I cannot see anything in their conduct implying such gross misconduct as to call for their immediate removal. That I think

would fix a stigma on them more severe than the extent of their offence requires.

Lord Gillies.—I concur with your Lordship. These managers have been going on a wrong tack, in first doing the thing and then calling a meeting to approve of it. This was altogether irregular. It will not do to say that they were the majority, and could have carried at the meeting any course they had previously resolved on. We must suppose that they remained open to conviction, and it was therefore not impossible that the arguments of the other manager, if opposed to their proposal, might have induced them to change their opinion of its propriety. Then, as to the Act of Parliament, I agree with your Lordship that they were bound to have complied with it. It is said the lease was advantageous; but there is certainly something very strange in the fact that it stipulated for a fall in after years instead of a rise. There is still a question behind,—Have these managers been guilty of such malversation as calls upon us to remove them and appoint others? The affirmative is a grave conclusion, and I confess I am not prepared to come to it.

Lord Mackenzie.—I concur. I don't attach importance to the other allegations; but the one relating to the lease deserves attention. I don't enter into the question, whether the Act of Parliament applies to the case of managers, and annuls any agreement which they may have made contrary to its provisions, but certainly the existence of such an Act ought to have impressed them with the necessity of acting with eminent caution. As to the lease itself, I am not satisfied that it was disadvantageous to the burgh. On the contrary, my impression is, that it was a good enough bargain. Assuming this to be the fact, it appears that a wrong has been committed by these managers in the manner of acting, but that no harm has resulted from it. In these circumstances, I should think an admonition sufficient. The removal from a public office like this inevitably carries a stigma with it; and the consequence of resorting to it, unless on strong grounds, would be to deter individuals from accepting of the appointment. I cannot see any thing here to call for removal.

The Court pronounced the following interlocutor:

"Find that the respondents, as managers of said burgh, acted irregularly and improperly in their mode of letting the subjects in question; but that the irregularity was not of a description to call for their removal from said management: Find that in their future proceedings as managers, they shall be bound to conform themselves to the rules and regulations that would be binding on the Magistrates and Councillors of said burgh, and that they are only entitled to interfere in the administration of its affairs at meetings of the managers duly called or authorised; and further, find that in respect of the impropriety aforesaid, the respondents are personally liable in expenses; allows an account," &c.

Act. Solicitor-General (M'Neill), Neaves; Roderick M'Kenzie, W.S., Agent.—Alt. Robertson, G. Bell; William Hunt, W.S., Agent.—N. Clerk.—[H.B.]

12th February 1842.

SECOND DIVISION.—(J.W.)

No. 126.—A. B., *Advocator*, v. JANET CHISHOLM, *Respondent*.

Parent and Child—Aliment—Process.—The mother of a natural child having, for an onerous consideration, discharged all claims against the alleged father, and afterwards brought an action against him for inlying charges and aliment, in usual form—Held that she could not pursue for inlying charges, or for aliment prior to the date of the action; but as she could not discharge the claims of the child, the action sustained for behoof of the latter, for aliment falling due thereafter.

Janet Chisholm raised an action before the Sheriff of Inverness, concluding against the defender for the sum of £5 of inlying charges at the birth of a male child, alleged to have been begot in fornication with him, and for the sum of £10 Sterling yearly for the aliment and support thereof, commencing from the

birth of the child. In defence—while the defender expressly denied being the father of the child—he founded on a probative discharge granted by the pursuer, whereby, in consideration of two sums, amounting to £52. 12. 6., paid to her by him, she discharged him

"of all claims and demands competent to the said child, or me as the mother of the said child, on account of aliment due or to become due, inlying charges, or otherwise, and generally, of all claims and demands arising from the paternity, or alleged paternity of the said child against the said A B as the father, or alleged or reputed father of the said child, on account of aliment, inlying charges, or otherwise, and of all action and execution competent thereon: And further, I, the said Janet Chisholm, bind and oblige myself to free and relieve the said A B, and his forebears, of all claims and demands competent to the said child, or to me as the mother of the child, on account of inlying charges, aliment or otherwise, in all time coming."

On 6th August 1840, the Sheriff

"Repels the defence founded on the discharge produced, as *ultra vires* of the party granting the same; and in respect the libel is denied, allows the pursuer a proof of the same, and to the defender conjunct probation; grants diligence against witnesses and havers," &c.

"*Note.*—The discharge in this case is *ex facie* incompetent and null. It sets out by acknowledging receipt of two sums of money;—the first on or about 24th May, more than two months before the birth of the child; and the second, for which no date is assigned, being probably the further price paid for obtaining this discharge. The document produced bears to have been granted at the request of the defender, and is dated several months after the birth of the child,—its tenor being, 'to discharge and exoner the said A B of all claims and demands competent to the said child,' &c.

"Such an attempt to get rid of an obligation, imposed alike by the laws of nature and of every civilized community, can never be countenanced in a court of justice; fortunately, in the present case, it is *felo de se*, bearing as it does *in gremio*, that it transacts the rights of a third party."

The defender advocated under the 40th section of the Judicature Act, and *pleaded*, that "the action being raised in name of the pursuer Janet Chisholm alone, and being founded on her own alleged individual rights, it is effectually barred by the transaction entered into between her and the defender, expressed in, and instructed by, the formal and probative deed of discharge produced by the advocator."

The respondent *pleaded*—That the action was for behoof of the child, and no bargain by her could relieve the defender of his natural obligation for aliment.

The Lord Ordinary pronounced the following interlocutor, accompanied by a relative note:

"12th January 1842.—The Lord Ordinary having heard parties, and considered the record, advocates the cause; recalls the interlocutor complained of; sustains the defence founded upon the discharge; assoilsies the defender, and decerns: Reserving all the rights of the respondent's infant son, of which she alleges that the advocator is the father, and of the respondent, or any other party, as administrator for this infant; and particularly reserving to the infant, and to its administrator, to raise an action for obtaining aliment, if due, from the advocator, and to the respondent her defences against any such proceedings: Finds the advocator entitled to expenses, both in this Court and in the Sheriff-Court: Appoints accounts thereof to be given in, and, when lodged, remits the same to the auditor to tax and to report.

"*Note.*—The discharge is effectual as against the mother, but is of no efficacy as against the child. And therefore, if this action had been instituted by the child, or by any person, even his mother, as administratrix for him, the discharge would not have formed any obstacle. But, as the summons stands,

the action is raised solely in the name, and solely for the advancement of the interests of the mother, inasmuch that it concludes for payment of the very inlying charges which her discharge bears to have been paid. If the advocator be the father, he is plainly bound to maintain the child; but after what has happened, it is not clear that he is obliged to risk what he may be liable to give, by paying it to the mother—which shows that her claim, and the claim of her child, are not necessarily identical. In the case of Pott, 7th December 1833, the action was not raised solely by the mother, but also by the child."

The respondent having reclaimed, the Court held that she could not to any effect pursue for her own behoof; and as she must be considered to have defrayed the inlying charges and the aliment of the child prior to the raising of the action, out of the sums acknowledged to have been received from the advocator, the action to that extent could not be sustained. But, on the other hand, as she could not discharge the claims of the child, or of any one actually alimentering him, and as it was not alleged that she was unfit to take charge of him, while an infant, that the action should be sustained at her instance, for behoof of the child, for the aliment due subsequent to its date.

The following interlocutor was pronounced:

"Recal the interlocutor of the Lord Ordinary; and in respect it is not alleged by the reclamer that she has contracted any debt for the bygone aliment of the child at the date of the action, sustains the defences founded on the discharge by the pursuer against her claims for inlying charges, or for bygone aliment prior to the date of the summons; and with this finding remit the cause to the Sheriff: Find the reclamer entitled to the expense of printing the note; modify the same to three guineas, and decern."

Lord Ordinary, Coekburn.—*For Advocator*, Rutherford, Graham Bell; *Laurence M. Macara*, W.S., *Agent.*—*For Respondent*, Solicitor-General (M'Neill), Rhind; Patrick Adam, S.S.C., *Agent.*—*T. Clerk.*—[J.W.]

12th February 1842.

SECOND DIVISION.—(J.W.)

No. 127.—CRAIG v. THOMSON.

Process—Proof—Reference to Oath—Production of Documents.

A party having brought an action against his client, ninety years of age, for recovery of certain business accounts which had prescribed, the record was closed without any productions being made, and a reference was made to the oath of the defender. In the reference a summons was produced, and the defender was asked if he recollected of the action relative thereto—Held that the document might be shown, to refresh the memory of the deponent, but could not be used in evidence to contradict his oath, or be produced in process.

Act, Maitland.—*Alt*, Turnbull.—[J.W.]

12th February 1842.

SECOND DIVISION.—(J.W.)

No. 128.—THOMAS DORES, *Pursuer*, v. MESSRS HORNE and ROSE, W.S., *Defenders*.

Diligence—*Reparation*—*Guarantee*—*Agent and Principal*—*Liability*—*A creditor having obtained decree and diligence against his debtor for the sum of £102. 6. 9½, the agents of the debtor wrote saying,—"we have now received authority to offer you, for an assignment of the debt and diligence, the sum of £85," which was accepted of. Eighteen days thereafter, the agents wrote, stating that the party expected to make the advance had found it impossible to give the money. In an*

action against the agents themselves—Held that they were personally liable to implement the offer which they had made.

In February and March 1841, the pursuer obtained decree and sentence against Mr Hamilton Miller for the sum of £102. 6. 9½, in virtue of which he executed a charge against him, and thereafter obtained a warrant for his apprehension and imprisonment. In consequence, the agents of Mr Miller, the defenders in the present action, addressed to the pursuer's agent a letter of offer for an assignment of the debt and diligence in the following terms:

"We received your letter of the 6th. We are authorised by a friend of Mr Miller to offer you payment of the expenses in the action, and a dividend of 10s. per pound on the principal sum, and the ordinary expense of diligence (but not that unnecessarily incurred by sending to Aberdour, &c.) on condition of an absolute supersederes of diligence, and an assignation to the debt to the extent paid, so as to allow the assignee to rank on any fund which may be realised from Mr Miller's claims on the Dalawinton estate."—"We can assure you that Mr Miller has not a sixpence to pay this or any other claim; and we are," &c.

This offer was duly communicated to the pursuer by his agent, who was instructed by him to address a letter to the defenders, which he accordingly did on the following day (10th April 1841), refusing the same, but at the same time making offer to accept of 10s. per pound on the principal sum and interest contained in the decree, with expenses of process and of diligence in full, and to grant a discharge or assignation of the debt and diligence at the expense of the defenders' client, if required. The defenders made two several applications to the agent of the pursuer for delay in communicating the above proposal, which was accordingly granted; and thereafter, on the 21st April, they addressed another letter of offer to the pursuer's agent, in the following terms:

"We have now received authority to offer you, for an assignment of Mr Dorea's decree and diligence against Mr Miller, £85, which we hope you will accept." "Mr Miller is now at home, in a state of health which renders personal diligence out of the question, and with the exception of what may be recovered in a difficult and complicated litigation with the Dalawinton trust, he has no fund out of which you can realise any thing. We are," &c.

On the 23d April, the pursuer directed his agent to accept of this offer, which he did in a letter in the following terms:

"*Edinburgh, 23d April 1841.*—I am favoured with yours of the 21st inst., making offer of £85 for an assignment of Mr Dorea's decree and diligence against Mr Hamilton Miller, to which Mr Dorea agrees,—the expense of the assignation falling on your client. I therefore send you enclosed the decree, in order that you may prepare the assignation. I am," &c.

On the 11th May, the defenders returned the decree and diligence, accompanied with the following note:

"We regret to be under the necessity of returning the decree Dorea v. Miller,—the party from whom Mr Miller expected the advance to pay you the composition proposed, having found it impossible at present to give him the money," &c.

In consequence the present action was raised, concluding against the defenders to implement their part of the letters of offer and acceptance by making payment to the pursuer of the sum of £85.

The defenders *pleaded*—1. The summons sets forth no relevant ground of action against the defenders personally. There is no *medium concludendi* from which personal liability can be inferred against the defenders,

in reference to a transaction in which confessedly they were acting as agents for a third party. 2. The defenders are not parties to any bargain or agreement with the pursuer, and did not become personally bound to purchase the pursuer's claim against their client Mr Miller, or to pay Mr Miller's debt to the pursuer, or any portion of it. 3. *Separatim*, and under reservation of the pleas above stated, The letters specially libelled do not contain or constitute a concluded bargain. Either party was entitled to resile, notwithstanding the letters libelled.

The record having been closed on summons and defences, the Lord Ordinary pronounced the following interlocutor:

"*5th November 1841.*—The Lord Ordinary having heard the counsel for the parties, and considered the process, sustains the defences, assolizies the defenders, and decerns: Finds the defenders entitled to expenses: Appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same and to report.

"*Note.*—A party, though he may in truth be acting for another, may undoubtedly so conduct or express himself as to constitute an obligation against himself personally. This was the position into which the defender placed himself in the case of *Sorley's trustees*, 14th February 1832; and it seems to have been that into which other agents placed themselves in the English decisions referred to by the pursuer. These authorities only show that the circumstance of the obligant being an agent, and describing himself as such, are not sufficient to prevent his becoming obliged. But though an agent may bind himself, the question here is, did the defenders do so?

"Now the Lord Ordinary thinks that they did not. The letters, especially when read together, show that they merely communicated a proposal made by an employer, who is recognised by the pursuer as *their client*. Every letter bears this to be their situation. The only obligation constituted against themselves is, that they shall disclose the person for whom they profess to be acting, and this it is not said that they have failed to do.

"The pursuer says that the offer communicated by them obstructed his diligence. But if he chose to abate his diligence during the discussion of a proposal perfectly honest on their part, they are not responsible for this.

"If the defenders had been bound personally, the Lord Ordinary would have disregarded their plea, that the pursuer's acceptance of the offer was qualified by a condition not agreed to. Because their silence, after that condition was intimated, was a virtual acceptance of it.

"But he decides upon the ground that there was no obligation, beyond that of revealing their party, constituted against them."

The pursuer reclaimed, and *argued*, that a law-agent does not stand in a more favourable situation than a factor in mercantile transactions, who is presumed to know the circumstances of the party for whom he acts; and those with whom he deals are entitled to go against either him or his principal: 1 Bell, 492. Young, 14th December 1831. Stevenson, 25th July 1836. *Burrel v. Jones*, 3 Barn. and Ald. p. 47. The Lord Ordinary says, that the defenders are only bound to disclose the party for whom they acted; but they are bound to disclose one able and willing to pay. Miss Miller was not called in the action because her name was not disclosed till after the action was instituted. The pursuer has no case against her, as no mandate has been produced; but if the defenders hold an authority from her to make the offer which they did, they will have their relief.

Answered—The principle contended for goes this length, that unless an agent, before he makes such an offer, has taken from his client a written mandate on

which action may be raised, he will be personally liable in implement. The question is, does Miss Miller dispute the authority which she gave? We say she is bound; and they don't say that she disowns the authority on which we proceeded.

At advising,

Lord Justice-Clerk.—I cannot concur with the Lord Ordinary. In my opinion, the case is clear for the pursuer, but it is one of great practical importance. In March, Dore held diligence against Mr Miller, and on the 6th of April, he writes inquiring whether he had any proposal to make for liquidation of the debt. Horne and Rose write on the 9th April—(reads letter.) This is an offer of payment, and contains a statement of Mr Miller's inability to pay one sixpence. Then comes the letter of the 21st April, making an offer of £5, and implying that the money was ready to be paid. It imports the belief of the agents that they had sufficient authority to make the offer, and amounts to a guarantee. The character and effect of the letter are most important. It relates to the matter of staying diligence when the creditor was ready to incarcerate, and when time was of the greatest moment. The party was a Sheriff, and no exertions would be spared by his friends in order to avoid what would lead to a forfeiture of his office. Here the diligence was to be immediately acted upon; and the letter imports immediate payment. One party was ready to imprison, and the other to pay. Where the funds were to be got, the creditor had nothing to do with. After caption, such an offer implies that the money is ready to be paid. If the pursuer's agent had sent for the money next day, with the assignation signed, the defenders were bound to pay. In many matters conducted through agents, they are, at the utmost, only liable for damage—not implement; but in an offer of this kind for staying diligence, all distinction between principal and agent is excluded. The offer succeeds, and the diligence is stayed. Their letter was a guarantee that they had the money ready on demand. The offer was not to be the commencement of new proceedings, but only payment, as if caption were in the hands of the messenger. Agents ought not to interfere, if not certain that the money will be provided; or if uncertain, they ought to make the creditor acquainted with it. In staying diligence, the party who makes the offer is truly the principal. The doctrine of the Lord Ordinary, that the agent is only bound to disclose the principal, is utterly inapplicable to such a case. If there is a principal able, bound and willing, to pay, then there will be no question; but it is not enough that the agent produce a principal able and bound. If not also willing, he gives only a law-suit and not payment. If he has mistaken the instructions of his principal, he must carry on the suit for his own relief. I don't go upon the specialties at all, but upon broad principle. It is asked, why does not the pursuer ascertain whether Miss Miller disowns the authority given to the defenders? But is that an offer to pay £86? The facts just show the duty and liability of agents. The agent ought to know and be sure of his ground before he makes such an offer. If the defenders have a written mandate from Miss Miller, they are safe; if they have not, parole evidence is questionable; and then, in an action at the instance of the pursuer, Horne and Rose would be objected to as witnesses without a discharge from the creditor, and thus he would lose his recourse against them.

Lord Medwyn.—I agree with your Lordship. I don't think that a law-agent in all cases incurs the responsibility of a mercantile factor; but he may so act as to render himself personally liable. When a party, on the faith of an offer, has done something which cannot be recalled, the agent is bound to produce a responsible person. Here the diligence was ready. The agents believed that the transaction would go on, and on the 23d of April it was completed. During all this time diligence was suspended, when payment might have been recovered. On the 1st and 11th of May, the pursuer remonstrates against delay, and then he receives the letter returning the decree, and stating that the party expected to advance the composition could not give the money. I do not see how the pursuer could have had any action against Miss Miller, because she had not bound herself, nor was he bound to proceed against her. The

offer and acceptance being counterparts, and acted on for a month, it is too late for the defenders to disclose their principal in this process. They should have ascertained that Miss Miller was able as well as willing to give the money; and they ought to have avoided delay.

Lord Moncreiff.—I have given a great deal of consideration to this case, and I cannot say that I differ from your Lordships in the result; but I do not think it an easy case, and I would not throw out of view the specialties. For if an agent writes to a creditor in terms of the letter founded on here, for the purpose of staying diligence, and if immediately thereafter he wrote, stating that the party resiled,—and if he disclosed the party's name, and gave the authority on which he made the offer,—I see no example laid down, or decided in law, for holding that the agent would be personally liable. *Gordon v. Hill*, 18th November 1839, bears a little on one point. An action was raised on a prescribed bill. The pursuer was willing to compromise, and the agent of the defender wrote, saying distinctly, I offer £50 as a settlement of the case. Afterwards he discovered that the bill was on a wrong stamp, and then attempted to retreat from the offer he had made. No action was brought against the agent but against the principal, and the pursuer got decree. The party for whom the agent made the offer was solvent; and in the case I have supposed, I assume that the party is solvent. In such a case, I find no authority for bringing an action directly against the agent without calling the principal. Diligence is a much stronger case than any other, and the offerer should be prepared to pay; but I would be sorry to lay it down as a rule, that action could proceed against an agent direct, if he gives up a solvent party, and shows his authority. In the English case quoted, and also in *Sorley*, there was a plain guarantee. If the case were to be decided on abstract law, I think it a very doubtful case; but the offer having been made with the view of staying diligence, the agent ought to have been certain of fulfilling it before he made it. I cannot throw out of view the specialties of the case; but considering them, I don't see how the agents can be relieved. It is not stated that they had any authority from Miss Miller on which action could have proceeded. It is said Miss Miller does not deny having given authority; but that is not enough. It is sufficient for the pursuer, at the present stage, that her authority is not produced. Looking to the delay which occurred, and taking all the circumstances into account, along with the peculiar nature of the case—the staying of diligence—I think that the agents are liable.

Lord Meadowbank absent.

The Court *altered*, decerned in terms of the libel, and found expenses due.

Lord Ordinary, Cockburn.—*Act*. Rutherford, Mure; Robert Anderson, S.S.C., *Agent*.—*Alt*. Solicitor-General (McNeill), Inglis; Parties *Agents*.—*T. Clerk*.—[J.W.]

15th February 1842.

SECOND DIVISION.—(J. W.)

No. 129.—JOHN GREGORSON and OTHERS, *Raisers*, v. ARCHIBALD EDWARD MACDONALD, *Claimant*.

Trust-Deed—*Trustees*, Discretionary Powers of—*Process*—*Multiplepinding*—*Competency*.—A testator bequeathed the sum of £3000 to his natural son, the interest of which he appointed to be applied in defraying the expense of his board and education, "until he make choice of a profession; and how soon my trustees are satisfied that he is doing well in such profession, and that it will be prudent to give him the command of the capital sum," to pay it over to him. The legatee, after having completed his thirty-second year, finally made choice of the business of a farmer, but had not taken any farm; and under these circumstances, required that the legacy bequeathed to him by his father should be paid over to him. The trustees raised a multiplepinding, for the purpose of having it determined whether they were warranted to comply with the demand. The action was dismissed, 1st, in respect of its being incompetent in the form of a multiplepinding; and, 2d, in re-

spect that the question raised was matter for the discretion of the trustees in the first instance.

The question at issue relates to the construction of the following bequest, contained in the trust-deed of the late Alexander Macdonald of Glenaladale:

"Second, I leave and bequeath to my natural son, Archibald Edward Macdonald, the sum of £3000 Sterling, with which my lands and estate of Glenaladale are hereby burdened in manner after mentioned, and bearing interest from the first term of Whitsunday or Martinmas after my death, £1000 of which I appoint my trustee or trustees to invest in his or their names upon a redeemable annuity, the income of which to be applied in defraying the expense of the said Archibald Edward Macdonald's board and education, and until he make choice of a profession; and how soon my said trustees are satisfied that he is doing well in such profession, and that it will be prudent to give him the command of the foresaid capital sum of £3000, I hereby direct and appoint them to invest him in the right of the said annuity-bond of £1000, and convey to him such other security as they may hold for the remaining £2000, in order that he may be put in the absolute right of the whole."

The testator died in January 1815, and the claimant reached majority in November 1830. The £1000 referred to in the trust-deed was never invested upon a redeemable annuity, it being considered by the trustees and the claimant inexpedient and unnecessary. No part of the £3000 has ever been paid, and the whole of that sum, together with about £800 of accumulated interest, is now in the hands of the trustees.

After the education of the claimant was completed, exertions were used by the trustees to procure for him a commission in the army, but without success. The profession of a civil-engineer, to which he afterwards directed his attention, was also abandoned as unsuitable. The only other business or employment for which he has shown a preference, is that of a farmer, and for some time past he has been occupied in acquiring the practical knowledge necessary to qualify him for that line of life. As yet, however, he has not taken any farm nor commenced business on his own account.

Under these circumstances, the claimant having required that the capital provision left by his father, should be immediately paid over to him; and the pursuers having entertained doubts how far, in the right execution of the trust committed to them, they would be warranted to comply with this demand—the claimant having not yet entered upon a profession, it was arranged that the present process of multipointing should be brought for the purpose of having the question judicially determined.

The Lord Ordinary, after hearing parties on the closed record, ordered minutes of debate to be given in, and made avizandum therewith to the Lords of the Second Division, accompanying his interlocutor with the following note:

"The object of both parties in this amicable suit is, to have an early and authoritative judgment of the Court on the question that has arisen between them as to the construction of the trust-deed. To facilitate their views in this respect, the Lord Ordinary has at once taken the cause to report.

"Had he been to dispose of the matter himself, his decided inclination would have been to sustain the claim for Mr Macdonald.

"Apart from the words of the bequest, the material facts of the case seem to be these:—1st, That the trust-deed bears date in October 1815, and was apparently executed in the prospect and anticipation of its being speedily followed by the dissolution of the testator,—his death having actually taken place in January

thereafter. 2d, That the claimant, to provide for whom was the object of the bequest, was then a mere child, not quite seven years old, it being admitted that he did not reach majority till November 1830. 3d, That with the single exception of this bequest, there were no means ever provided, or ever likely to be provided, whether for the claimant's maintenance and education in childhood, or for settling him in a profession in a more advanced age; and that as this was known to the testator (the claimant being his natural son), it is fairly to be presumed, that whatever directions were adjoined by him as to the management and disposal of the fund bequeathed, the primary end and intent of the bequest must have been to render the same as available as possible for the claimant's settlement in life. 4th, That the claimant has now completed, or is just about to complete his thirty-second year, having still no other means belonging to him than what the bequest affords, and that after various attempts on the part of the trustees, first to procure for him a commission in the army, and afterwards to educate and bring him up as a civil-engineer, &c., which are admitted to have been unsuccessful, he has himself finally made his choice to follow the profession of a farmer, having (as the trustees themselves state, revised minute, p. 5), 'for a considerable time past been engaged in qualifying himself for following out that line of life,' though not having as yet actually 'taken any farm, or commenced business on his own account.'

"So far the parties are at one. But, while the claimant, on the one hand, demands his legacy, not merely as indispensable for enabling him to prosecute the farming business with success, but as essential even to his entering, with any regard to prudence, upon the responsibilities of tenant, by taking and stocking a farm at all,—the trustees, upon the other, hold themselves not in safety to comply, conceiving that, by the terms of the bequest, it is requisite that the claimant not only shall have made choice of a profession, but shall, moreover, in order to entitle him to payment of his legacy, 'have made such progress in it, as to afford reasonable evidence that it would be safe and prudent to intrust him with the entire command of the money.'

"The trustees do not allege that there is anything in the conduct or character of the claimant to render it, in their own estimation, supposing them to have been vested with a full and absolute discretion in the matter, unsafe or imprudent to intrust him with the disposal and management of his own money. Neither do they say, that in proposing to follow the business of a farmer, he has made choice of a profession for which he is not qualified, or which he does not mean in good faith, and with reasonable prospects of success, to pursue. Finally, they do not say, that if he be to pursue it, the possession and application, for that end, of the money which he now demands, would not greatly enhance his chances of succeeding. The first element, therefore, for a decision in the claimant's favour, seems here to exist in its fullest force, viz., that unless from a supposed defect of power, rested on the express intention and will of the testator, the trustees have themselves nothing to object to the claim, and would not, on any grounds within their own mere discretion, have resisted it. Indeed, looking to the mature age at which the claimant has now arrived, and the acknowledged fact that nothing but want of the necessary means has prevented him before now from entering upon, and successfully prosecuting the business of his choice, it would be difficult for the trustees, in any pure question of discretion, to have arrived at any other conclusion.

"Accordingly, the trustees have hardly ventured to maintain, that but for the accumulated interest accruing on the legacy, and now in their hands, to the amount of about £800, which they represent as 'probably adequate to enable him to take and stock a farm in every respect suitable for a beginner,' they could have had any justification for withholding payment of the legacy. Indeed, had the interest been annually consumed, as the testator appears to have intended, in the expense of the claimant's education and maintenance, the trustees, before they could have made good such a result, must have been prepared to contend that the claimant, down to the very last moment of his life, unless he could successfully establish himself in a profession, without the possession of any means whatever, must have been content to see the provision left by his father for the express purpose of his advancement, remain wholly idle and unproductive.

" But this accumulation of interest, the Lord Ordinary is disposed to regard as a mere *accident* in the case. It was not in the view of the testator in making his settlement, and ought not, therefore, to be considered now, in any attempt to spell out his meaning. It might, besides, at any time have been put an end to by the claimant—as, indeed, it may be even now—by simply uplifting what is his own absolute property. Had it been so, the same abstract question, as to the true reading and intent of the trust-deed, and the powers thereby vested in the trustees, would still have remained. An imprudent and extravagant expenditure of the interest might no doubt have been dealt with by the trustees, in coming to a *discretionary* judgment, how far it might be safe to intrust him also with the principal. But where it is conceded that they have nothing, in point of mere *discretion*, to urge, where no objection has been taken on that head, and where the very accumulation of the interest speaks to the prudence and propriety of the claimant's past conduct, and consequently to the chances of ' his doing well in the profession ' of which he has made choice—it is quite plain, that so far as the question of *construction* goes, viz., whether it be within the *power* or beyond the *power* of the trustees to pay this legacy—(the expediency, in mere *discretion*, not being contested),—this matter, arising out of the accidental accumulation of interests, can have no proper place.

" Is there, then, anything in the words of bequest which should, in point of mere *construction*, constrain and force the trustees to do otherwise than they would have been disposed to do, supposing them to have had unlimited *discretion*?

" 1. In the first place, the legacy is so given, as *ex concessis* to vest at once *a morte testatoris*.

" 2. There is no destination over, so as to raise a conflicting interest in any third party. The legatee is not to forfeit his right, happen what may. In no event is the provision to lapse, so as even to fall back into the residuary estate. Whether he choose a profession, and choosing it succeed,—or the reverse,—the power of ultimate disposal is with him. He may test upon it. He may convey it *inter vivos*. If he get into debt, his creditors may attach it. Even the interest annually to accrue upon it, is not secured from their diligence. It is not declared an alimentary provision, nor in any way protected, so as to be available against the day of misfortune. To what end, then, withhold it, when it may be best turned to account for his advancement? And why force him to dispose of it—at a loss it may be—by a sort of *post obit* transaction? If there be no good end to answer, it is not to be *presumed* that such was the testator's intention. He obviously meant to do what was best for the legatee. And without express words of positive and unbending direction, the construction which would lead to an opposite result is, *in dubio*, to be rejected.

" 3. But there are no words of positive and unbending direction. The bequest itself is absolute: and, so far as there is any suspensive quality adjoined to its payment, not only is its existence left at best to mere implication, but there is a peculiar ambiguity in the expression of the deed as to the very *term* and endurance of the suspense. Thus, as to the income derivable from the £1000 appointed to be invested upon redeemable annuity, it is said that it shall be applied by the trustees in defraying the expense of the legatee's ' board and education, and *until he make choice of a profession*.' But what is to happen *after* he has so made his choice? Is the application of this income then to stop? The trustees, in this argument of *construction*, ought consistently to have maintained, that they have no power to pay the income, any more than the *principal*, until they be satisfied ' that he is *doing well in such profession*.' But this could never be maintained. And therefore, taking the clause as a whole, the Lord Ordinary thinks that, both as to income and stock,—the ' making choice of a profession,' when the income is to stop, and ' the doing well in such profession,' when the stock is to be handed over, are to be taken as equivalent and co-ordinate forms of words, and to be construed, not as inferring two distinct *termini* for two diverse and separate events, but as being mere duplicate expressions of what, in the testator's mind, had substantially reference but to one and the same event. There was plainly to be no interval between the cessation of the income, as referable to one event, and the payment of the capital as referable to another. The two branches of the clause,

therefore, and the diversity of expression employed in each, must, in some way or other, be reconciled. Now this, as it appears, may fairly enough, and without any violence to the just spirit of the bequest, be done by holding the testator to have intended,—on the one hand, by ' the choice of a profession,' and on the other, by his ' doing well in such profession,'—just such a deliberate, persevering, and steady devotion of himself to a particular business or calling, by the legatee, and such a previous endeavour to qualify himself for its successful prosecution, as might entitle the trustees reasonably to infer that he would do well in it, without exacting, as an additional test, anything so extravagant and absurd on the face of it, as that he should *actually have succeeded* in settling himself lucratively in business, without either capital or assistance of any kind to start with.

" 4. If, indeed, the opposite construction contended for by the trustees were to be adopted, the all but unavoidable result must be, that the legacy would not become payable during the whole lifetime of the legatee. It is very true, that as things have turned out, there is a separate fund now extant, to the amount of £800, from the accumulation of interest in their hands, wherewith, as the trustees have submitted, the claimant may probably be enabled to start well enough as ' a beginner.' But, as already remarked, this was not in the testator's view, and must be treated as an accident. What the testator looked forward to, was the advancement of his son, by the direct aid of the *capital* of the provision. He never intended that the best years of his son's life should be spent in idleness, in order to hoard up a separate stock, from miserable savings out of his annual income, wherewith to set him up at the ripe age of thirty-two, or later, in a comparatively trifling business by way of ' a beginning.' He left his son a child, and therefore naturally trusted him so far to the discretion of his trustees. But it was only to this effect, that they should be enabled to superintend his education, until, as the Lord Ordinary has proposed to read the clause, he had made choice of a profession. And how soon he had done this, under such circumstances as to give augury of success, and to satisfy them—for that, after all, is the substance of the matter—that it will be prudent to give him the command of the forsoaid capital,—he enjoined them to pay it over,—having nowhere, it will be observed, given counter injunction that they should even, under any circumstances, withhold payment of the money altogether. The Lord Ordinary is satisfied that the money has already been withheld too long; and that it cannot longer be withheld without defeating the primary end that the testator had in view in making the provision.

" 5. Finally, even if the claimant had refused to betake himself to any profession, and had resolved to employ his money, for example, in the purchase of a life annuity, the Lord Ordinary is by no means satisfied that the trustees could have refused payment. He understands the rule to be, that even where a legacy is expressly given to answer a *particular purpose*, if this purpose be disappointed, without fault in the legator, the legatee is still entitled to the legacy, it being considered that the property was intended for the legatee *at all events*, and that the mode directed for its application was merely a *secondary* consideration, and independent of the gift. In England, accordingly (and with regard to the construction of legacies our law does not rest on a different principle), *Roper* gives us an instance of this, the case ' of a sum of money being left for the benefit of an infant, as an apprentice fee, and he is never placed in the situation or character of an apprentice.'—(1 *Roper on Legacies*, 551; 2 *Ib.* 433.) But the present case is still stronger, for the legacy in itself, so far as the mere words of gift go, was not here given for any particular purpose. It was given absolutely, and was not made, either *ex figura verborum* or otherwise, defeasible upon any contingency. If the legatee, therefore, do not choose a profession, shall the legacy be postponed or forfeited? Or rather, shall not the directory words be made to yield to the shape in which the case actually presents itself, and (the supposed condition implied in these words being but of secondary consideration, and no longer applicable to the actual case) the legacy still be rendered available to the legatee, as a gift which was at all events, and under whatever circumstances, to endure for his benefit.

"There is a separate question raised by the trustees. Whether they be not still under an obligation to invest £1000 of the legacy upon redeemable annuity? But if the Lord Ordinary's view of the case be otherwise well founded, there would seem to be no reason why the claimant, now that he is *sui juris*, should not, as the sole party interested, have his own way as to this matter. He is now, according to that view, entitled to demand and discharge the entire provision; and even were an annuity to be purchased, he would be entitled, immediately on getting a conveyance to it, to dispose of it at his pleasure. Besides, as the sole object of purchasing the annuity was, from the first, to enlarge the income for the claimant's board and education, 'until he made choice of a profession,' now that the claimant has actually made that choice, there seems still less reason, than at any former period, to make such an investment. If the trustees, having the claimant's consent, were justified in not doing so hitherto, and, more especially, if their abstaining be placed, as they have placed it, on the footing that investment in that form was inexpedient, surely still more must they be justified, on the same ground, in continuing in the same course now, when they are about to make, once for all, a final settlement with the claimant for the whole provision."

At advising,

Lord Justice-Clerk.—I doubt the right of the trustees to ask the advice of the Court in this matter. If it was left by the trustee to their discretion, they must judge and act for themselves. Besides, a multiplepinding is not the proper form of action.

Lord Medwyn.—I have the same opinion. Looking to the terms of the trust-deed, it is a matter of discretion, which the trustees must exercise in the first instance.

Lord Moncreiff.—If there were a question as to the power of the trustees, it would be different. But this is a multiplepinding with only one party, and the trustees just want the advice of the Court. The discretion is with themselves, and it rests with them, in the first instance, to exercise it. If the beneficiary should be dissatisfied, he might then come to the Court and get an opinion. If there be any ambiguity in the trust-deed, a declarator may be brought; but the present form of action is objectionable.

Lord Meadowbank absent.

The Court dismissed the action—*first*, in respect of its form; and, *second*, in respect that the question raised was a matter for the discretion of the trustees in the first instance.

Lord Ordinary, Ivory.—*Act. Miller; Adam M'Cheyne, W.S., Agent.*—*Alt. G. G. Bell; Fraser and Crawford, W.S., Agents.*—*T. Clerk.*—[J.W.]

15th February 1842.

SECOND DIVISION.—(J. W.)

No. 130.—ANDREW CLASON, W.S., *Pursuer, v. DAVID BLACK and OTHERS, Defendants.*

Public Officer.—Messenger.—Reparation.—Negligence.—Process.—Statute 1672, c. 6.—*A messenger having returned an execution of a summons in which a number of the defenders were neither named nor designed, and the action having in consequence been dismissed, and the pursuer found liable in expenses—Held, in an action by the pursuer against the messenger, that he was liable for the expenses paid to the defender, and for those incurred by the pursuer himself, in raising, executing, and bringing into Court the summons in the original action, as well as in maintaining the same against the preliminary defence founded on the invalidity of the execution returned.*

The pursuer, in the month of March 1837, transmitted to Mr Alexander M'Arthur a summons of wakening and transference, in order that it might be executed against such of the defenders in the libel as resided in the neighbourhood of Inverary. Mr MacArthur put the summons into the hands of the defender,

with instructions to execute it, *inter alios*, against John Campbell, late of Craignure, and the defender returned the summons, professing to have duly executed the same against all the parties named in the execution,—in particular, against the said John Campbell.

None of the defenders called or cited to the libel lodged defences, with the exception of Mr Campbell, who proponed the plea of no process, in respect that the parties thereto were not designed in terms of law in the executions of citation returned by the messengers employed. This defence was founded upon the terms of the Act 1672, c. 6, which enacts, that all executions of summonses shall "bear expressly the names and designations of the parties, pursuers and defenders, and it shall not be sufficient that the same do relate generally to the summons, otherwise the execution shall not be sustained,"—the allegation in the defence being, that in the execution against the said John Campbell, a number of the other defenders called to the action were neither named nor designed.

The Lord Ordinary, 4th July 1837, sustained the dilatory defence, dismissed the process as incompetent, and found the pursuer liable to Mr Campbell in expenses. This interlocutor was intimated by the pursuer to the defender on 10th July 1837, and led to considerable correspondence. Ultimately, however, the defender wrote, 4th September 1837,

"I decline to give any advice, or to interfere in the matter, being satisfied that the alleged blunder is not one for which I am responsible, under all the circumstances of the case. I consider the objection untenable, and shall maintain the validity of the execution in any action to which I may be made a party."

In these circumstances the pursuer reclaimed against the Lord Ordinary's interlocutor; but the reclaiming note was refused by the Court on 21st December 1837, and the pursuer was subjected to Mr Campbell in additional expenses,—(*Vide Vol. X. p. 171*). Mr Campbell's expenses amounted to £26. 3. 2., and were paid by the pursuer. He also incurred the sum of £31. 4s. 5½d. in raising the summons and discussing the dilatory defence.

The present action is directed against Mr Black the messenger, and his two cautioners, and concludes for payment of the above sums, amounting to £57. 7. 7½.

Pleaded by the pursuer—1. The expenses sued for having been occasioned by the negligence or want of skill of the defender Black, in the execution of his duty as a messenger-at arms, he and his cautioners are liable in reimbursement thereof to the pursuer. 2. There are no grounds relevantly set forth, or truly existing, on which this liability can be evaded; and more particularly, (1.) The alleged irregularity of the summons can form no justification to the defender for his neglect of duty, or for the erroneous and inept execution returned by him. (2.) The summons was not, in point of fact, irregular. (3.) Even the irregularities, as alleged, could only have rendered the summons defective as a warrant of citation against Mr Harkness alone, which might have been obviated by that gentleman voluntarily appearing, or by a supplementary summons; and this, again, forms no justification for the defender's contravention of duty in not executing the summons.

Pleaded by the defender—The action is unfounded, 1. In respect that the pursuer has not suffered any

damage through the fault or negligence of the defenders, or either of them, for which they are legally responsible. 2. More particularly, in respect that the pursuer's said original summons of wakening and transference was null, void, and objectionable, having been vitiated by erasures *in essentialibus*, having contained no valid and effectual will or warrant of citation, and having been inconsistent with, and unwarranted by the bill and the deliverance thereon, on which it bore to have passed the Signet. 3. That the draft of the defender's execution libelled, was specially revised and approved of by the pursuer's country agent, as well as by the pursuer himself, before appearance was entered under said summons. 4. As also, in respect of the difficulty of the question in regard to the formality of the said execution, and the general practice in conformity therewith in similar cases. 5. On the part of the defender Mr Black, the messenger, it is separately submitted, (1.) That the pursuer's claim is unfounded, in respect that the defender's execution was valid and sufficient, and conform to the general practice in similar cases: (2.) That the defender cannot, in any view, be liable for that part of the expenses claimed, which were incurred prior to the 10th July 1837, the date of intimation of the said preliminary defence to him as aforesaid. 6. On the part of the cautioners, Messrs Paterson and Livingstone, it is submitted that they cannot, in any view, be liable for the expenses claimed, seeing that they did not receive intimation of the said preliminary defence until long after it had been finally sustained by the Court.

The Lord Ordinary pronounced the following interlocutor:

"2d November 1841.—The Lord Ordinary having heard parties on the closed record, and made avizandum, repels the defences: Finds that the defenders are liable to the pursuer,—the defender, David Black, primarily as principal debtor, and the other defenders, Archibald Paterson and Donald Livingstone, conjunctly and severally *subsidiarie* as his cautioners,—*primo*, for the sum of £26. 3. 2., being the admitted expenses decreed for against, and paid by the pursuer in the original process at his instance against Mr Campbell and others; and also, *secundo*, for the expenses incurred by the pursuer himself in raising, executing and bringing into Court the summons in the said original action, as well as in maintaining the same against the preliminary defence founded on the invalidity of the execution returned by Black, as the said expenses shall be taxed by the auditor of Court between agent and client, with interest upon both sums of expenses from the date of citation in the present action; remits the last-mentioned account of expenses to the auditor to tax and report: Finds the pursuer farther entitled to his expenses in this process; remits the account thereof likewise to the auditor to tax and report, and decerns.

"*Note*.—1. On the main defence, so far as regards the expenses paid by the pursuer to Campbell, and his own expenses, at all events *from the date of intimating* the proceedings upon the preliminary defence, there can, it is thought, be no doubt that he is entitled to decree. The case of *Henderson*, 3d March 1831, is, to this extent, a distinct authority in his favour.

"But, even as regards the expenses incurred by the pursuer prior to the intimation, the Lord Ordinary has felt himself bound to adopt the rule of decision unanimously given effect to in the later case—*Collier*, 6th December 1836; and to decern also for these. The present is, indeed, a stronger case in this respect than *Collier's*; for not only did Black here (to use Lord Balfour's words), 'allow the litigation to go on without objection, and would have taken the full benefit of it all, had it proved successful;' but he expressly 'declined to give any advice, or to interfere in the matter,' and insisted 'that the alleged blunder is not one for which I am responsible, under all the circumstances

of the case. I consider the objection untenable, and shall maintain the validity of the execution in any action to which I may be made a party.' And accordingly, down to the very last, even in the present action, he has contended 'that the pursuer's claim is unfounded, in respect that the respondent's said execution was valid and sufficient, and conform to the general practice in similar cases.'

"Even according to *Henderson's* case, it would be but a comparatively trifling deduction to which the defenders would be entitled; for, in any view, the expense of raising, executing, and bringing into Court of the original action, would seem to be a loss of which they must relieve the pursuer. The question would thus be reduced to the mere expense of the Outer House debate on the preliminary defence.

"2. The other grounds of defence, the Lord Ordinary does not consider to have any weight."

The defenders reclaimed. At advising,

Lord Medwyn.—I do not think there is any specialty in this case to relieve Black. The country agent may have seen, but does not appear to have taken charge of the execution returned. Neither was it found to be incorrect, in consequence of the error in the will of the summons; but, in terms of the statutory law of the land, a messenger has a peculiar duty to perform, and he is bound to know the statutory law which regulates it.

Lord Moncreiff.—I am clearly of the same opinion. This was a statutory duty, and the messenger fails in that duty; and in consequence, the summons was found not duly executed, and dismissed. The preliminary defence was settled summarily, and there was no time for intimation; but the pursuer immediately thereafter gave notice of the interlocutor pronounced. I have not the least idea that the messenger can relieve himself by sending a draft of the execution to be revised by the country agent, who was not employed to do that, but merely to put the summons into the hands of the messenger.

Lord Justice-Clerk.—I am of the same opinion. I had an idea that the execution was revised by the agent in the country, but this would not relieve the messenger, as the agent had no mandate from Clason to do so. Nor can I admit, that when a preliminary defence is stated, the want of immediate intimation will relieve the messenger. Often there is not time; and when a party receives an execution, he is entitled to hold it good, and go on to defend it—not certainly to any protracted litigation; but there is no such specialty here, and I think it precisely a case of liability for which the messenger must be answerable.

Lord Meadowbank absent.

The Court refused the note, with additional expenses.

Lord Ordinary, Ivory.—*Act*. G. G. Bell; Andrew Clason, W.S., *Agent*.—*Alt. Solicitor-General* (M'Neill), Horn; John Ross, S.S.C., *Agent*.—*T. Clerk*.—[J. W.]

16th February 1842.

SECOND DIVISION.—(J. W.)

NO. 131.—*HERITORS and KIRK-SESSION OF AYTON, Advocators, v. HERITORS and KIRK-SESSION of COLDINGHAM, and JEAN ALLAN, Respondents.*

Parish—Commonry—Aliment—Usage—Proof—In a question between two parishes as to the locality of the residence of a pauper, and the liability of the one or the other to aliment her—Held that as lands can be neither extra-parochial, nor belong in common and pro indiviso to several parishes, the different portions of a common, allotted in a process of division before the Court of Session, do not accresce to, and form part of, the parishes in which the different dominant tenements are situated.

Parish—Commonry—Title—Usage—One of the allotments of a commonry having been feued out subsequent to a decree of division—Circumstances in which the usage following thereupon was found insufficient to annex the feu to a parish different from that in which it was described as lying by the feu-contract.

This action originated in a petition presented by Jean Allan to the Sheriff of Berwickshire, craving him

to ordain the Heritors and Kirk-session of the parish of Ayton to modify aliment to her and her indigent family. The Heritors and Kirk-session put in answers, in which they submitted that the late husband of the petitioner possessed a property (of which the petitioner is liferentrix) situated in Coldingham Moor, in the parish of Coldingham, where he died, and where he had resided for five years immediately preceding his death. The Heritors and Kirk-session of Coldingham thereupon sisted themselves in the action; and the question at issue between the two parishes is, which of them is liable for the support of the petitioner? The solution of this question depends on the fact, whether the lands of Laverock Law lie in the parish of Ayton or the parish of Coldingham Moor.

Coldingham Moor, of which Laverock Law is a part, was a commonity surrounded by dominant lands, situated in several different parishes. In 1772, a process of division was raised before the Court of Session, and a claim having been made by Mr Fordyce of Ayton, in respect of his lands in the parish of Ayton, a share of the common, extending to 602 acres, was allocated to him in property, as part and pertinent of his lands. Soon after, Mr Fordyce converted his share into a separate farm, and gave it the name of Laverock Law. By a feu-disposition, dated 24th March, he feued out part of this farm to the husband of the petitioner, and the ground is described in the title as "lying in the parish of Coldingham, and sheriffdom of Berwick," &c. A record having been made up, and a proof allowed and adduced for both parties, the Sheriff appointed minutes of debate to be lodged in process.

Argued for the parish of Ayton—

In Carr's History of Coldingham Priory, it is observed,—"The parish of Coldingham is, with the exception of that of Lauder, the largest in the county of Berwick, containing within its area 57,600 imperial acres, upwards of 5000 of which form the extensive waste called Coldingham Moor." Again, at page 131,—
 "After the arrangement of parishes, the present parishes of Ayton, Eyemouth, and Coldingham, formed the then parish of Coldingham. At the Reformation, Ayton was disjoined from Coldingham, and united with Lamberton; but not long afterwards, it became, as it is now, a parish *per se*." According to the county map of Berwickshire, in the Scotch Atlas, and the large map of Sharp, Greenwood, and Fowler, published in 1826, the whole of the tract, known as Coldingham Moor, and in the very centre of which lies the allotment of Laverock Law, is entirely within the bounds of the parish of Coldingham. The terms in which the common is described in the decret of division 1776, are—"the commonity, commonly called the Commonity of Coldingham, or Coldingham Moor." In all the leases and feus of Laverock Law, the lands are described as "lying in the parish of Coldingham." Down to 1830, the whole of Mr Fordyce's tenants and feuars in Coldingham Moor, including Laverock Law, have been invariably charged for, and paid statute-labour conversion-money, as in the parish of Coldingham. Although feuars alone, and not superiors, are legally liable in poors-rates, the feuars of Laverock Law have never been so charged in the parish of Ayton, and though charged for road-money, for two years subsequent to 1830, payment was effectually resisted, and at last, by a minute of the Commissioners of Supply, they were allowed to expend it "on the roads passing through their own lands." According to the law of Scotland, no land is extra-parochial. And the Moor of Coldingham was at no time common to several parishes, but belonged either entirely to one parish, or in distinct and separate portions to more than one parish. The situation of a common, as within any particular parish, cannot be affected by the locality of the several dominant lands whose owners have an interest therein. The only competent tribunal by which the

boundaries of a parish can be altered, is the Court of Teinds; and the Moor of Coldingham, including the lands of Laverock Law, being locally situated within the bounds of the parish of Coldingham, and having, prior to the division of the commonity, formed part of that parish, no portion thereof could be transferred to, or fixed in another parish, by virtue of the decree of division pronounced by the Court of Session, or by any usage following thereupon.

Argued for the parish of Coldingham—

According to Chalmers, in the historical account which he gives of the Monastery of Coldingham, in his Caledonia, Vol. II. p. 226, it appears "that before the Reformation, the monks of Coldingham had acquired in *proprios usus*, the churches of Coldingham, Ald-Cambus, Ayton, Fishwick, &c.; a fact which shows clearly that both Ayton and Ald-Cambus were then separate parishes, just as much as Coldingham. The titles of Mr Fordyce describe his lands as all lying within the parochia of Ayton; and where a party is infeft under a bounding charter, by which his lands are expressed to lie within a particular parish, such limitation will form an absolute bar to his prescribing any right of property in lands beyond the boundaries expressed in his charter. Accordingly, if the commonity in question had been wholly situated in the parish of Coldingham, the proprietor of Ayton could not have been found entitled, in the division, to a share in the property of the common: Hepburn v. Duke of Gordon, 25th November 1823. 1st, It is admitted, that ever since the date of a division of the valued rent in 1779, the lands of Laverock Law have always been separately rated, and have paid cess, bridge, and rogue-money, and all other county burdens, as being a part of the parish of Ayton. 2d, Both prior and subsequent to the division, the lands of Laverock Law have always paid stipend, *in cumulo* with the rest of the barony of Ayton, to the minister of the parish of Ayton; and it is admitted that they have never paid stipend to the minister of the parish of Coldingham. 3d, It is further admitted and proved by the documents in process, that the proprietor and tenants of Laverock Law have always paid schoolmaster's salary to the schoolmaster of the parish of Ayton, and have never made any similar payments to the schoolmaster of Coldingham. 4th, It is admitted, that neither the proprietor nor tenants of the lands of Laverock Law have ever at any time been charged with, or paid poors' rates in the parish of Coldingham. 5th, It is proved by the lists produced, corroborated by the evidence of the sheriff-officer, that the residents on the lands of Laverock Law, including the husband of the present petitioner, were charged for road-money in the parish of Ayton, that warrants to poind were from time to time applied for, obtained and executed by the collector against the defaulters, and that although little was recovered in this way, no appeal was ever made on the ground of the parties having been charged in a wrong parish; and lastly, what is equivalent to actual payment, the parties so charged were allowed by the statute-labour trustees, upon their application to that effect, to expend the sums charged against them upon the repair of their own roads. 6th, That the persons residing at Laverock Law, liable to serve in the militia of the county of Berwick, were included in the militia lists for the parish of Ayton, and that none of these persons were ever included in the lists for Coldingham is proved by the lists produced in process. 7th, The notoriety of the fact, that Laverock Law was within the parish of Ayton, is farther demonstrated by the circumstance, that the inhabitants were included in the population of that parish at the last census of 1831; that they gave up their names for proclamation, with a view to marriage, there; that the persons resident at Laverock Law, qualified to act as jurymen, were returned in lists for that parish, and that they claimed and were enrolled as voters in the same parish. The lands of Laverock Law having thus, for the last sixty years and upwards, formed an undoubted part and parcel of the barony of Ayton, which is confessedly situated wholly within the parish of Ayton, and the said lands, and the owners and occupiers thereof respectively, having been, during the whole of that period, recognised and treated, in regard to all public and parochial burdens, rights and privileges, as a part of the parish of Ayton, these facts amount to conclusive legal evidence, that the said lands of Laverock Law do belong to, and form a part

of the said parish. Laverock Law having been originally part of a common, in which the heritors of several lands situated in different parishes held rights of common property, in respect of the titles of the said dominant lands, and possession had by them in the common; and there being no evidence whatever to show that the whole of the said common was locally situated within one only of the said several parishes; and the state of the titles, and of the use and possession of the common, previous to the period of division, having been such as to exclude the application of the usual tests for determining the parochial boundaries of its different portions, the only rational and practicable rule for fixing that matter, after the division had actually taken place, was to hold the shares of the common, respectively allotted to the heritors of the said several lands, as parts of the several parishes within which the said dominant lands respectively lay.

The Sheriff-substitute pronounced the following interlocutor:

"5th December 1839.—The Sheriff-substitute, on resuming consideration of this case, with the minutes of debate for the heritors and kirk-session of the parishes of Ayton and Coldingham with reference to the subjoined note, Finds that the parish of Ayton is the parish liable in allment to the original petitioner, Jean Aitchison or Allan; and remits to the Heritors and Kirk-session of that parish to take her claim under consideration, and dispose of the same in terms of law; and supersedes disposing of the question of expenses till it shall be ascertained whether this interlocutor shall be acquiesced in or affirmed by the Sheriff.

"Note.—By the decret of division, which is dated 12th December 1766 and 2d March 1776, and intervening dates, No. 81 of process, the common in question is described as '*the common of Coldingham, or Coldingham Moor.*' No farther description is given to it in any part of the decret as lying in either of the parishes of Coldingham, Ayton, Old-Cambus, or Eyemouth. It appears sufficiently established that it never did lie within any one of these parishes, but lay before the lands comprehended in these parishes were separated into their present boundaries (at what period before the decret of division no evidence has been produced) in an undivided and unseparated state, in common, as parts and pertinents of dominant tenements, situated in each and all of the four parishes above mentioned, under certain rights of servitude to the other tenements not dominant. By the decret of division, to which all parties having any interest in the common were called, the Supreme Court accordingly found that the lands of certain heritors, situated not in one but in all the four parishes respectively, 'are dominant tenements upon the fore-said common, and have a common property thereon, and that the said heritors of the said lands have a right to draw a share of the said common, conform to the valuations underwritten of said dominant tenements belonging to them respectively.'

"By the decret, it was at the same time found that other lands were not dominant tenements, but had certain servitudes on the common, which, with roads, were provided for out of the measurement of the common before the respective portions, as parts and pertinents of the dominant tenements, were allotted to these tenements respectively in absolute property.

"Had the dominant tenements, in each of the four parishes, not been fixed by the decret of division of the common, and certain fixed portions allotted to them (supposing it possible, in that case, that a question such as the present could have arisen), it would have been a difficult matter to have ascertained the proportions in which each dominant tenement was liable in support to a pauper having acquired a legal residence upon the common; but the decret having fixed this, and allotted to the dominant tenements in each the part and pertinent which belonged to it, and that share of the common allotted to Mr Fordyce (whose dominant tenements, beyond a doubt, are situated in the parish of Ayton) being that part of the common now called Laverock Law, a part of which was feued out by Mr Fordyce to the petitioner's husband, and on which she has acquired a legal residence, the difficulty appears to be removed, as it can now be ascertained what portion of the common each parish has a right to as parts and pertinents of the dominant tenements.

SCOTTISH JURIST.

"If the valuations of the dominant tenements have, by the decret of division, in any case been taken *in cumulo*, where they lay in different parishes, in consequence of their belonging to the same heritor, in the event of these dominant tenements falling into the hands of separate heritors, and such a question as the present occurring, it may give rise to another division of the allotment of the common, so far as respects that *cumulo* valuation. Indeed, one instance occurs in the decret, where separate allotments were set apart to an heritor for his entailed, and another for his lands held in fee-simple. But no question of the kind arises in the present case.

"It cannot occasion surprise that the proof brought forward by the parishes of Ayton and Coldingham, as to the payments of burdens affecting that portion of the common allotted to the dominant tenements in the parish of Ayton belonging to Mr Fordyce, should not have been uniform, but the evidence brought forward by the parish of Coldingham much predominates, and is not to be overlooked. The common, notwithstanding the division of it, has continued to bear the same name which, in every probability, it bore before the separation of the dominant tenements into separate parishes, and certainly bore at the date of the decret of division, so far back as 1766, viz., '*the Common of Coldingham, or Coldingham Moor.*'"

On the 13th March 1840, the Sheriff having resumed consideration of the process, the Sheriff-substitute, as advised by him, affirmed the interlocutor appealed against.

"Note.—The Sheriff concurs in the views expressed in the note subjoined to the interlocutor appealed against.

"Whether the division of the district or barony of Coldingham into parishes was accompanied by an express declaration of a corresponding right in each of the parishes to a proportional part of the common moor, or the moor was afterwards regarded as situated partially in each of these parishes, which, in point of locality, it appears that it may have been, has not been shown, and it was not judged to be necessary in the process of division before the Court of Session, to ascertain. The parishes of Coldingham, Ayton, Old Cambus, and other parishes, obtained by that decree adjudged rights of separate property in what was originally a district common to all. If the name of the moor was retained from the original barony or district, and was not adopted from a locality in the parish of Coldingham as divided, the appellants have established no ground for holding that, beyond the proportions adjudged to dominant tenements in each parish, any part of the moor shall be held to be located in one parish rather than in another; while, so far as regards the understanding and conduct of the parishes of Coldingham and Ayton, and all interested, as to the locality parochial of the property in question subsequent to the decree of division, the evidence in process, whether of a nature more or less public, seems to leave little doubt."

The Heritors and Kirk-session of Ayton, presented a note of advocacy, accompanied with the following additional pleas:—1. According to the principles of the law of Scotland, no lands can be either extra-parochial or common to several parishes, so that whatever may be the rights of property or servitude over a common, it must be locally situated either wholly in one parish, or in distinct portions in different parishes. 2. As lands can be neither extra-parochial, nor belong in common and *pro indiviso* to several parishes, the rule contended for on the part of the parish of Coldingham, that the different portions of a common shall, subsequent to a division, accresce to, and form part of, the parishes in which the different dominant tenements are situated, is unwarranted and untenable, and would, if acted on, lead to the greatest difficulty and confusion. 3. An estate may be situated exclusively in one parish, and yet possess rights of part and pertinent over lands in other parishes, and even in parishes not immediately contiguous to the dominant tenement.

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The Lord Ordinary made avizandum with the process to the Lords of the Second Division.

At advising,

Lord Justice-Clerk.—I am not satisfied as to the manner in which this case comes into the Inner-House. It is a question of fact, in which the assistance of a jury would not only have been beneficial, but is almost necessary. Such questions are generally tried in England by a jury, and with perfect ease—(Burrell). I feel the more inclined to state this, as it may be remarked upon in the House of Lords, if the case should be carried to appeal. As to the documents produced, such as registers and lists, there is no way of ascertaining how they were made up; and the value to be attached to them was a point proper for the estimation of a jury. I doubt whether registers, embracing a period within the memory of man, are evidence, without the testimony of the parties by whom they were made up. If the keepers be alive, the registers are only secondary evidence of a very low character. There is no legal presumption that a commonalty belongs to contiguous parishes, or to those within which the dominant tenements are situated. It cannot belong *pro indiviso* to several parishes. I never heard of a commonalty in reference to parishes, or as parts and pertinents of parishes. A parish is territorial, and implies that it consists of a distinct portion of ground, however difficult it may be to determine the boundaries. Dominant tenements may have allotments of a commonalty furthest removed from them; and therefore I never can hold that a division of commonalty can have any effect upon the divisions of parishes. Laverock Law had no connection with the parish of Ayton before the decree of division in 1776; and the recent usage can be of no avail. The question is, whether the facts afford any presumption *retro* of a prior connection? The connection is by reason of the allotment alone, and is not only recent but insufficient. There is a good deal of secondary evidence which ought not to have been received; and in some instances it is not uniform. But I attach more importance to the titles which describe the lands as lying in the parish of Coldingham—particularly the feu-disposition granted to the petitioner's late husband. These titles commence when there was no inducement or interest to throw the lands out of the parish of Ayton. In all the cases, the utmost importance has been attached to the evidence contained in the titles—(Nith fishings). The older evidence leaves an impression on my mind that the moor belonged to the parish of Coldingham. The case of Hepburn is not applicable. Part of the commonalty lay in the parish of Fetteresso, and Hepburn's lands lay in Fetteresso; and it was found he could not prosecute a division of the commonalty beyond what lay in the parish of Fetteresso. But that case does not sanction a runrig division of parishes according to the attempt here,—nor does it establish that contiguous parishes may hold a *pro indiviso* right of property in a common moor. Whether Mr Fordyce could have prosecuted a division of the commonalty, was a question in the process of division, and may not have been started. On the whole, I see no ground for holding that the moor was not in the parish of Coldingham, except upon the theories of the Sheriff, which I think inadmissible, and the usage, which is of recent date. On this question of presumptions, the case of Reid v. Mercer has a considerable bearing.

Lord Moncreiff.—I entirely concur. There might be a doubt in the minds of a jury whether the lands in question were situated in the parish of Coldingham or not; but it is impossible to go along with the principles relied on by the Sheriff. It is impossible to hold that a commonalty extending to six hundred acres belonged neither to one parish nor another, but was in all four separate parishes. I can understand that one part might be in each parish, and that, in a process of division, it might be ascertained which part belonged to each parish. That is intelligible. But the theory is, that the whole was in neither, but partly in each, and that when the division took effect, the parts were allotted—not to the parishes, but to the dominant lands which immediately fixed the parishes. Hepburn's case has no application; but it is said Fordyce's titles described his lands as situated within the parish of Ayton, and that the parts and pertinents must be within the same. This would be the theory of the Sheriff; but I cannot agree with

it. On the whole evidence, we must say that the feu of the petitioner belongs to one parish or another; and I think it belongs to Coldingham. Locally, it lies in the centre of the moor, away from the parish of Ayton. Usage is relied on; but the best evidence of usage is that in the titles of the feu itself, which Fordyce not only gave, but the feu received.

Lord Medwyn.—If the usage had lasted longer, and if the evidence of it had been stronger, I would have thought it sufficient to join the lands to the parish of Ayton, notwithstanding their discontiguity. But I am satisfied that the usage is neither consistent nor old enough; and looking to the titles, I think the evidence preponderates that the lands lay, and must remain annexed to the parish of Coldingham.

Lord Meadowbank absent.

The Court pronounced the following interlocutor:

“Advocate the cause: Find that the parish of Coldingham is the parish liable in aliment to the original petitioner, Jean Aitchison or Allan, and remit to the Heritors and Kirk-session of that parish to take her claim under consideration, and dispose of the same in terms of law; and find no expenses due to either party.”

Authorities for Advocators.—Dunlop's Parochial Law, pp. 357–61. Ross v. Earl of Haddington, 8th June 1824; 8 and D., III. 115. Bell's Law Dictionary, *voce* Parish. Balfour's Practicks, p. 175. Carr's Hist., pp. 5, 80 and 131. Irvine v. Dundonald; 3 S. and D., 173. Statistical Account of Scotland, Vol. I. pp. 78–80; Vol. II. pp. 44, 45. Craig, Lib. II. Dig. 3, § 24. Connell on Tithes, Vol. I. p. 308, 1st edit.

Authorities for Respondents.—Earl of Wigton, 23d January 1730; Mor. p. 2237. Johnston v. Duke of Hamilton, 30th July 1768; Mor. p. 2481. Young v. Carmichael, 17th November 1671; Mor. p. 9636. Hepburn v. Duke of Gordon, 25th November 1823; Shaw's Cases, Vol. II. Chalmers' Caledonia, Vol. II. p. 226. Erskine, B. II. t. 6, § 3, *in fine*. Wight, p. 199. Connell, Vol. I. pp. 307, 367, 1st edit. Wight's Election Law, App. No. 32.

Lord Ordinary, Cockburn.—*Act.* Dean of Faculty (Wood), R. Robertson; Joseph Grant, W.S., *Agent.*—*Alt.* Solicitor-General (McNeill), Miller; George Turnbull, W.S., *Agent.*—*F. Clerk.*—[J.W.]

22d February 1842.

SECOND DIVISION.—(J. W.)

No. 132.—*The TRUSTEES of the HARBOUR of DUNDEE, Pursuers, v. The MAGISTRATES of DUNDEE, Defenders.*

Obligation—Contract, Mutual—Sale—Title, Delivery of—Price, Payment of.—Statute 11 Geo. IV. c. 119.—*The magistrates of a burgh having, by virtue of an Act of Parliament, transferred their rights of harbour to certain statutory trustees, and accepted, in consideration thereof, certain bonds payable ten years thereafter, and that period having arrived—Held that the magistrates were entitled to withhold delivery of the disposition and conveyance, until the trustees should pay up the sums contained in the bonds.*

By the 11th Geo. IV. c. 119, entitled “An Act for more effectually maintaining, improving, and extending the harbour of Dundee, in the county of Forfar,” the trustees to be elected in the manner appointed by the Act, and their successors in office, were erected into “one body politic and corporate, by the style and name of the Trustees of the Harbour of Dundee.”

The 38th section of the Statute authorised and required the Magistrates and Council, or managers *ad interim*, of the burgh of Dundee, on compensation in manner therein mentioned, to convey and make over to the said Trustees all right, or claim of right, which they had to the port and harbour of Dundee;

“and the said Magistrates and Council, or managers *ad interim*

respectively, and the said Trustees were thereby authorised and required to treat regarding the compensation or value to be paid to the said Magistrates and Council, or managers respectively, on behalf of the community of Dundee, for the right, or claim of right, so to be transferred; and upon payment of such value or compensation, or satisfaction therefor, the said Magistrates and Council, or interim managers, were directed to convey the said rights, and claims of right, in manner before mentioned."

In terms of this section, the Magistrates and Trustees concluded an agreement, by which the Trustees, on the one hand, became bound to pay to the Magistrates and Town-council the sum of £27,500, as at the 1st September 1841, and to grant bonds for the same, bearing interest at the rate of four per cent. per annum, payable half yearly, from 1st September 1831, during which period of ten years, it was agreed that the said principal sum should remain in the hands of the Trustees at the credit of the Magistrates and Town-council, and that as compensation for all the claims competent to the said Magistrates and Council under the said Act, or, generally, as grantees of the port and harbour of Dundee. On the other hand, the Magistrates and Council became bound, in consideration of the said sum of £27,500 so agreed to be paid, and bonds to be granted therefor, to renounce and make over in favour of the Harbour Trustees, their whole rights to the harbour of Dundee, and rates and duties leviable thereat; and they farther bound themselves, at any time the same might be required, to grant a formal disposition to the said harbour and other rates, containing procuratories of resignation and precepts of sasine. In conformity with this arrangement, bonds or assignments were granted by the Harbour Trustees in sums of different magnitude, but amounting in whole to the sum of £27,500, as set forth in a schedule of bonds or assignments on the back of the deed of renunciation. The renunciation itself bears this narrative:

"And now, seeing that the said Trustees have, in implement of their part of the said treaty and agreement, granted, executed and delivered, or are about to grant, execute and deliver, in favour of us and our successors in office, bonds or assignments in conformity to, and in terms of the said recited Act, as specified in a schedule thereof hereunto annexed, and amounting in all to the said sum of £27,500 Sterling, of which bonds or assignments we hereby acknowledge the receipt, renouncing all exceptions or objections of the law proponable on the contrary: Therefore, and in consideration thereof, we, the said Magistrates and Council, have renounced, discharged and over-given, as we hereby renounce, discharge and overgive, to and in favour of the Trustees of the Harbour of Dundee, acting under and by virtue of the before-recited Act of Parliament, all rights, and claims of right, and claims of damages competent to us under the said recited Act," &c.

By section 62, the Trustees were empowered to borrow any sum or sums of money, not exceeding at any one time £180,000 in whole, on the credit of the rates and duties of the harbour, for the purposes of the Act, "and to grant, assign, and set over the several rates and tonnage, and other duties granted by the said Act, to any person or persons whomsoever who should be willing to advance and lend money thereon, for securing repayment of the same." All which assignments should be granted under the hands of the trustees, in the form prescribed by the Act. That form contains no specific term of payment, nor any obligation on the Trustees, either personally or in their corporate capacity, to repay the money so borrowed. On the other

hand, the bonds granted to the Magistrates were made payable on the 1st of September 1841. They all contain (1.) an obligation on the trustees, *qua* such, to pay at that date, and (2.) a separate assignment in security to the rates and duties,—and in all of them there is inserted a clause of registration.

The Harbour Trustees having recently called on the Magistrates and Council to grant a formal disposition of the harbour in their favour,—and the parties having differed as to the terms in which it should be expressed,—the points of controversy were submitted to determination in the present action of declarator at the instance of the Trustees against the Magistrates. In this action the Lord Ordinary pronounced an interlocutor, dated 20th March 1841, approving of a draft disposition prepared by Mr Alexander Duff, W.S., and appointing the same to be executed by the Magistrates. Both parties acquiesced in this interlocutor, and the Magistrates accordingly executed a disposition in terms of the draft as adjusted. At the date of that interlocutor, the term of payment of the bonds granted for the price had not yet arrived,—the bonds being payable at the 1st of September 1841; but the Trustees having refused to pay the money, and the Magistrates having, in consequence of that refusal, declined to part with the disposition, the Trustees enrolled the case, and moved the Lord Ordinary for an order on the Magistrates to deliver the disposition. A note of objections was lodged for the defenders, and answers for the pursuers.

Pleaded for the objectors—1. In terms of the Dundee Harbour Act, the Trustees had full power and authority to treat and agree with the Magistrates and Council regarding the amount of compensation to be paid by them for the harbour, and other rights to be transferred by the Magistrates; and as the Act prescribed no limitation as to the time at which such compensation should be paid, it was also within the statutory powers of the Trustees to agree with the Magistrates that the period of payment should be postponed to any particular term that might be fixed, and to grant bonds or obligations accordingly, binding themselves, in their corporate capacity, to pay the amount at the arrival of such term. 2. The terms of the bonds actually granted by the Trustees for the amount of compensation agreed on, differing essentially, both in form and substance, from the statutory assignments to the rates and duties applicable to the case of borrowed money, in so far as these bonds specify a fixed term of payment, and contain an express obligation on the Trustees to pay at that term (over and above an assignment in security to the rates and duties), and likewise a clause of registration for diligence, prove conclusively that the consideration contemplated by the parties was not a mere assignment of the nature alluded to, but an obligation binding the trustees to pay at the stipulated term. 3. As the bonds granted by the Trustees contain an express obligation to pay on the 1st September 1841, and that period having now arrived, the Trustees are not entitled to demand delivery of the disposition from the Magistrates and Council, unless they themselves are prepared at the same time to make payment of the agreed on price or compensation. 4. In requiring the Trustees to perform the counterpart of the agreement, the Magistrates are neither disturbing the statutory arrangements of the har-

bour trust, nor imposing any hardship or inconvenience on the trustees, since these parties have it in their power, at any time, to raise on loan the funds necessary for paying the amount of compensation to the Magistrates.

Pleaded for the respondents—1. Under the transaction entered into between the parties in 1831, the compensation due to the Magistrates and Council for the transference of the rights of harbour, and other rights in question, was finally settled and satisfied, and no farther claim remained in the Magistrates, except under the bonds or assignments granted to, and accepted by them as statutory securities. 2. The Magistrates, under the transaction in question and subsequent proceedings, were truly divested of all right to the subjects in question, and cannot now plead that it is competent for them, on any footing, either to annul the arrangement then concluded, or to withhold the title which they were taken bound to grant at any time when required. 3. Under the terms of the disposition finally adjusted and executed by order of the Lord Ordinary, it is incompetent for the Magistrates to allege that they have not got full implement of the consideration therein set forth, or to retain the disposition until payment of the sums contained in the assignments, which they received in satisfaction of their original claim. 4. Under the mutual dealings of the parties, and in the whole circumstances of the case, the utmost that the Magistrates could demand under the assignments in question, as at 1st September 1841, was, that the Trustees, if not in a situation to pay the principal sums in the assignments, were bound to relieve the Magistrates of their obligations to the holders of the bonds, by paying legal interest on the amount; and as the Trustees have always been willing to comply with that demand, no farther claim is, *in hoc statu*, competent against them.

The Lord Ordinary pronounced the following interlocutor, accompanied by a relative note:

"18th December 1841.—The Lord Ordinary having heard counsel on the motion of the pursuers, the Trustees of the Harbour of Dundee, for delivery of the disposition and conveyance executed by the defenders, the Magistrates of Dundee, in terms of the deed of renunciation granted by them in 1831, as well as of prior judgments in this cause, now final.—Finds that the defenders are bound forthwith to deliver the said disposition to the pursuers; reserving to the defenders to take such steps for recovering payment of the bonds held by them as they may be advised, and to the pursuers all pleas against such proceedings, if adopted, as accords; and allows interim decree to the preceding effect to go out and be extracted, if the said disposition be not delivered on or before the first sederunt-day in January next.

"*Note*.—The Magistrates of Dundee, as representing the community, gave up their right to the harbour of Dundee and its pertinents to certain trustees in 1831, soon after the Act 11th Geo. IV. cap. 119, was passed, entitling the latter to acquire that harbour and the dues exigible thereat. Apparently after much communing, the price or consideration was fixed at £27,500, for which the Magistrates, in 1831, agreed to take bonds from the Trustees 'in terms of the Act.' A deed of renunciation accordingly was executed in November 1831, and bonds containing assignments of the rates for sums varying in amount, and extending in all to £27,500, were then granted by the Harbour Trustees to the Magistrates.

"These bonds bore interest at four per cent., and were not payable for ten years till 1st September 1841; the reason of such postponement, according to the view of the Harbour Trustees, being, that the money should carry interest only at that

limited rate certain till 1841; while the Magistrates allege that the postponed time of payment was fixed to enable them, in September 1841, to demand payment of the price of the harbour in cash, if inclined then to call it up.

"From circumstances not fully explained, there was considerable delay in the adjustment and execution of a formal disposition and conveyance by the Magistrates in favour of the Trustees, in terms of the preceding arrangement. At length, in January 1840, the Harbour Trustees brought the present action against the Magistrates, to have them decerned and ordained to execute and deliver a valid and formal conveyance to the pursuers of the said Harbour, pertinents and dues. After the usual preliminary proceedings and debate, the Lord Ordinary remitted the case to Mr Alexander Duff, W.S., to hear the agents, and to prepare the draft of such a conveyance as appeared suitable to the previous arrangements and legal rights of the parties. Mr Duff accordingly prepared the draft; counsel and agents were heard thereon at great length; and the draft was finally adjusted, and the principal conveyance was executed in terms thereof in the month of April 1841.

"It was supposed that this exhausted the present action; but this has not turned out to be the case. The same delay in finally settling the question still occurred as had been exhibited in the previous stages. The disposition was not delivered prior to September 1841. By that time the nominal term of payment, during which the rate of interest was limited to four per cent., had arrived. The Magistrates then demanded payment of the principal sums from the Trustees. The latter resisted, and stated that they were neither bound nor entitled by the Statute under which they acted, to pay up the principal sums in the bonds; that the Magistrates, if so disposed, might now exact the full legal interest instead of four per cent., but that they could not ask more. The defenders, on the other hand, contended that a new ground had lately emerged, in consequence of the Trustees refusing to pay the bonds at the stipulated term, which entitled them, on the principles of common law, to refuse implement of their part of the contract. The case was assimilated to that of a purchaser who refuses, or is unable to pay the price of an estate sold, in which case the seller has right to retain the title.

"In order to bring that new plea in due form under discussion, the pursuers moved for a special order or decree against the defenders, to deliver the disposition and conveyance to the pursuers, as adjusted at the sight of the Court. After bearing parties fully on that motion (the pleas of the parties on reference to it being shortly exhibited in the objections and answers lately given in), the Lord Ordinary was of opinion that the objections of the defenders to deliver the disposition were not well founded, and therefore he has granted the motion of the pursuers on the following grounds:—

"1st, It is thought that the plea of the defenders is not maintainable in the present action, and under the terms of the conveyance executed in terms of prior interlocutors long ago final. By the narrative of this disposition (which so far corresponds with the renunciation executed by the Magistrates in 1831), it is incontestably established that the consideration stipulated consisted of bonds granted by the Trustees in virtue of their statutory powers. The said disposition sets forth, that 'the said Trustees have, in implement of their part of the said treaty and agreement, granted, executed and delivered in favour of us and our successors in office, for behoof foresaid, bonds or assignments in conformity to, and in terms of the said Acts, and amounting in all to the said sum of £27,500 Sterling, and that in terms of the obligation to that effect expressed in a discharge and renunciation executed by us in favour of the said Trustees, dated the 3d day of November 1831.' As the Magistrates have long ago got, and still retain these bonds, they are in possession of the only consideration stipulated for granting the conveyance, and the Magistrates must give the counter consideration for which they were granted, and forthwith deliver the disposition to the Trustees for the harbour.

"2d, With regard to the plea of the Magistrates, that a new and unexpected circumstance has emerged in the non-payment of the bonds at the stipulated term of payment, which entitles them now to withhold the disposition,—it is thought that this objection is not maintainable in this cause, and between the

two sets of public functionaries here at issue with each other. If the Magistrates are advised, or sincerely think that they have now a right to be paid the amount of their bonds *in cash*, let them *give a charge on the bonds*. It is not thought that they can either reasonably or in consistency with the adjusted terms of the conveyance, resist delivery of the title to the pursuers, till the extent of their legal right under the bonds is tried. As the pursuers are public functionaries who cannot alienate the property conveyed, they are exposed to no hazard by delivery of the title.

"3d, It does not appear to the Lord Ordinary that the defenders have made out any case to show *prima facie* that they are now entitled in justice, or will ever be able, under any form of proceeding, to demand payment of these bonds and assignments in cash, or in any other manner than the other holders of bonds and assignments of the rates are entitled to make them effectual under the Act. It is manifest, both from the deed of renunciation executed in 1831, and from the conveyance lately framed and executed at the sight of the Court in this cause, that the bonds stipulated for by the defenders were specially declared in words that cannot be mistaken, to be 'bonds or assignments in conformity to, and in terms of the said Acts.' But on recurring to the Act 11th Geo. IV. § 62, it seems clear that the Trustees were only entitled to grant bonds to the effect of *assigning the rates and dues*; that no preference of one creditor over another could be given among the holders of these bonds; and that the Trustees were not personally liable for repayment of the same. The legal import and effect of these bonds, therefore, just was to constitute the parties *creditors over the rates* till their principal sums were paid.

"The Magistrates found strongly on the terms of the bonds granted to them; they state that they differed essentially from the style given in the Act (§ 62), in so far as there was here a specific obligation to repay the principal sum at a definite term (September 1841), together with a clause of registration in terms altogether at variance with the form and substance of the bond authorised by section 62. But the cause of any difference in the style seems to be self-evident. The style in section 62 of the Act was adapted to bonds granted for money to be held at the legal rate of interest. The Trustees in the present instance, however, stipulated for bonds more favourable to the trust than these, as the money was to be held at *four per cent.* for ten years. Even the provision in section 63 of the Act was not in all points applicable to the transaction between the parties, as that enactment contemplated the case of money being always capable of being raised to five per cent. at the will of the creditor, *on six months' notice*. But that was not meant here. It seems plain, therefore, that the bonds were framed in the present instance to meet a particular arrangement made by the parties *respecting the interest*, and by no means to give the Magistrates a preference over the holders of bonds and assignments.

"In all other points the Lord Ordinary conceives it to be clear that the Magistrates, as holders of these bonds, were to be subject to all the conditions, and to have all the rights of the other bondholders and assignees of the rates, and no more. It is not possible to give any other interpretation of the express words both of the renunciation of 1831, and the conveyance of 1841, whereby it was set forth that 'the said bonds or assignments were in conformity to, and in terms of the said Acts.'

"It is said that the bonds were conformable to the Acts, because the trustees were authorised by clause 37th of the Act of 11th Geo. IV. to 'treat regarding the value to be paid for the said right,' &c., and it is said that, under this clause, the Trustees were authorised to issue bonds payable at a future day in money. But the same clause provided, that 'on payment of such value or compensation, or satisfaction therefor,' the Magistrates and Council should convey the harbour; and the Lord Ordinary conceives that it is proved beyond doubt, under the hand of the parties, that all interested agreed in 1831 that *satisfaction* for the price should be given in *statutory bonds*, with an arrangement as to the *interest*, not contrary to the Statute. Accordingly, it deserves very particular notice, that the Magistrates, since 1831, have had under their bonds the security which the Statute authorises, in *assignments of the rates*. These assignments they still hold: and their present proposition is to recover payment in cash from the trust-property, of large sums secured by as-

signments, before any of the other assignees of the rates are paid. This is conceived to be directly contrary to the Act. If, then, the predecessors of the defenders really had it in view to demand payment of their principal sum in September 1841, and at the same time, to hold legal assignments of the rates for a *temporary term*, they were attempting to obtain two sorts of obligation *incompatible* under the Act, and which the Trustees were not entitled to grant. The defenders, therefore, cannot in any form enforce their bonds and assignments to any greater extent and effect than 'in conformity to, and in terms of the said Act.'

"Finally, when the defenders referred to the style of *other bonds and assignments* as being different from theirs, it is impossible not to remark, that the latter were *subsequent* in date to the defenders' assignments, and apparently intended for loans on other terms than were agreed upon in reference to the price of the harbour."

The defenders reclaimed. At advising,

Lord Medwyn.—This appears to me to be a simple case. The harbour of Dundee is proposed to be enlarged, and the Magistrates are empowered by Act of Parliament to make over all right which they had therein to trustees, "upon payment of such value or compensation, or satisfaction therefor," as should be agreed upon. The Trustees are empowered to borrow money to the extent of £180,000, but the creditors are not entitled to exact payment unless the Trustees insist on paying only a low rate of interest. The compensation is quite distinct from the sums borrowed. The Act plainly contemplated that it should be immediately paid, but the Magistrates agreed to postpone payment for ten years; and the Trustees now say that the bonds granted are not payable after ten years, but that the Magistrates are in the same situation as ordinary creditors. They were entitled to payment at September 1841. The conveyance might have been granted within the ten years, but these have now expired, and the Magistrates are entitled to retain the title till payment of the compensation. In an ordinary purchase the bargain may be rescinded, but that cannot take place here; and the Magistrates are entitled to enforce implement by withholding the title.

Lord Moncreiff and the *Lord Justice-Clerk* concurred.

Lord Meadowbank absent.

The Court pronounced the following interlocutor:

"Find that the defenders are entitled to withhold delivery of the disposition and conveyance executed in terms of the treaty and agreement in 1831, until the pursuers, the Harbour Trustees, shall pay up the sums contained in the bonds granted by them in implement thereof: Find the defenders entitled to expenses of this discussion, and remit to the Lord Ordinary to proceed accordingly, and further, as shall be just."

Authorities for defenders.—*Stair*, I. 10, last section. *Dempster*, M. 9163. *Selkirk*, 9167. *Black*, *Hume*, p. 699.

Lord Ordinary, *Cuninghame*.—*Act*. *Solicitor-General* (*M'Neill*), *Rutherford*, *Neaves* and *Patton*; *John Yule*, *W.S.*, *Agent*.—*Alt.* *Anderson*, *Miller*; *William Miller*, *S.S.C.*, *Agent*.—*F. Clerk*.—[*J. W.*]

22d February 1842.

SECOND DIVISION.—(*J. W.*)

No. 133.—*MRS ELIZABETH MADDEN and OTHERS, Pursuers, v. ARCHIBALD CURRIE'S TRUSTEES and OTHERS, Defenders.*

Husband and Wife—Liferent and Fee—Destination—Sale—Implement—Title—*A feu-right of certain property was conveyed "to, and in favour of, Edward Kerr and Elizabeth Kerr, and to the longest liver of them two, in conjunct fee and liferent, and to the heirs of the marriage of the said Edward and Elizabeth Kerr; whom failing, to his and her own nearest and lawful heirs or assignees whomsoever, equally between them in fee, heritably and irredeemably."* The husband having died leaving no issue of the marriage, the widow sold the property as belonging entirely to herself—Held that she could not give a valid title to the purchasers for the property sold.

The pursuers, on the 21st of April 1840, sold to

the late Archibald Currie, hair-dresser in Greenock, a certain subject situated in the town of Greenock. The price of the subject was, according to the missives, £530 Sterling, and the purchaser's entry was to be at Whitsunday 1840. Archibald Currie, the purchaser, is now dead; but he is represented by the defenders, who refuse to accept from the pursuers alone a conveyance of the subjects as in implement of the sale. In consequence, the present action was raised, concluding to have it found and declared that the pursuer, Elizabeth Madden, has, by virtue of a disposition and sasine libelled on, a good right and valid title to the whole of the subjects sold to Currie, and that the pursuers are consequently in a situation to grant a valid disposition and title to the defenders, as the representatives of the purchaser. The title founded on in the summons consists of a feu-contract or disposition granted by the commissioner of the late Sir Michael Shaw Stewart, Baronet, whereby the subjects were sold and disposed in feu-farm and heritage for ever,

"to and in favour of Edward Kerr" (the pursuer's first husband), "and Elizabeth Morrison or Kerr" (the pursuer), "and to the longest liver of them two, in conjunct fee and liferent, and to the heirs of the marriage of the said Edward Kerr and Elizabeth Morrison; whom failing, to his and her own nearest and lawful heirs or assignees whomsoever, equally between them in fee, heritably and irredeemably;"

which contract bears the dates of 28th October and 24th December 1833. In virtue of the precept of sasine contained in this contract of feu, sasine was granted to and in favour of "the said Edward Kerr and Elizabeth Morrison, and to the longest liver of them two, in conjunct fee and liferent, and to their aforesaid in fee," conform to instrument of sasine, dated the 6th of February, and registered in the Particular Register at Glasgow, the 1st day of April 1834. Edward Kerr having died, and there never having been any children born of the marriage, his widow, the pursuer, maintained that she thus became sole fiar of the whole property under the foresaid feu-contract and infestment.

Pleaded in defence—A conveyance to spouses in conjunct fee and liferent, and to the survivor, and their heirs and assignees, meaning the general heirs and assignees of the survivor, will vest the total right of fee in the surviving wife: Erskine, B. III. t. 8, § 36; Fergusson v. McGeorge, 22d June 1739, Mor. 4202; McGregor v. Forrester, 3d June 1831, 9 Shaw, 675, 1 Shaw and McLean, 441. But the case is different where the conveyance is to the spouses in conjunct fee and liferent, and to the survivor and the heirs of the marriage, and not to their general heirs and assignees. In that case, even though the wife survive, the fee is, by presumption, in the husband. It was so found in the case of Nelson v. Murray, Craigie and Stewart's Reports, p. 65. The same rule was recognised in the cases of Finlayson v. Finlayson, Mor. 12,874, and McDonald v. McLauchlan, 9 Shaw, 269; and incidentally also in the case of McKellar v. Marquis, 3 Dunlop, 172, New Series. In the present case, if there had been no substitution beyond the heirs of the marriage, the fee, upon the principles above stated, would have been exclusively in the husband. The substitution that here occurs, "to his and her own nearest and lawful heirs or assignees whomsoever, equally be-

tween them in fee, heritably and irredeemably," may have the effect of giving to the wife the fee of one-half, but cannot have the effect of giving her more. In these circumstances, the defenders are not bound to accept a title from the pursuers, unless without delay an express conveyance shall also be offered from the heirs of Edward Kerr, after these parties shall have taken up by service the other half of the subjects.

The record having been closed on summons and defences, the Lord Ordinary pronounced the following interlocutor:

"2d December 1841.—The Lord Ordinary having heard counsel on the record as closed, and thereafter considered the title-deeds produced, and whole process, finds that in 1833 the deceased Edward Kerr, first husband of the pursuer, Elizabeth Morrison, acquired a feu-right of the property libelled on from Sir Michael Shaw Stewart, whereby it was conveyed 'to and in favour of the said Edward Kerr and Elizabeth Morrison or Kerr, and to the longest liver of them two, in conjunct fee and liferent, and to the heirs of the marriage of the said Edward Kerr and Elizabeth Morrison; whom failing, to his and her own nearest and lawful heirs or assignees whomsoever, equally between them in fee, heritably and irredeemably;' and that infestment passed on this feu-right, in the course of the same year, in favour of the said Edward Kerr and Elizabeth Morrison, and to the longest liver of them two, in conjunct fee and liferent, and to their foresaid in fee.' Finds that a house was erected on these premises, and that Edward Kerr soon afterwards died: Finds it presumable that the said feu-right was granted by the superior in the above terms at Edward Kerr's request, and that the pursuer has not established, or alleged, that Kerr was under any antecedent obligation to take the right in these terms: Finds it not alleged that the expenditure made on the premises was defrayed by funds of the pursuer, or from which her husband's *jus mariti* was excluded: Finds that the said Edward Kerr died some time ago, leaving no issue of the marriage, and that the pursuer has since sold the said subjects as belonging entirely to herself, to Archibald Currie, now deceased, whom the defenders represent: Finds that the pursuer is not in a situation to give a valid title to the whole property to the defenders; and that, by the conception of the said feu-right, she was only vested in a contingent liferent of the same, and that her husband was fiar thereof during the subsistence of the marriage: Finds that, upon the dissolution of the marriage, the pursuer was entitled to claim one-half of the fee of the said property, as now belonging to her and her heirs, under the ultimate destination in the settlement, without prejudice to her right of liferent over the other half: And in respect this appears to be agreeable to the view of her right, admitted in the defences, on the whole matter sustains the defences, and assoilzies the defenders from this action: reserving to the pursuer to bring such action of implement or otherwise, as she may be advised, of the contract of sale libelled on, upon her tendering a good and sufficient title to the defenders, and to the latter parties their defences thereagainst, as accords: Finds the defenders entitled to expenses, as the same may be taxed by the auditor, and decerns.

"*Note.*—Had the property here been of greater value than it is, the Lord Ordinary would probably have ordered it to be argued in writing, as the legal construction of the destination on which the question depends is of importance in practice, and deserves to be deliberately considered. At the same time, as the case has been fully and elaborately argued at the bar, and as there are many precedents on record, having a close analogy with this case (though none in which the whole words used in the present destination occur), the Lord Ordinary has found little difficulty in satisfying himself that the construction of the destination founded on by the defenders is the sound one.

"The general canons as to the legal import of destinations, in conjunct fee and liferent, to spouses and their heirs, is nowhere better explained than in Professor Bell's Commentaries, Vol. I., p. 56. The rule which at first sight appears most applicable to the present case, is stated under the 5th head of his chapter on this subject, as follows:—'5. When the destination

is to husband and wife, and the survivor and their heirs, it was doubted whether *their heirs* did not mean only the heirs of the marriage. But this opinion did not prevail. The fee was held to be in the surviving wife, or rather in the surviving party, whether husband or wife, on the principle that it was the heirs of the survivor who were substituted to the spouses in the nomination. And the cases of Fergusson and of Riddell, reported in the Dictionary, voce *Fiar*, (p. 4202,) and others, are referred to by the learned author.

"But the destination in the present case differs, in two important parts, from the preceding:—

"(1.) The right here was not taken to the spouses, and 'the survivor and their heirs;' but the first branch of the substitution differed in a material point,—the destination here was, 'to the spouses, and longest liver in conjunct fee and liferent, and to the heirs of the marriage;' whom failing, to his and her own nearest and lawful heirs, *equally between them*,' &c. The interposition of the heirs of the marriage makes an essential difference in the interpretation of the right. In the first place, it strengthens the presumption that the husband was meant to be the unlimited *fiar*, and to have the absolute power of burdening and disposing of the fee of the subject as he chose, probably in the view that such power in a father is in general expedient for the benefit of the children themselves. In the next place, however, from the effect given to the rights of the children of a marriage, the wife, under such a destination, has no more than a *liferent*, and has not the power given to husbands, which, in the quaint jargon of the old law, was conferred on them *ob eminentiam masculini sexus*. Accordingly, Professor Bell lays it down as a fixed point under his second head,—'it is a sufficient destination to give a fee to the husband, if the subject is taken in conjunct fee and liferent, and to the heirs of the marriage in fee.'

"There are various cases illustrative of that rule, which, indeed, has never been controverted; but the case bearing the most near resemblance to the present is that of *Nelson v. Murray*, in 1732, reported in Craigie and Stewart's Appeal Cases, p. 65, in which case a destination, even of the wife's estate, to herself and her husband, and the survivor, in conjunct fee and liferent, and to the heirs of the marriage in fee, was found, on the failure of children of the marriage, and notwithstanding the survivorship of the wife, to vest a fee in the husband and his heirs. To the same effect was the case of *Edgar* in 1727, (Dict. p. 4202), *Watson* in 1766, (4288), and the late case of *M'Donald and M'Lauchlan* in the First Division in 1831, (10 Shaw, 269.) In these cases, no doubt, the ultimate destination, failing children of the marriage, was to the husband's heirs and assignees; while here the ultimate substitution is in other terms, which remain to be noticed.

"(2.) The second peculiarity, therefore, in the destination in the present case is, that the fee-right is destined, on failure of the children of the marriage, 'to his and her own nearest and lawful heirs and assignees whomsoever, *equally between them* in fee.' It is apprehended that these words must be taken in their plain and obvious meaning, as a substitution of the heirs of each spouse to the extent of *one-half* only, and not as changing her right primarily given to the wife, which, without such a destination, would have been that of a *liferentrix* only, as to the whole, i.e. that of a *fiar* of the entire estate, one-half only of which is destined to her heirs. It would be a new application of technical rules and principles so to interpret the destination. Accordingly, there are various cases in the Dictionary, in which the legal import of provisions nearly equivalent (which seem to have been common in ancient times) is well fixed. Thus, in the case of *Anderson v. Bruce* in 1660, (Dict. p. 4332), in which there was a destination very analogous with the present, when the husband survived the wife, he was found to have the free disposal of a fund so secured during his life; and the wife, notwithstanding the substitution of her heirs, was found to be only a *liferentrix*. A similar decision was pronounced in 1697 in the case of *Laws*, (Dict. p. 4236), and lastly, in the case of *Purdie and Ross* in 1707, (p. 4238), where the wife survived without leaving children of the marriage, 'the husband's heir was ordained to procure himself infet in the conquest, and to dispose the half, with warrantice from fact and deed, to the wife's assignee, though the husband was *fiar*.'

"These authorities appear to be sufficient to support the plea of the defender in the present case.

"Had this been a question between the husband and wife's heirs, the Lord Ordinary would not have given expenses to either party; but as the defenders are purchasers, having right to a good title, which it has been found has not yet been offered to them, it is impossible to refuse them costs."

The pursuers reclaimed. At advising,

Lord Justice-Clerk.—In this action the defenders plead, that the pursuer has not right to the whole subject sold, but only to one-half. It is fixed, that where a conveyance is to spouses "in conjunct fee and liferent, and to the heirs of the marriage," the fee is vested in the husband as much as if the right had not been conjoined; and the right of the wife is limited to a liferent. The case of *Nelson v. Murray* is clearly in point, and the case of *Fergusson* is not inconsistent with it. There are other and older cases in Bell's Illustrations, II. p. 555, and there is one referred to in the Lord Ordinary's note. The heirs in this case having failed, and the husband having died, what becomes of the other half it is needless to inquire. If the pursuer has not right to the whole property, she can't give a valid title; and that is sufficient for deciding this case. The first part of the interlocutor appears to me to be too special, and I should propose to take only the finding, that the pursuer is not in a situation to grant a sufficient title.

Lord Medwyn.—I concur. The heirs of the marriage always means the heirs of the husband; and in such a destination, although the wife survive, and there be no heirs of the marriage, the law holds that the fee is in the husband. A conveyance in conjunct fee and liferent, and to the survivor, is not of much importance, if also to the heirs of the marriage. The wife, in that case, only takes a liferent. The terms "to the survivor," are only of consequence when the further destination is "to their heirs and disponees."

Lord Moncreiff.—Although at the first I had some doubt, I concur in thinking that the wife in this case acquired no right to the whole property by survivorship, and this is sufficient for judgment. By a conveyance "in conjunct fee and liferent, and to the longest liver, and to their heirs," the wife has the fee if she survive; but here the destination is not to "their heirs," but to "the heirs of the marriage." By the heirs of the marriage, there is raised a positive presumption not to give to the heirs of the wife. *Nelson v. Murray* leaves no doubt as to the point here in question, although there may be some obscurity in the report.

Lord Meadowbank absent.

The Court pronounced the following interlocutor:

"Recal the interlocutor complained of; of new find that the pursuer cannot give a valid title to the defenders for the property sold, and assoilzie them from the conclusions of the action, and decern; reserving to the pursuers, within due and proper time, to bring such action of implement, or otherwise, as she may be advised, of the contract of sale libelled on, upon her tendering a good and sufficient title to the defenders, and to them their defences as accords; of new find expenses due to the defenders, allow an account," &c.

Lord Ordinary, Cuninghame. — *Act*. Solicitor-General (M'Neill), G. G. Bell; Gibson-Craig, Dalziel, and Brodie, W.S., Agents.—*Alt*. Dean of Faculty (Wood), Neaves; James Stuart, S.S.C., Agent.—*T. Clerk*.—[J.W.]

22d February 1842.

SECOND DIVISION.—(J.W.)

No. 134.—JOSEPH BROWN, Pursuer, v. JAMES GEORGE and OTHERS, Defenders.

Superior and Vassal.—Sale.—Retention of Title in Security of Price.—Contract, Breach of.—A party sold a property, and executed a disposition in favour of the purchaser, in virtue of which he was enrolled as a voter for the county, was entered in the rental-book of the superior, and obtained possession of the subjects; but it being admitted that the deed remained in the custody of the seller at his death, as a security for payment

of the balance of the price; and he having died before completing a feudal title to the subjects—Held, in a question between his heir-at-law and the disponees of the purchaser, that the heir had the only good and undoubted right to obtain a charter from the superior; and that the disponees were not entitled to molest the superior in the granting, or the heir in the obtaining of the same.

Charles Brown, the brother and immediate ancestor of the pursuer, held, in May 1837, a certain subject in the village of Huntly. The original rentaller of the subject had been a John Allan. But the right and title to the subject had been transmitted to different individuals by means of deeds of assignation completed by an entry of the assignee's name in the landlord's rental-book, followed by possession. Charles Brown's own title was thus constituted. He sold the property to Robert Porter in Huntly, in whose favour he granted, upon 30th May 1837, a deed of disposition and assignation, conveying the subject to him and his wife in conjunct fee and liferent, &c. The price agreed upon was £190, whereof £50 was to be paid at Whitsunday 1837, and the purchaser engaged to grant a bill, and security for payment of the balance, with interest, within a year from said term, it being understood and agreed that no disposition should be delivered till the security was granted.

In reference to this agreement the following memorandum was found in the repositories of the seller, now deceased:

"Huntly, 26th May 1837.

The cause of my having the title-deeds of the property I sold to Robert Porter in my possession is, that he could not find security to me for the balance due of the purchase-price, which is £190 Sterling. £50 was paid to me, being part of the purchase-price, and the balance, which is £140, is due, for which he is to pay me five per cent. interest until paid up, and I retain the title-deeds until the whole is paid, with interest."

(Signed) "CHAS. BROWN."

The following is the receipt granted for the £50:

"Huntly, 30th May 1837.

"SIR—I have received from you £50 Sterling in part of the purchase-price of £190 Sterling for that property in Huntly purchased by you from me; and having executed the deed in your favour to-day, I retain the same, along with the whole title-deeds, in my possession, as a security to me for payment of the balance and interest,—your entry to commence at 26th current. I remain," &c. (Signed) "CHARLES BROWN."

"JAS. SKINNER, witness."

"ALEX. STEWART, witness."

The summons bears, that notwithstanding the retention of the title-deeds, it was stipulated "that, in the meantime, the said Robert Porter should be put into possession of the said subjects, with right to claim and exercise the elective franchise, and all other privileges which could be exercised by a proprietor of heritable subjects burdened with an unpaid balance of the purchase-price thereof; and that the said Charles Brown should, if it became necessary so to do, to entitle his intended disponee to claim such rights, exhibit, but in the custody of his, the said Charles Brown's, own agent, a disposition of the said subjects in favour of the said Robert Porter." The above conveyance was entered in the rental-book of the lordship of Huntly in the following terms:—"Charles Brown disposed feu, No. 213, in favour of Robert Porter and spouse, and their family, on 30th May 1837." Porter at the same time entered to possession of the subject, and continued

thereafter to pay the feu-duty or rent exigible by the landlord. Moreover, he was enrolled as a freeholder for the county of Aberdeen at the registration for the year 1838, in virtue of the conveyance from Charles Brown—entry in the landlord's rental-book—and possession of the subjects. Porter having become embarrassed, he, on the 23d May 1840, executed a disposition and assignation to the above-mentioned subject in favour of the defenders. This deed was delivered to the defenders, as the assignees, and was forthwith intimated both to the factor of the Duke of Richmond, the landlord, and also to Sir James Gibson-Craig, his Grace's commissioner. This is instructed by the following markings indorsed upon the disposition itself:

"This disposition was this day presented to me, and noted in the rental book of the lordship of Huntly."

(Signed) "GEO. M'PHERSON."

"Huntly, 23d May 1840."

"Intimated 29th May 1840."

(Signed) "J. G. CRAIG."

Charles Brown having died before he had taken out a charter of the subjects, and completed a feudal title to the same in his person, the pursuer expede a general service as his nearest and lawful heir before the Sheriff of Aberdeen, on the 5th of February 1841, which was duly retoured to Chancery. And he has brought the present action, concluding to have it found and declared that he has the only good and undoubted right to obtain a feu-charter from the superior, to the end that he may dispose the subjects in implement of the missives or agreement of sale entered into between his deceased brother and the said Robert Porter or his assignees, on payment of the balance of the purchase-price, or failing such payment, to sell and dispose of the subjects for payment of the said balance; and it being so found and declared, "Charles Gordon Lennox Duke of Richmond," the superior, and one of the defenders, "ought and should be decerned and ordained, by decret foresaid, to grant and deliver to the pursuer, and at his expense, a feu-charter of the said subjects accordingly; and the said other defenders ought and should be prohibited and discharged, by decret foresaid, from troubling or molesting the said Duke in regard to the granting of the said charter in favour of the pursuer, and the pursuer in obtaining the same, and making up a feudal title thereon."

It was *pleaded* in defence—1. That Messrs George and Falconer and Morrison, being now vested with the real right in the subjects, according to the natus of the title, the pursuer, as the heir of Charles Brown, cannot now claim any right in the property. 2. Charles Brown being bound to warrant the right, title, and possession which he granted and conferred upon Porter, the defenders' right and title of possession, onerously derived from Porter, cannot be called in question by the pursuer as the heir of Charles Brown. 3. In any view of the nature of the title, and of the pursuer's claim, he is nothing more than an ordinary personal creditor of Porter, and cannot therefore compete with the defenders under their title and possession. 4. The pursuer cannot claim the property, or the right to complete a feudal title thereto, in competition with the defenders; or at least, he cannot maintain any such claim unless upon payment of the defenders' debts.

The record having been closed on the summons and

defences, the Lord Ordinary pronounced the following interlocutor :

" 25th November 1841.—The Lord Ordinary having heard parties, repels the defences, and decerns and declares in terms of the libel : Finds the pursuer entitled to expenses : Appoints an account thereof to be given in, and when lodged, remits to the auditor to tax and to report.

" *Note*.—It is clear that, as in a question with the pursuer, Porter had no right to dispose in favour of the defender. He had neither a feudal nor a personal title to the subject,—no right or title whatever, either in law or in equity. On the contrary, the contract between him and Charles Brown was, that he was to get no title till he paid the balance of the price, and his attempting to dispose to the defenders was a breach of this arrangement.

" Accordingly, all that the defenders have to say is, that they were misled to give him credit by his being put into possession, and by his being allowed to exhibit himself as the owner in the Registration Court. If the defenders can make the pursuer or the property responsible for their debts on this account, they may bring forward a proper claim for this purpose. But the only question now at issue is, whether they, as his disponees, are entitled to prevent the pursuer from completing his title with the superior ? The Lord Ordinary thinks they are not. They trusted to no sasine—for Porter was not infest ; and those who trust to the mere possession of the person they deal with, or to their apparent right of real property, ought to know that they are liable to all exceptions competent against him.

" The entries in the rental-book, whatever effect they may have in any other action, can have no influence in the question raised in this summons."

The defenders reclaimed. At advising,

Lord Medwyn.—If the purchaser had paid the price, he would have got delivery of the disposition, but the seller retained it until the price was paid. If the disposition was delivered for a temporary purpose, such as to enable the disponee to be admitted to the elective franchise, but was thereafter returned, that was no delivery.

Lord Moncreiff.—The disponee might defraud the register, but he was not entitled to defraud the party.

Lord Justice-Clerk concurred.

Lord Meadowbank absent.

The Court pronounced the following interlocutor :

" In respect that it is admitted that the disposition executed by the late Charles Brown remained at his death in his custody, in terms of the letter in process, 26th May 1837, and receipt taken by Robert Porter, dated 30th May 1837, Adhere to the interlocutor of the Lord Ordinary, and refuse the desire of the note : Of new find the pursuer entitled to expenses," &c.

Lord Ordinary, Cockburn.—*Act*. Anderson, C. Robertson ; John Hunter, W.S., *Agent*.—*Alt*. Dean of Faculty (Wood), G. G. Bell ; Andrew Clason, W.S., *Agent*.—T. Clerk.—[J.W.]

TEIND COURT.

23d February 1842.

No. 135.

The following augmentation was awarded :

Durrisdeer—Presbytery of Penpont—Old Stipend, 20th December 1820, 15 chalders, and £8. 6. 8. for communion elements.—Stipend modified of this date, 16 chalders, and £8. 6s. for communion elements,—being an augmentation of 1 chalders.

23d February 1842.

FIRST DIVISION.—(H. B.)

No. 136.—JAMES INGLIS and ALEXANDER HUME, Pursuers and Respondents, v. WILLIAM RICHMOND, Defender and Advocate.

Property—Possessory Judgment—Road—An individual having, at his own hand, enclosed a piece of ground which a public body had kept for more than seven years under their charge, as part of a street for the use of the public, on the allegation that that body, and the public through them, had no title, and that he was the true proprietor—Held that the public body were entitled to retain possession until dispossessed by the order of a court of law.

James Inglis, clerk to the Commissioners of Police for the city of Glasgow, and Alexander Hume, superintendent of streets, presented a petition to the Dean of Guild, in which—founding on a Statute-Labour Act (1820), relating to the royalty of Glasgow, and vesting the management in fifteen trustees, and another Act (1837), transferring the powers of these trustees to the General Commissioners of Police, and empowering them to sue or be sued in name of their clerk,—they complained that William Richmond, merchant in Glasgow, proprietor of a wood-yard within the royalty, had proceeded, without consent or order of law, to enlarge his wood-yard, by erecting a wooden paling which enclosed a considerable portion of a public street and foot-path, which had been upwards of seven years under the management, first, of the Statute-Labour Trustees, and afterwards of the Commissioners of Police, for the use of the public,—and prayed that he should therefore be ordained to remove said paling, so far as it encroached on the foot-path and street, and restore them to the state in which they were previous to his interference.

Richmond pleaded, as a preliminary defence, that the Dean of Guild had no jurisdiction, as the object of the action was to dispossess the defender of an heritable subject in which he was infest, and in the actual possession. This defence having been repelled by an interlocutor, which

" sustained the competency of the Court to the effect of regulating the interim possession of the piece of ground in dispute ; reserving to the defender to establish his heritable right to the said piece of ground in the competent action and in the competent Court."

Richmond pleaded on the merits—1. The defender, as absolute proprietor of, and infest in the subjects in question, was entitled to make the enclosure complained of. 2. The pursuers, or the public whom they profess to represent, cannot acquire a right of property in a street or passage, except in one or other of two ways ; 1st, by a regular feudal title ; or, 2d, by uninterrupted possession for forty years. 3. The pursuers do not claim in respect of either of these rights. They have not founded upon any title whatever. 4. Although the ground in dispute had remained unenclosed, and had been used as a street for ten, twenty, or thirty years, this would not imply a right of permanent occupation on the part of the public, without a proper title. 5. It is not competent to the Dean of Guild to prevent a proprietor from building or enclosing to the extreme verge of his property, although his doing so should obviously interfere with the public convenience : Smellie, 12th May 1803 ; Dict. 7588. 6. The present action is incompetent in your Lord-

ship's Court. Its object is to dispossess the defender of an heritable subject in which he is infest, and of which he is in the actual possession. It is competent to the Supreme Court only.

The pursuers *pleaded*—1. The defender having made the erection complained of, enclosing and appropriating to himself the ground in dispute, *vi aut clam*, he is bound, and the Court is amply warranted to order restitution of the possession, irrespective of, and without inquiring into, the defender's alleged right of property. 2. But *esto* that the defender could be allowed to justify his forcible aggression on the street, by alleging, or even proving that the ground in dispute was originally private property, and has been conveyed to him, he could not succeed in his present attempt to deprive the Statute-Labour Trustees and the public of the possession enjoyed for upwards of seven years. 3. The defender's predecessors having ceded the ground in dispute for the purpose of forming London Street, as laid down on the plan of 1827, if it was private property previously, the defender cannot now claim the ground as private property.

A proof having been led, the Dean of Guild pronounced decree in terms of the prayer of the petition.

Richmond advocated, and put in an additional plea, to the effect that he had raised a declarator, and that the possessory question ought to be sisted until the declarator was decided.

The Lord Ordinary pronounced the following interlocutor:

"18th January 1842.—The Lord Ordinary having heard counsel for the parties, and thereafter made *avizandum* to himself with the whole process, Finds it proved in matter of fact, that the pursuers, in behalf of the public, have for upwards of seven years had possession of the area or stripe of ground claimed by them as part of the public street: Finds, in matter of law, that the pursuers, under the Acts of Parliament referred to in their complaint, have the rights and powers belonging to the Statute-Labour Trustees, and have charge of the public streets, &c., within the royalty of the city of Glasgow; and that the ground in question having been for more than seven years a part of the streets within the royalty of the said town, they are entitled to retain possession of it, and to prevent the defender from inverting that possession *via facti*, until they shall be dispossessed by the order of a court of law: Therefore remits the cause *simpliciter* to the Inferior Court, and decerns: Finds expenses, both in this Court and the Inferior Court, due; allows an account of the expenses in this Court to be given in, and, when lodged, remits to the auditor to tax the same and to report.

"*Note*.—The Lord Ordinary, after hearing parties fully, has not discovered any sufficient ground for altering the judgment pronounced in the Inferior Court, although the case was argued with great zeal and ability by the advocate's counsel. The advocate does not dispute that the Police Commissioners are now the Statute-Labour Commissioners for the city of Glasgow, and that their clerk, supposing this to be a street falling under their charge, has a title to present a complaint of this nature, where any encroachment is made on the streets that fall under their superintendence. The plea chiefly urged by the defender is, that the ground in question belonged to certain commissioners appointed by the 5th Geo. IV. cap. 69, for amending a former Act for opening a street from the Cross of Glasgow to Monteith Row, and that the property having been acquired and vested in them under that Act of Parliament, they had no power, unless by a sale in terms of the Act of Parliament, to make over any part of it (even the street) to the Statute-Labour Trustees, or any other persons; and that the Statute-Labour Trustees, on the other hand, having obtained

no conveyance to it, had no right to apply the statute-labour funds to it, or to possess it as one of the streets falling under their management and superintendence: that they therefore have no sufficient title upon which they can found a possessory action; while, on the other hand, the defender has received a direct conveyance under the Statute from persons to whom the ground in question, including this stripe, was disposed by the London Street Commissioners in 1837 under the Act of Parliament: Therefore, that while there is a direct real right on his part under the Statute, the pursuers have no title to which they can ascribe the possession which they have had.

"It appears to the Lord Ordinary, that if this had been possessed for a period exceeding seven years as one of the public streets within the royalty of Glasgow, the pursuers had a good title to complain of any encroachment made upon it. The Statute 1 Geo. IV. cap. 88 (1820), the first object of which is declared to be for amending the 47th Geo. III. cap. 45, relative to the statute-labour of the royalty of Glasgow, declares, section 22, that that Statute, so far as not altered, shall remain in force and be construed as one Act. Sections 11 and 14 of the 47th Geo. III., taken along with the 1st Geo. IV., of which they must be held to form a part, give ample powers to the Statute-Labour Trustees for the royalty of Glasgow (which the complainers are admitted to have become under the Statute in 1837, referred to) to take charge of, and apply the statute-labour funds to all streets within the royalty of Glasgow. The question comes therefore to be, has this been a street for more than seven years within the city of Glasgow? The defender says no. It remained the exclusive property of the London Street Commissioners, who had no power to give it up to the Statute-Labour Trustees, and they sold and conveyed it, including the disputed ground, to the defender.

"That this street has *de facto* been paved and possessed as a street is abundantly proved. But it is said it illegally became such, and remained the property of the Commissioners when they made the conveyance to the defender's authors in 1837. This makes it necessary to look at the Statute under which this street or way was opened. The third object of the 1st Geo. IV. cap. 88, section 30, was to open a new street from Great Hamilton Street or Monteith Row to the Cross of Glasgow. That was the communication in question, but the Magistrates were unable to accomplish it, and therefore the 5th Geo. IV. cap. 69 (1824), was passed for the purpose of amending the former Statute, and for opening a street from the Cross of Glasgow to Monteith Row. Certain commissioners were named, and all who should subscribe not less than a hundred pounds for making the street were appointed commissioners for opening, causewaying and paving the said street, which it is declared shall be called London Street. A particular form of conveyance to purchasers is fixed in the Statute. The 15th section, upon which the defender founds, declares the capital stock, property of and in the said street, and of the lands and grounds through which the said street is to be carried, &c., to be vested in the subscribers. The 16th section empowers them to sell the grounds or lands to be acquired by them *on each side of the said street*, and the buildings or other heritages thereon. The Act contains no clause relative to making over the street to the Statute-Labour Commissioners, from which the defender argues it could not be legally made over to the Statute-Labour Commissioners, or come under their management. The Lord Ordinary has, however, come to the opposite conclusion. The object of the Statute 1 Geo. IV. cap. 88, as well as that of 5 Geo. IV. cap. 69, which was passed to amend, is to open a new street from Hamilton Street or Monteith Row to the Cross of Glasgow, —and such street was intended, when finished and opened, to form one of the streets of Glasgow. That being the obvious intention of the Act, it required no special enactment to provide that the street or communication, when opened, was to fall under the management of those who were by law intrusted with the charge of the streets of Glasgow. It was the apparent object of the Statute that it should be so; and if it had been intended that the street should remain, after it was completed and opened, in possession of the London Street Commissioners, clauses would have been required for that purpose, and for upholding and repairing it, and managing it separately from the other streets in Glasgow. The defender has referred to St

John's Street in Edinburgh, as an instance of a street remaining shut up, and separately possessed by the proprietors alone, and maintained by them. If that is the case, it is evidently the exception in opposition to the general rule, that all streets and roads, when opened, fall under the superintendence and management of those who by law are intrusted with the management of roads and streets within certain limits, and levy rates for the purpose of maintaining them. Where a new street is to be made, paved, and opened by certain commissioners, who undertake the expense of doing so, there may be a certain period, before the buildings are finished, during which it may be considered under their intermediate management, and as not fully completed and opened for the public. In this case, it appears from minutes of the Statute-Labour Trustees, that on the 30th October 1827, the London Street Commissioners had applied, through their architect Mr Weir, to the Statute-Labour Trustees, to relay a part of the causeway, previous to London Street being opened for carriages, and a small sum was granted. In 1828 there was a further application from the treasurer to the London Street Company, for payment of the expense of causewaying. The consideration of that application was however delayed till a future period by the Statute-Labour Trustees. On the 7th of December 1829, there is a renewed application by the commissioners for London Street, stating that a great proportion of the intercourse from the east passes through that street, and that consequently much of the expense of keeping the Gallowgate is saved. This renewed application is referred to the superintendent by the Statute-Labour Trustees, who, in his report, complains of the want of proper fence-walls and parapets. On the 16th of July 1832, the London Street Commissioners presented a petition to the Statute-Labour Trustees, in which they set forth, that in the years 1824, 1825, and 1826, they had opened this new street, and that it had been made use of for some years as a great leading thoroughfare into the city; and that they had been refused the money laid out for causewaying, on the ground that the street was not two-thirds built upon. After another report, the Statute-Labour Trustees agree to take the *whole street* under their protection in future, and to pay the London Street Commissioners £110 as a compensation for the materials laid on the street; and a receipt for that money, dated 6th October 1832, is produced. The defender maintains this was illegal on both sides. It appears to the Lord Ordinary to have been perfectly legal. The London Street Commissioners were anxious to get rid of the expense of maintaining the street as soon as they could. The Statute-Labour Trustees appear to have acted in general, in similar cases, on a rule not to take streets under their management until two-thirds of the houses were built. But it does not appear to have been fancied by the commissioners that they could retain and sell what was a public street, under the Act of Parliament, or possess it as their separate or exclusive property. There was nothing illegal in the London Street Commissioners giving up the street they had formed, or in the Statute-Labour Trustees applying a part of their funds, then and afterwards, towards maintaining a communication which appears to have been considered very beneficial to the public. At all events, the title of possession is apparently good and sufficient,—the defender having reserved to him whatever pleas he can make good in his action of declarator.

"The defender has stated that he does not admit the accuracy of the plans that have been produced and sworn to; and his counsel in the reply stated, that the street was broader than the seventy feet allowed by the Statute, without including the stripe of ground in question. If the defender was not satisfied with the accuracy of the plans, which the pursuers have proved by witnesses, he had an opportunity, not only of cross-examining those witnesses, but of producing any other plan while the proof was going on at Glasgow, and establishing its superior accuracy, if that could be done. As he did not do so, the Lord Ordinary must decide according to the evidence taken, and plans proved in the Inferior Court.

"The defender urged a minor point in the case, viz., that the ground enclosed by him was not upon London Street, but on a street which had no name at the time his authors received their conveyance, but has since been called Green Street. But it appears to the Lord Ordinary that all the communication from

Great Hamilton Street to the Cross, by London Street, became equally public with the other streets of Glasgow, and equally fell under the management of the pursuers, and there is no reason for making any distinction between that and the other streets of Glasgow."

Richmond reclaimed. At advising,

Lord President.—I see no solid ground for altering the interlocutor of the Lord Ordinary. I don't wish to say any thing as to the question of title, as that will be formally decided in the declarator which is now in dependence. But, *prima facie*, there was a title in the commissioners who transferred it to the Statute-Labour Trustees, by whom it was again transferred to the Commissioners of Police. Considered as a possessory question, there can be no doubt that the ground in question has been enjoyed for seven years by the public, and that the advocate's erection, if permitted to remain, would invert the possession. The cases which have been quoted to show that a party could not be maintained in possession without some title, referred to private property; but other decisions show that a distinction must be made when the question relates to public property.

Lord Gillies.—I have arrived at the same conclusion, though I was somewhat puzzled at one time from not adverting to the distinction to which your Lordship has referred. This is not a question of private property. The title may be one way, and the possessory right another. If it had been merely a question of private right, it might have been necessary to examine the title more minutely; but here the possession was first in one public body, who transferred it to another. It may be that Richmond's title is better than theirs, and that they did wrong in taking that part of the ground under their charge; but having done so, and without objection, they are now bound to prevent encroachment on their possession. Richmond says the ground is his property. That is a good plea; but is he entitled to take the law into his own hand, and enforce his right *brevi manu*? It is impossible to countenance such a proceeding. *Spoliatio ante omnia restituenda*. The public have enjoyed the use of this ground, and it is the duty of the commissioners to defend them against encroachment. I concur therefore with the Lord Ordinary.

Lord Mackenzie.—My conclusion is the same, and on the same grounds. Any street in any town, if such encroachments were allowed, might, seven years after its formation, be blocked up by a neighbouring proprietor, on the allegation that the ground was his, and the public had no title. Here they have at least title enough to support their possession. It is not said that they got possession *clam*, or by any unfair means. They took it, and have kept it without objection for upwards of seven years. In these circumstances, even the true proprietor could not be allowed, at his own hand, to take it back again. The result of the declarator may be, to find that the public have no good title; but, in the mean time, it is impossible to allow this sudden inversion of the possession.

Lord Fullerton.—I agree in a great deal of what has been said. In so far as the Statute-Labour Trustees, acting for the public, have had possession, it is impossible to allow it to be inverted in the manner which has been attempted; but I have some doubts as to one piece of ground forming the footpath. I don't see that the public have had the same use of it as of the street; and I doubt if mere possession by the Statute-Labour Trustees, unaccompanied with actual enjoyment by the public, would be sufficient to support that possession in the absence of a proper title.

The Court adhered.

Lord Ordinary, Murray.—For *Inglis and Others*, Robertson, R. Macfarlane; Charles Fisher, S.S.C., Agent.—For *Richmond*, Rutherford, Maitland; John Cullen, W.S., Agent.—B. Clerk.—[H.B.]

24th February 1842.

SECOND DIVISION.—(J.W.)

No. 137.—JEAN BEATTIE and HUSBAND, *Pursuers, v.*
ROBERT MURDOCH, *Defender.*

Competition—Diligence—Preference of Ancestor's Creditors—Statute 1661, c. 24.—*A creditor of a party deceased having constituted his debt by decree, and attached the estate of his debtor within three years from the period of his death—Held that a bond granted by the heir of the debtor within year and day of his death, was reducible under the Act 1661, c. 24, although averred to have been granted for the purpose of paying debts due by the ancestor.*

The deceased David Beattie was proprietor of a small heritable property in Kilmarnock. The house having fallen into disrepair, his daughter, the pursuer, advanced several sums of money to enable him to rebuild it. David Beattie died in January 1836, when the work had not been taken off the tradesman's hands, and was succeeded by his son, Allan Beattie, who entered into possession of the subjects and made up a title thereto, conform to precept of *clare constat* from the superiors, dated 21st March 1836, and instrument of sasine following thereon, dated 25th April, and recorded 1st June 1836. On the same day, or within a year from his father's death, he granted to the defender a bond over the subjects for £80, which, it was alleged by the defender, was expended in completing the repairs upon the house, and in paying the business account of the agent of David Beattie, for which the titles were hypothecated. The pursuers, as creditors of the deceased David Beattie, constituted their debt, and attached the heritage of their debtor, within three years of his death,—1st, By a decree *in foro*, dated 6th March 1838, obtained by them in the Sheriff-court of Ayrshire against the aforesaid Allan Beattie, eldest son and heir of the said deceased David Beattie, as representing him, and as having made up titles to his father's heritage: 2d, By a decree of adjudication and abbreviate thereof, obtained against the said Allan Beattie, as representing his father, dated 3d July, and recorded in the Register of Abbreviates of Adjudications the 29th August 1838, adjudging from the said Allan Beattie, and all others pretending right thereto, the said houses or subjects in Kilmarnock, for payment and satisfaction to the pursuers of the several sums of money, principal, interest, and expenses, amounting, when accumulated at the date of the decree of adjudication, to the sum of £62 Sterling: 3d, By a charter of adjudication from the trustees of Henrietta Duchess of Portland, the superiors, in favour of the pursuer, Mrs Jean Beattie or Torrance, her heirs and assignees, dated the 15th October 1838, and instrument of sasine following thereon, in favour of the pursuer, Mrs Jean Beattie or Torrance, dated 27th November, and recorded in the Particular Register of Sasines for the shire of Ayr on the 5th of December 1838. The present action was instituted for the purpose of reducing the bond granted to the defender, in so far as it was to the prejudice of the pursuers and of their security as creditors of David Beattie. A record having been made up, it was

Pleaded for the pursuers—1. The pursuers are just and lawful creditors of the deceased David Beattie, and their debt is validly constituted by the unchallenged decree which has been condescended on. 2. As the

pursuers validly and effectually attached the estate of their debtor, David Beattie, by their diligence within three years from the period of his death, they are preferable creditors, in terms of the Statute 1661, cap. 24, upon the estate so attached, to the defender, as a creditor of Allan Beattie, David Beattie's heir-at-law. 3. As the bond by the said Allan Beattie, as his father's heir-at-law, in favour of the defender, was executed within a year after the death of David Beattie, it is, in terms of the Statute 1661, cap. 24, invalid and reducible at the instance of the pursuers, as having been granted in prejudice of their rights as creditors of the ancestor as aforesaid. 4. The pursuers are therefore entitled, in terms of the conclusion of their summons, to obtain decree of reduction of the bond and sasine libelled on, in so far as they are prejudicial to their preferable rights as creditors of the said David Beattie; and as the defender has been in possession of his father's property, the pursuers are entitled to obtain account of his intrusions with the rents, mails, and profits thereof; or alternatively, to obtain decree for the specific sum of rent concluded for. Further, they are entitled to decree of removing and for expenses as libelled.

Pleaded for the defender—1. The decree of constitution founded on by the pursuers does not afford conclusive evidence of the debt sought to be enforced, and the subsistence of the same is not admitted. 2. The provisions of the Statute 1661 do not apply to a person in the situation in which the said Allan Beattie was when he granted the disposition sought to be reduced. 3. No diligence having been done against the said Allan Beattie, as prescribed by the said Statute, within the time prescribed, the provisions thereof do not apply to this case; and, in particular, the first branch libelled of the said Statute is not applicable to deeds executed by the heir. 4. The said Statute does not apply to the case of a disposition made substantially for behoof of the ancestor's creditors, or to pay debts of the ancestor, more especially if any of those debts are preferable *sua natura*. 5. Supposing the said provisions to apply to this case, the pursuers could not succeed in this action, without giving the defender credit for such disbursements as were made on the property adjudged by them, and sought to be vindicated in this action. 6. The pursuers are not entitled to set aside the said security, in respect it is not averred in their libel that the said Allan Beattie is not possessed of means available to the pursuers for payment of their debt, independently of the said subject, and in respect it is not averred that the residue of the property of David Beattie is insufficient to pay the debt. 7. In no view of this case are the pursuers entitled to more than a *pari passu* preference on the said subject, along with the defender.

The Lord Ordinary pronounced the following interlocutor:

"2d December 1841.—The Lord Ordinary having heard parties, and considered the process, repels the defences, and declares in terms of the declaratory and reductive conclusions; and quoad the petitory conclusion for accounting, appoints the cause to be enrolled: Finds the defender liable in the expenses of discussing the conclusions now disposed of; and appoints an account thereof to be given in, and, when lodged, remits to the auditor to tax and report.

"*Note*.—1. The Lord Ordinary holds the pursuer's decree of constitution as conclusive evidence of the validity of her debt.

"2. Diligence having been done by adjudication against the estate, he does not hold that it was necessary also to do diligence against the heir personally.

"3. As the pursuer does not admit that the bond under reduction was granted for the purposes or to the effect of paying debts due by the ancestor, the Lord Ordinary would have allowed the defender to prove this, if he had thought the fact relevant. But he thinks it irrelevant; that is, he is of opinion that, assuming the matter to stand as the defender states, still the bond is reducible.

"4. For, after reperusing the opinions given in the case *Christie against the Royal Bank*, 17th May 1839, and the report of the case in the House of Lords, 6th April 1841, he adheres to the principles supported by the majority of the Court, that a deed by an heir, within year and day of his ancestor's death, is not saved from reduction under the Act 1661, cap. 24, by being made in favour of one of the ancestor's creditors. He has nothing however to add to the very full and very learned views there taken, and begs to refer to the report of that case."

The defender reclaimed. At advising, the Court pronounced the following interlocutor:

"Adhere to the interlocutor complained of, and refuse the desire of the note; reserving to the defender in the present accounting, or in any ordinary action at his instance, to claim credit for such sums as he may prove to have been beneficially expended towards supporting the pursuer's right and title, and to the pursuer her objections thereto; of new find the defender liable in expenses, and remit to the Lord Ordinary to proceed accordingly."

Lord Ordinary, Cockburn.—*Act*. Solicitor-General (M'Neill), Whigham; J. and J. Macandrew, S.S.C., *Agents*.—*Alt*. A. M'Neill; L. Mackintosh, S.S.C., *Agent*.—*F. Clerk*.—[J.W.]

24th February 1842.

SECOND DIVISION.—(J. W.)

No. 138.—KIRKMAN FINLAY and OTHERS, *Pursuers*,
v. JAMES THOMSON and ARCHIBALD M'CONNELL,
Defenders.

Reparation—Damages—Collision.

This was an action concluding for reparation of loss and damage occasioned to the steam-packet Windsor Castle, the property of the pursuers, in consequence of a collision between her and the steam-packet called the Tartar, the property of the defenders, in the river Clyde.

The Court, after specific findings upon the evidence, assuozied the defenders *simpliciter* from the conclusions of the libel.

Lord Ordinary, Ivory.—*Act*. Robertson, A. M'Neill; Charles Fisher, S.S.C., *Agent*.—*Alt*. Solicitor-General (M'Neill), Mackenzie; W., A. G., and R. Ellis, W.S., *Agents*.—*T. Clerk*.—[J.W.]

26th February 1842.

SECOND DIVISION.—(J. W.)

No. 139.—ROBERT THOMSON, *Petitioner*, v. JOHN HAMILTON MACK, *Respondent and Advocate*.

Process—*Petition*, *Prayer of*—*Decree*—*Waiver*—*Hypothec*—*A party presented a petition, praying the Sheriff to decern and ordain the respondent to produce in process an account for which, he alleged, certain title-deeds were hypothecated, and failing his doing so, to ordain him instantly to deliver up the title-deeds. The respondent produced his account, with answers to the petition, and pleaded retention of the titles till payment. The application having resolved into an action of*

count and reckoning between the parties; and the Sheriff having decerned in terms of the original petition, after a condescendence and proof, it was objected, that under the prayer of the petition, the proceedings subsequent to the production of the account were incompetent—Held under the circumstances, that the objection, if competent, had been waived.

The petitioner is the tutor-at-law of John Thomson, who succeeded to a bond of £240, which, together with the instrument of sasine following thereon, had been deposited by his father in the hands of his agents, of whom the respondent was one. The petitioner applied for delivery of the bond, and received for answer that it would be delivered up on payment of certain business-accounts due to the respondent by the father of the pupil. But the respondent having failed to render his accounts, or deliver the bond, the tutor-at-law presented a petition to the Sheriff, praying him "to decern and ordain the said John Hamilton Mack to produce in process the said account for which he alleges the said deeds are hypothecated; and failing his doing so, to decern and ordain the said defender instantly to deliver up to the petitioner, as tutor foresaid, the said bond and disposition in security," instrument of sasine following thereon, and relative title-deeds.

The respondent, in his answers, admitted that the bond was in his possession, and stated, that "he can have no object in withholding the accounts, nor in retaining the said bond and disposition farther than in securing payment of the accounts. Copies of the accounts are herewith produced. They amount in whole to the sum of £27. 15s., and on the accounts being paid as taxed, if a taxation is required, the bond and disposition, and infestment thereon, will be instantly delivered up." The relative plea was in these terms:—Supposing the action properly directed against the respondent, and supposing him to be held individually liable as the custodier of the said bond and infestment, he is entitled to retain possession thereof till the said accounts be paid.

In the replies it was averred, that the respondent had been overpaid his account by his intromissions with the estate of James Thomson. The action came thus to resolve into one of count and reckoning between the parties.

A record having been made up, and a proof led with that view, the Sheriff pronounced an interlocutor decerning in terms of the original petition.

The respondent advocated and *pleaded*—The advocate having, in the outset, satisfied the principal conclusion of the original petition, by producing with his answers to it, the business-accounts referred to; and as it was only "failing his doing so," or in the event of his failure to produce them, that decree for delivery of the titles was asked, it was illegal and incompetent for the Sheriff, in the face of the respondent's own application, to go beyond its conclusions, and to pronounce the decree against the advocate complained of, for delivery of these titles.

The Lord Ordinary pronounced the following interlocutor:

"20th November 1841.—The Lord Ordinary having heard parties, and considered the process, advocates the cause, sustains the second additional plea for the advocate, viz., that after he produced the account called for in the original petition, it was incompetent for the Sheriff, under the peculiar prayer of that petition, to proceed further, either by ordering a proof of the

articles of the account, or by decerning for delivery of the writings: Recals all the interlocutors of the Sheriff subsequent to the production of the account; and finds, that after that account was produced, the proceedings ought to have terminated: Finds the advocator liable in expenses till the date of producing the account; modifies the same to £2. 2s., for which decerns, and finds no subsequent expenses due to either party.

"*Note.*—The Lord Ordinary has a strong desire to decide against the advocator, because, considering the position of the parties, he does not like the complexion of his case.

"But the Lord Ordinary cannot support the Sheriff's interlocutors, because he thinks that, under the terms of the prayer of the petition, in which nothing is asked except that, failing the production of an account, certain writings should be produced, the Sheriff was bound to have considered the production of the account, as satisfying the petitioner's demand.

"But he can give no expenses to the advocator, because, instead of resting on this plea, he never even stated it till the case came into this Court; on the contrary, he virtually abandoned it by going into the accounting and into all the other matters of the cause; inasmuch, that if it stood even now solely on his objecting, the Lord Ordinary would not give effect to the plea. But it is *pars judicis* to notice the terms of the petition, and not to go beyond what is prayed for."

The petitioner reclaimed. At advising,

Lord Medwyn.—I cannot concur with the interlocutor in this case, however anxious I may be that matters should be accurately conducted in a legal process. If, on making production of his accounts, the respondent had craved to be absolved, this would have been granted, or the prayer of the original petition would have been allowed to be enlarged. But he pleads retention till his accounts be paid. If they are to be paid, they must first be investigated; and he joins issue thereon. If he did not waive the objection, that this was beyond the prayer of the petition, he should have stated it before allowing a revised condescendence and proof. This is very like a waiver.

Lord Moncreiff.—The substance of the thing was, that the respondent should produce his accounts, and if settled or paid, or found not due, then to produce the bond and titles. If the objection had been taken at first, then the Sheriff would have ordered an amendment of the prayer. I think there was a sufficient waiver to justify us in altering the interlocutor.

Lord Justice-Clerk.—I concur. The answer of the respondent was very simple. If he meant to rely upon this objection, he had merely to produce his accounts and ask absolvitor. On the contrary, he states his claim of retention till payment of his accounts. *Stewart v. Glog* was a summons, where one must look to the conclusion; this is a summary petition for redress, and the prayer must be looked to in connection with the petition, and is more flexible. I think the objection was clearly waived.

Lord Meadowbank absent.

The Court recalled the interlocutor, repelled the additional plea in law, and remitted to the Lord Ordinary to proceed further in the cause.

Lord Ordinary Cockburn.—*Alt.* A. McNeill; E. and A. Macmillan, W.S., *Agents.*—*Alt.* Maitland, Turnbull; Wotherpoon and Mack, W.S., *Agents.*—*F. Clerk.*—[J. W.]

26th February 1842.

SECOND DIVISION.—(J. W.)

No. 140.—JOHN THOMSON, *Suspender*, v. AGNES WESTWOOD, *Charger*.

Prescription—Act 1579—Parent and Child—Aliment of Bastard Child—*Found that the claim for aliment of a bastard child does not fall under the triennial prescription of the Act 1579.*

The suspender was charged at the instance of Agnes Westwood, residing in Airdrie, for aliment to an illegitimate child, of which he admitted he was the father, at the rate of £6 annually, from September 1828, the date of the birth of the child, till the child should attain the

age of seven years. The action in which the decret under suspension was pronounced, was brought in September 1836. The suspender pleaded, that he had already paid to the charger sums on account of this child, more than equal to the whole amount of the aliment claimed; and he, at the same time, pleaded the triennial prescription, as applicable to the first five years for which aliment was claimed.

The Lord Ordinary, entertaining a doubt whether the statements made by the suspender upon the record were sufficiently specific to raise the plea of payment and prescription, pronounced an interlocutor, 20th May 1841, ordering the suspender to condescend more specially

"on the particular items of goods and money composing the *cumulo* amount of £135. 4. 2., which he alleges to have been advanced and furnished by him to the charger, with the precise date of each several advance or furnishing, and the manner in which he proposes to apply the same."

Against this interlocutor the suspender reclaimed, and contended, that he had already put upon record a sufficient averment of payment of the aliment of this child. But in order that no doubt upon the question might remain, he lodged a minute, in which he made the following explanation:

"The Dean of Faculty for the suspender stated,—with reference to the averment made on the part of the suspender in the Inferior Court record, and repeated in the record in this Court, viz., that he had paid the pursuer sums amounting in whole to £135. 4. 2., being considerably more than he was bound to pay, or the pursuer could demand, for the aliment of both the children of which the defender is the father,—that although the averment of payment of the sum now sued for is there made with sufficient specification, the suspender, nevertheless, farther averred, that from the date of the birth of the child in question, on 26th September 1828, till the date of the summons, he had advanced and paid to the charger, expressly on account of its aliment, and in extinction of all claim, a sum amounting to upwards of £65 Sterling."

Their Lordships of the Second Division pronounced the following interlocutor:

"26th June 1841.—The Lords having resumed consideration of the reclaiming note, with a minute for the reclaimer, recal the interlocutor of the Lord Ordinary submitted to review; and in respect of said minute, remit to his Lordship to hear parties on the plea of prescription, and to do therein as he shall see cause, reserving all questions of expenses."

The Lord Ordinary afterwards ordered minutes of debate to be given in on the question of prescription.

Argued for the suspender.—

The words of the Statute 1579, c. 83, are,—“that all actiones of debt for house-maillies, mennis ordinars, servandis fees, merchantes comptes, and uthir the like debts, that are not founded upon written obligationes, be persewed within three yieres, uthirwise the creditour sall have nae action, except he outhir preif be the writ or be aith of his partie.” By this Statute prescription was made applicable to all that class of debts which are not usually constituted by writing, and which were supposed likely to be paid at the time, or periodically as they fell due. Sir George Mackenzie remarks, in his *Observations on this Act*, that it was founded on a presumption “that men would not suffer such debts to lie over without taking an obligation for them in writ, and the presumption lies for their being yearly paid; and that which was *presumptio hominis* is, after the current of three years, made here *presumptio juris et de jure*.” The claim for aliment advanced to a natural child closely resembles those claims for entertainment, under the words “men's ordinars.” It is a debt of the like nature, consisting of periodical and continuous advances, which the party was not likely to allow to run into arrear for a lengthened period, without having them vouched

by a written obligation. Accordingly, claims for repayment of aliment generally appear clearly, according to the opinion of our institutional writers, and the course of decisions, to be exposed to the triennial prescription; nor is there any distinction between aliment advanced under a contract, and aliment advanced in implement of a *debitum naturale*: Bankton, B. II. tit. 12, § 27. Ersk. B. III. tit. 7, § 17. Bell's Prin. 4th edit., p. 239. Balfour v. Landale, Nov. 1683. Harcarse, p. 216. Hamilton v. Lady Hamilton, M. 11,100. Galloway, M. 11,122. In Forsyth v. Simson, 15th Feb. 1791, Dict. 11,081, the question was *in terminis* decided in favour of the plea of prescription, and is the last case in which the general question has been decided free from specialties. It is said that "all the particulars expressed in the Statute were reducible to sale or location;" but it is plain that to many cases of sale or location the Statute does not apply. For instance, to bargains of sale of moveables, to cases of a single furnishing, or to cash advances. It is farther argued, that the claim of the mother of a natural child for aliment from the father, is one of recompense, on the principle that both are jointly liable for the child's aliment; and therefore, that if the mother alimments the child alone, she has paid the father's share of the aliment as well as her own, and is entitled to repayment of the advances which he should have made; and to such claims of recompense it is maintained that the triennial prescription has no application. But by whatever name the pursuer may characterise her claim, the substance of the matter is, that the father of a natural child is bound in law to make a certain annual allowance, according to his circumstances, for the maintenance of the child; that the mother, in the event of his failing to do so, has the means of enforcing payment by obtaining a decree for aliment against him; that if she does not apply for such a decree, the reasonable presumption is that she did not do so, because the father, without the compulsion of law, had fulfilled the obligation to the extent that the law would have imposed it upon him; and that this presumption of payment, arising from the absence of any legal demand, or any written obligation showing that the sum is still resting owing, is just as strong, if not more so, in the case of a debt due *ex debito naturale*, though not yet legally constituted, as of a debt which the father was bound to pay under a specific compact. It is a decided point, that it makes no difference, in regard to the application of the Statute, whether aliment has been advanced under a specific contract or not. Though no bargain has been entered into on the subject, and the aliment may have been advanced voluntarily, it still suffers the triennial prescription: Smellie v. Cochrane. The cases subsequent to Forsyth proceeded upon specialties. In M'Dowall v. M'Lurg, F. C., Feb. 19, 1807, the pursuer was *non valens agere*. In Arbutnot v. Symon, May 16, 1834, the decision rested not upon the plea of prescription, but upon a taciturnity of thirty-two years; and the judgments in Thom v. Jardine, 24th June 1836, and Butchart, 28th June 1839, proceeded upon the admissions of the parties.

Argued for the charger—

The Statute has plain reference to a class of debts which the creditor may have vouched by written documents, or has the means of instantly enforcing. The expression "other the like debts," cannot possibly amplify the class to which it relates. It is a general rule of construction, that an expression of this sort, following an enumeration of particulars, can have no extending force. This is the clear law both of England and Scotland. Accordingly, however similar the debt may be, yet if it arise from a different species of obligation, it does not fall within the purview of the Statute. Thus a claim *ex negotiorum gestione* has always been excluded from the application of the Statute, though in one sense a like debt: Drummond v. Stewart, M. 11,103. Long before the date of this decision, and on the same principle, it was held that bargains of sale of moveables and single transactions, did not fall under the Act: White v. Spence, January 1683, M. 11,065. Baird v. Montgomery, February 1688, M. 11,092. Ewart v. Murray, June 1730, M. 11,067. The doctrine is also firmly fixed in modern practice; Hamilton v. Murray, 24th January 1795, M. 11,120. This was an action for payment of the price of seven hundred bushels of pease and thirty barrels of beef, consigned to the

defender for sale. The defence was the triennial prescription. It was held that the object of the Act was to prevent the hardships from the loss of old discharged accounts of shopkeepers and other retailers, but not to apply to the contract of mandate. The defence was repelled: Bell's Illustrations, p. 366. Sadler v. M'Lean, 18th November 1794, M. 11,119. More recently, the same doctrine was held in Nobles v. Armstrong, 11th June 1813. Macfarlane v. Brown, 17th January 1827, 5 S. and D., p. 205. Following out the same principle, it has been decided that the Act does not apply to accounts of freight betwixt the owners and masters of a ship; Butchart v. Mudie, 13th June 1781; Hailes, II. p. 885;—to a single advance of money: Smith v. Bell, 19th June 1829, 4 S. and D. p. 771. Keir v. Magistrates of Kirkwall, 15th June 1827, 5 S. and D. p. 802. The claim of a schoolmaster for his salary, arising out of a public provision, does not fall within the Statute: Nicholson v. Monro, 20th January 1747, M. p. 11,080;—nor a claim of arrears of pay to a soldier: Graham v. Earl of Leven, 14th July 1709, M. 11,093. It has also been held that the triennial prescription does not apply to any claim arising in consequence of acting as factor: Freer v. Paterson, 27th July 1826, S. and D. Still more particularly, and more germane to the matter now in hand, it has been held that the prescription does not apply to any claim of relief amongst *corei debendi*: Bland v. Short, 11th July 1825. Now, what is the real nature of the obligation to aliment a natural child as betwixt the parents? It is most plainly the obligation of recompense or remuneration. The parties are *corei*, and the obligation which the one has against the other is that of relief: Stair, I. 8, 2. In reporting the case of Balfour, Harcarse himself seems to have thought that it was of no authority, for he points to other cases decided afterwards thus—*vide* No. 776, p. 220: "Found that alimmenting and process, or defence thereon, doth not prescribe in three years, that not being in the case of men's ordinaries, mentioned in the Act of Parliament: February 1687, Irving *contra* Maxwell of Barncleuch. The like was found betwixt John Dick and Walter Gibson, merchant, Glasgow. *Vide* No. 765." In Davidson v. Watson, M. 11,077, it was found in the House of Lords, reversing the judgment in the Court of Session, that the Act does not apply to actions for the aliment of minors. The next case is that of Paterson v. Cochrane, (11,080,) the rubric of which is,—"*Aliment of bastard child found not to fall under the triennial prescription of the Act 1579. The defender had acknowledged he had paid a certain sum, which was evidently not sufficient.*" The judgment of the Court was: "The Lords repelled the defence founded on the Act 1579, and found the defender liable in £40 Scots yearly, for maintenance of the child till fourteen years of age, and in expenses of process." If the case of Forsyth stood alone, it might be deemed an express authority the other way, but it is shaken by the subsequent course of decisions. In the case of M'Dowall v. M'Lurg, the triennial prescription was found "not applicable to a claim of aliment against the father of a bastard child, he having gone abroad." In the case of Finlayson v. Gown, 7th July 1809, F. C., it was laid down by the Lord President (Blair) that no prescription applied. In the case of Arbutnot v. Symon, which was an action for a long term of arrears of aliment, Lord Medwyn laid it down expressly, that "prescription does not apply to such a claim." More's Stair, *voce* Prescription, p. 275, Note a. a. Tait's Law of Evidence, p. 455. Finally, in the case of Thom v. Jardine, 24th June 1836, Lord Fullerton found that the triennial prescription did not apply to such a case, and added a note to his interlocutor, giving a concise view of the authorities, and his own opinion upon the point. To these views his Lordship adhered in the subsequent case of Butchart v. Ireland, 28th June 1839.

The Lord Ordinary pronounced the following interlocutor:

"11th January 1842.—The Lord Ordinary having advised the mutual minutes of debate for the parties, and resumed consideration of the closed record, and whole cause, repels the plea of prescription: Finds it admitted that the suspender is the father of the illegitimate child for whose aliment the decree now under suspension was pronounced: Finds that no objection has been taken to, or lies against said decree, so

far as regards either the rate of aliment decerned for, or the number of years for which it has been awarded: But finds it alleged, that the claim for said aliment has been wholly satisfied and extinguished by the suspender's having, at various times, advanced in goods and money to the charger more than he was bound to pay, or than she could legally demand in name of such aliment; and more especially (as set forth in his minute of 24th June 1841,) 'that, from the date of the birth of the child in question, on 26th September 1828, till the date of the summons, he had advanced and paid to the charger, expressly on account of its aliment, and in extinction of all claim, a sum amounting to upwards of £65 Sterling.' Finds, however, on the other hand, that no proof of this alleged advance and payment has been adduced by the suspender, and that, in the absence of such proof, it must be held that the aliment decerned for is still resting-owing: Therefore, repels generally the reasons of suspension, with the exception of that set forth in the suspender's third plea in law as to the incompetency of the Sheriff's recal of the previous modification of expenses—in regard to which, finds that it was not competent for the Sheriff, in the face of his previous final judgment of 19th May 1837, finding expenses 'subject to modification,' to recal said modification; and so far, therefore, sustains the reasons of suspension, and finds the suspender entitled, in respect of said modification, to a deduction of £1. 11. 10. (the sum-total, subject to modification, as at the said 19th May 1837, being £5. 11. 10.) from the amount of expenses charged for: Therefore, on the whole matter, suspends the letters to the extent of the said £1. 11. 10; but, *quoad ultra*, finds the letters orderly proceeded, and decerns: Finds the suspender liable in expenses; appoints an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report.

"*Note.*—Upon the construction and application of the Statute, the Lord Ordinary was disposed to have reported the case, for an authoritative determination of that most important question by the Court. But the charger having pressed for judgment, and stating that she was unable to bear the expense of printing, &c., the Lord Ordinary did not feel warranted to withhold a deliverance by himself.

"The view which he takes of the Statute is substantially, though not perhaps in all its details, nor more especially as regards the effect attributed to some of the authorities, the same with that expressed by Lord Fullerton in *Thom*, 24th June 1836, and *Butchart*, 28th June 1839. With that learned Judge, were the case to be dealt with as one now arising for the first time, he would have no hesitation in ruling that the statutory prescription did not, and was not intended to extend to a claim of the nature here in question. He cannot regard such a claim as a claim of *debt*, in the proper sense of the word *debt*, as used and exemplified in the Statute. The statutory debts are all more or less immediately referable, for their origin and constitution, to some contract, bargain, agreement, or at least some dealing or understanding implying positive *convention* between the supposed debtor and creditor. In *house-maills*, for instance, the debt arises on a contract of lease between landlord and tenant; in *servants' fees*, on a contract of *locatio operarum* between master and servant; in *merchants' accounts*, on a continued series of dealings and contractions, as between *buyer* and *seller*, or the like; and, finally, in *men's ordinaries*, on some positive agreement, or conventional understanding, between the party *furnishing* and the party *receiving*.

"It is thought impossible to bring a claim for the aliment of a natural child, such as is exhibited in the present case, within any of the enumerated heads of the Statute: or looking to the general category of *debt*, as that word is there applied, to bring it within the scope even of the general reference to 'other the like debts,' with which the more special enumeration is followed up. Such a claim does not constitute *debt*, in the proper sense of *contraction* or *convention* at all. It is a claim in which the *child*, rather than the mother, is at bottom the father's creditor, and the liability to contribute to its aliment is a liability which *attaches* by force of the law itself, and simply in respect of the birth and existence of the child, without the intervention of any act or proceeding whatever on the father's part to constitute, in the statutory sense, a claim of proper debt against him. The mother indeed, is, as regards this claim of aliment,

as much debtor to her child as the father, and her claim against the latter is truly a claim for *rateable contribution* or *relief*, just as would be the claim of the parish, where the mother (as frequently happens) is compelled to apply for parochial aid.

"It has been urged, that, in other *alimentary* questions, the statutory prescription has, in various instances, been held to apply. But there is a palpable distinction between the claim for aliment in a case like the present, and that which arises in the class of cases referred to, as to the *ordinaries* or *board*, whether of a person *sui juris* and dealing with his own means, or of a *minor* or *fatuous* person having means under the administration of others by whom he is represented—the liability in this latter case being always more or less a liability of express or implied *paction*.

"The real difficulty of the case lies, as the Lord Ordinary considers it, in the conflict of authorities, which renders it doubtful whether the question is now to be dealt with as being still an open one. But the very fact that the authorities are thus in conflict, is at all events conclusive, that there is as yet nothing, in point of legal construction, definitively or authoritatively fixed. And in *dubio*, therefore, the Lord Ordinary is compelled to resort to the Statute itself, were it only to decide *how*, consistently with the principles of a just interpretation, the conflict of authority is to be solved.

"The Lord Ordinary has felt himself much fortified by the two consecutive judgments pronounced to the like effect by Lord Fullerton. It is true that, in reviewing these judgments, the Court (there being enough to support them otherwise) did not find it necessary to adopt or proceed upon this particular *ratio decidendi*: But, on the other hand, neither did they repudiate or decide against it. The Lord Ordinary cannot, in such circumstances, hold the authority of the decision to have been seriously, if at all affected. And at all events, with such precedents before him, he should, as an Outer-House Judge, have hesitated to pronounce differently, even had his own opinion not been substantially concurrent."

The suspender reclaimed. At advising,

Lord Justice-Clerk.—In this case I concur with the Lord Ordinary on the only point now before us—the plea of prescription. I own I am not anxious to express a general opinion as to whether all claims of aliment are excluded from the triennial prescription. It is enough that the aliment of minors and bastard children has been found not to fall under it. If the case of Davidson be a decision on the point, and if there be no series of decisions contrary to it, it is authoritative, being a judgment of the House of Lords. The report by Kilkerran is short: that by Clerk Hume is fuller; and it was found in this Court in express terms, that the aliment of a minor did fall under the triennial prescription; and if the judgment in the House of Lords had been designed to rest on any other ground than the reverse of this finding, there were grounds in the interlocutor for doing so. Craigie and Stewart's Reports give the judgment at great length, and very specifically. It could not bring out the point more distinctly against prescription. *Pater-son v. Cochrane* is another decision; and I see no specialties, although Lord Fullerton, in his note in the case of *Thom*, seems to say that there were. I do not see any from the report; and I consider it a decision upon the general point. Then *Finlayson v. Gown* is another direct authority, in which we have the opinion of President Blair, and in which judgment was given for fifteen years' aliment,—the Court holding that the triennial prescription was not applicable. There are two cases following upon a judgment in the House of Lords, in support of the view taken by the Lord Ordinary;—at the same time the cases, where there is a presumption of payment, as in the case of *Arbuthnot*, arising from taciturnity, are not touched by this judgment.

Lord Medwyn.—The apparent conflict of authorities arises mainly from not attending to the parties against whom the claim for aliment is made. The presumption of payment applies only to persons of full age: *Forrest*; *Hamilton*; *Fraser*, 1838. The case of *Davidson* adopted the same principle. Payment in the case of a minor cannot be presumed; and the House of Lords reversed the interlocutor pronounced in this Court. If a party furnished aliment on an implied or positive agreement,

the claim would fall under the triennial prescription; but the aliment of a child is not matter of contract: it is a natural obligation, and prescription does not apply. If the mother furnish the whole aliment, then she has an ordinary claim of relief against the father for his share. There is no case since Forsyth sustaining the plea of prescription. In Finlayson, the claim was for fifteen years' aliment; and I then acting as Sheriff, conceiving it to be a very grievous case upon a poor man—the claim amounting to about £100—restricted it to £20; but the Court altered, and gave the full amount,—Lord President Blair expressing his opinion that the plea of prescription did not apply. In the case of Arbuthnot, 1834, I laid it down that prescription did not apply to such a claim; and looking upon it as a claim of relief, it does not fall under the purview of the Statute.

Lord Moncreiff.—This question has undergone a great deal of discussion, and there have been contradictory decisions; but finding one clear case decided in the House of Lords, followed by Paterson and Finlayson, and the two cases decided by Lord Fullerton, I do not see how we can go past the judgment in the House of Lords. I am therefore for adhering.

Lord Meadowbank absent.

The Court *adhered*, with additional expenses.

Lord Ordinary, Ivory.—*Act.* Moir; Wotherspoon and Mack, W.S., *Agents.*—*Alt.* A. M'Neill; E. and A. Macmillan, W.S., *Agents.*—*F. Clerk.*—[J.W.]

26th February 1842.

SECOND DIVISION.—(J. W.)

No. 141.—ELIZABETH M'GREGOR *or* MUNRO, *Pursuer, v. Poor* ANDREW MUNRO, *Defender.*—*Et c. contra.*

Process—Expenses—Poors' Roll—Husband and Wife—Separation and Aliment—Adherence—*A husband on the poors' roll, defender in an action of separation and aliment, and pursuer in an action of adherence, moved for absolvitor in the one, and decreet in the other, in respect that the wife had failed to lodge her revised condescendence,—the motion was refused, in respect that he had failed to obtemper an order for payment of £10 towards her expenses. The Court admitted her to the poors' roll, and remitted to the Lord Ordinary to receive the condescendence, and to proceed in the cause.*

The first of these conjoined processes was an action of separation and aliment at the instance of the pursuer against her husband, and the second an action of adherence at his instance against her. Defences having been lodged in both processes, the Lord Ordinary pronounced the following interlocutor:

"17th December 1841.—Conjoins this process of adherence with the previous process of aliment; and in the conjoined process, appoints the condescendence to be revised against the box-day in the recess, and the revised answers to be lodged against the fifth sederunt-day in January next: Farther, ordains the husband, Andrew Munro, to make payment to Mr David Johnstone Macbrair, S.S.C., the agent for Mrs Elizabeth M'Gregor *or* Munro, of £10 Sterling, towards the expenses of carrying on for her the present conjoined process, and that within ten days, and decerns *ad interim* accordingly, and also for the expense of extract, in case that shall be necessary through non-payment within said ten days."

Elizabeth Munro having failed to obey the interlocutor of the Lord Ordinary by revising and lodging her condescendence, the conjoined processes were enrolled by the husband, who moved for absolvitor in the action of separation and aliment, and decree in the process of adherence.

The Lord Ordinary pronounced the following interlocutor:

"25th January 1842.—Lord Murray, for Lord Cuningbame, SCOTTISH JURIST.

having heard the counsel for the parties on the motion for the defender, Andrew Munro, for decreet of absolvitor in his favour, Refuses this motion *in hoc statu*, in respect the said Andrew Munro has failed to obtemper the order for payment of £10, pronounced by the Lord Ordinary on 17th December last."

The husband reclaimed.

At advising, the claimer *pleaded*, that having been admitted to the poors' roll on account of his inability to pay his own expenses, it was unreasonable to stay proceedings until he should pay her's. She ought herself to go upon the poors' roll, which she had refused to do.

The Court, following the interlocutor in the case of Macgregor, 8th July 1841, (*ante*, Vol. XIII. p. 628,) found that, the husband being on the poors' roll, the wife was also entitled to have the benefit of that roll, admitted her accordingly, and remitted her to

as counsel and agent to conduct her cause; farther, remitted to the Lord Ordinary to receive the revised condescendence when prepared, and to proceed in the cause.

Lord Ordinary, Murray.—*Act.* Robertson; D. J. Macbrair, S.S.C., *Agent.*—*Alt.* G. Ross, jun.; William Muir, S.S.C., *Agent.*—*F. Clerk.*—[J.W.]

1st March 1842.

SECOND DIVISION.—(J. W.)

No. 142.—JOHN MONE, *Pursuer, v. JOHN ANDERSON and OTHERS, Defenders.*

Reparation—Damages—Wrongous Imprisonment—Public Officer—Process—Summons—Justices—Relevancy—Proof—Oath, Form of—Roman Catholic—*A Roman Catholic, adduced as a witness, was sworn in the form usual in the courts of this country, but, on the requisition of the public prosecutor, was desired by the Justices acting as judges to take the oath a second time, with his hand upon a copy of the Bible having the figure of the cross cut upon it: he refused, on the ground that he was already sworn, and in consequence was imprisoned for a contempt of Court. In an action of damages against the Justices and the Procurator-fiscal, averring malice and want of probable cause, it was held, notwithstanding, that the facts set forth in the summons were not relevant, and the action was dismissed on the summons and defences.*

On the 24th June 1841, the pursuer lodged a complaint at the Police-Office in Airdrie against Mathew Anderson, carter, and the following excerpt from the Police records of the Burgh Court will explain the instance at which the complaint was brought, and the nature of the charge:

"At Airdrie, the 28th day of June 1841 years. The Procurator-fiscal of Court, for the public interest, charges the offenders after named and designed in this and the following pages, with the offences and contravention after specified, and craves that, on conviction thereof, they may be punished according to law."

"HUGH M'CULLOCH, *Pro-fiscal.*"

"*Sitting in judgment.*—John Anderson and William Fleming, Esquires, two of the Magistrates of the burgh of Airdrie," defenders in the present action.

"Mathew Anderson, carter in Airdrie, summoned at the instance of the Procurator-fiscal of Court, for the public interest, is charged with annoying and molesting John Mone, spirit-dealer in Bell Street, Airdrie, on the forenoon of Thursday, the 24th day of June current, between the hours of eleven and twelve o'clock; all without any provocation, and in breach of the peace."

Mathew Anderson appeared in Court in terms of the citation which he had received, and the pursuer, as the party aggrieved, was cited as a witness against him.

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The pursuer is a native of Ireland, and professes the Roman Catholic religion; and when he was called upon to give evidence, some discussion ensued as to the form in which the oath should be administered to him. He expressed himself willing either to be sworn in the legal form recognised and required in the courts in this country, or, if the Magistrates required it, in the form of the English law, which is also that followed in Ireland. After some consideration, one of the Magistrates administered to the pursuer the oath usual in the courts in this country, and the pursuer took and emitted the same. Thereupon the defender, Lawson, who is superintendent of police, and who was present in Court, although no party to the proceedings, stated to the Judges, that in consequence of the pursuer having been so sworn, and not sworn upon the Bible, they would not get a word of truth out of him. The public prosecutor then insisted that the pursuer should take an oath again in a different form and manner, viz., with his hand upon a copy of the Bible, having the figure of a cross cut in white paper pasted on it. But the pursuer having been already sworn in the manner usual in this country, and conceiving that he was not bound, especially after the remarks of the defender, Lawson, to take the oath again, refused to do so, giving for his reason that he was already sworn. In consequence of this refusal he was not examined as a witness, and the complaint against Anderson was dismissed as not proven. The Procurator-fiscal then moved the Court to have the pursuer committed to prison for contempt of Court; and the Magistrates pronounced an order ordaining him to be imprisoned accordingly. The following is the entry which appears on the record:—"John Mone, spirit-dealer in Airdrie, having been called as a witness, and refused to take the oath, the Bailies remit him to the Police-office till the Court is over, for contempt of Court, and dismiss him with an admonition."

In consequence of these proceedings the pursuer instituted the present action of damages, directed against the two Magistrates who officiated as judges, the Procurator-fiscal, and the Superintendent of Police. The summons set forth,—That the statement by Lawson was false, calumnious and malicious, and meant to charge the pursuer with an utter disregard of the oath which he had sworn, and an intention to commit wilful and deliberate perjury; that the Procurator-fiscal, in insisting upon the pursuer's taking an oath again with his hand upon a Bible bearing the figure of a cross, did so upon the false and erroneous assertion that such is the form required by the pursuer's creed; that after being seized by the officers of Court, and taken to the Police-office of the burgh, the pursuer was searched and locked up in a cell used for the confinement of criminals; that the commitment, apprehension, and imprisonment of the pursuer were grossly illegal, nimious and oppressive, and were done maliciously, and without any reasonable and probable cause; that they took place in the court-room of the burgh in the middle of the day, and when the Court was crowded; that the pursuer has been resident in the burgh for upwards of five years, and has always conducted himself in a quiet and peaceable manner; and that the proceedings were calculated to cause, and did cause, serious loss and injury to the pursuer's credit, character and reputation,

and a deep wound to his feelings: "Therefore, the said defenders ought and should be decerned and ordained, conjunctly and severally, or severally, to make payment to the pursuer of the sum of £500 Sterling in name of damages, and as a solatium to the pursuer in the premises."

Separate defences were put in for the Magistrates and the Procurator-fiscal.—Lawson, the superintendent of police, lodged no defence.

Pleaded by the Magistrates—1. As the defenders were acting judicially in their character of Magistrates, and were farther sitting as judges of a court of record, no action of damages is maintainable in law against them for any judgment pronounced, or act done by them when administering justice in such court,—at all events, without alleging in the summons that they were actuated by malice, and proceeded without reasonable or probable cause. 2. The defenders, sitting as Bailies of a burgh, having the statutory jurisdiction conferred upon them by the Act 3 and 4 William IV. c. 77, were entitled to vindicate the jurisdiction of their Court, and commit for contempt of their authority; and no relevant action of damages lies against them for so doing, at least without alleging malice and want of probable cause. 3. The defenders are entitled to the protection of the Statutes 43 Geo. III., 9 Geo. IV. and 11 Geo. IV., and 1 Will. IV., founded on. 4. Generally the summons is irrelevant, and the allegations insufficient to support the conclusions thereof against the defenders, who are entitled to be assoilzied, with expenses.

Pleaded for the Procurator-fiscal—1. The summons is irrelevant, as libelled against the defender. 2. At any rate, the defender having acted in the matter in question *bona fide*, and within the limits of his public and official duty, is not liable in damages to the pursuer. 3. Even supposing that the defender had fallen in any respect into error, he could not be subjected in damages unless malice and want of probable cause were established against him.

The Lord Ordinary pronounced the following interlocutor:

"18th December 1841.—The Lord Ordinary having heard the parties on the defences as dilatory, and considered the summons and defences, sustains the defence of irrelevancy, dismisses the action as to all the defenders except James Lawson, and decerns: Finds the said defenders entitled to expenses; appoints an account thereof to be given in, and when lodged, remits the same to the auditor to tax and to report.

"*Note*.—If it be sufficient to render an action of damages against Justices or other public officers relevant, that the words malice and want of probable cause be used, this interlocutor is wrong. But at present the Lord Ordinary does not think that these phrases can always prevent the real truth of the case, as disclosed in the summons, from being looked at. The pursuer himself reveals facts here which sustain the dilatory defence of irrelevancy.

"He admits that he is a Catholic; that he was sworn, when a witness, as a Protestant; that when the Justices desired him to take the oath according to the Catholic form, as practised in the country, he refused, and that it was for this contempt of Court that he was committed.

"In so far as the Justices are concerned, these facts entitle them to have the action instantly dismissed. They were acting judicially, and within their jurisdiction, and it was their clear duty to punish this clear contempt. Even if they had had a malicious pleasure in annoying the pursuer, this feeling will not render what they did unlawful; and, at any rate, malice alone is

not enough. And as to want of probable cause, it cannot be stated without refuting itself. The pursuer admits that all this may be fairly stated in defence on a trial of the merits. But if the defenders have a defence of irrelevancy, they are entitled to be protected from protracted torture.

"As to the *Procurator-fiscal*, it is set forth in the summons that all that he did was to exercise his undoubted right, if not duty, of insisting that the witness should be correctly sworn, and of moving, when the witness refused, that he be committed. It is not even alleged that he was malicious and improbable in his cause; for these terms are only applied to the 'said commitment, apprehension, and imprisonment.' It is said that he made an erroneous and false 'assertion.' But what was it? That the proposed form of the oath was such as was 'required by the pursuer's creed.' Men may surely differ as to this fact without actions of damages."

The pursuer presented a reclaiming note, praying the Court to alter the interlocutor, and to sustain the action as relevant.

At advising,

Lord Medwyn.—Suppose the pursuer were to establish all the facts which he alleges, we are now required to institute the inquiry, whether they be sufficient to render an action of damages relevant against the defenders? This course was approved of in the case of *Duncan*; and the Lord Ordinary has dismissed the action as irrelevant against all but *Lawson*. Now, assuming the facts to be proved, do they show that the Magistrates acted maliciously, and without any probable cause? It is the common practice to swear Roman Catholics in a peculiar form; and such practice is neither illegal nor oppressive. If the public prosecutor use no insulting expression, and if the witness object, it will be presumed that he considers the form proposed as more binding than the common form; and the public prosecutor would the more, on that account, insist on its being taken. The pursuer in this case does not object that the manner in which the oath was tendered was against his creed or conscience, but simply that he was already sworn. In my opinion, he was not entitled to refuse the oath on this ground, and the Magistrates were entitled to insist on his taking it, and to punish him for refusing, as a contempt of Court, which is punishable on the spot. The Court of Justiciary sometimes commit a witness who refuses an oath on the ground of religious scruples: but here no such reason is alleged. The *Procurator-fiscal* only did his duty in moving that the witness be committed; and the Magistrates were guilty of nothing oppressive in ordering him to be so. I think, therefore, that the interlocutor of the Lord Ordinary is right.

Lord Justice-Clerk.—Aware of the difference of opinion which subsists as to this case, I approach it with great reluctance, and have repeatedly considered it. I think the interlocutor involves points, both under the Statutes as to jury trial and those protecting magistrates, of the very greatest importance. But any question under the latter Statutes sinks into insignificance, when compared with the principle and result of the decision under the jury Statutes. It humbly appears to me that if this interlocutor stands, the main object of introducing jury trial is defeated, and that there is no case of oppression and wrong which the Court may not, on its own notions of the facts, intercept before going to trial, and thus deprive the subjects of the judgment and opinion of a jury upon the character of the acts in which the wrong is stated to consist. I do not wish to found merely upon the first sentence of the note of the Lord Ordinary, although I concur with Mr Maitland, that under the Statutes protecting magistrates, this summons is relevant, and cannot competently be dismissed. It is more important to notice, that the remainder of the note proceeds upon the Lord Ordinary's view, and estimate, and opinion of the supposed facts, and assumes that a contempt of Court is fully proved on the face of the summons. Even if that were so, yet if the action on the case, to use the phrase of the Statute, that is, the action for remedy and redress, shall libel that the acts were done maliciously and without probable cause, the action is, under these Statutes, perfectly relevant, and must be disposed of by the verdict of a jury, though under the direction of course of the Judge, and the ultimate review of the Court. These Statutes give no pro-

tection to inferior magistrates, where the act or proceeding is set forth as malicious and without probable cause, so as to exclude a trial. I own I think this is a view of the case which is lost sight of. Under these Statutes, when that allegation is made, the case cannot, I understand, competently be withdrawn in England from the cognizance of a jury. I do not think this Court has any such power. It is wisely and justly held, that in the administration of criminal justice by inferior magistrates, there may be great practical oppression and wanton tyranny, even under regularity of legal forms; and hence, while the Legislature has extended great indulgence and protection to them, if their motives are pure, it has, on the other hand, most wisely seen that they may often be liable to be influenced by motives from local causes or knowledge: so that, in order to protect the liberty of the subject, it is right that, if malice and want of probable cause is established, there shall be no protection. But in such cases, if I read these Statutes rightly—if I understand the principle of the jury Acts,—the Legislature entertains the greatest distrust of the estimate and opinion which the Judges of courts of law may form of the character of the facts as constituting oppression, and still more of the character and import of the acts by which the malice and the want of probable cause are to be established. I own I entertain of myself the utmost distrust in such matters. Let us see, in the first place, what the protecting Statutes require. The first of the Statutes, the 43d Geo. III. c. 141, relates exclusively to convictions or proceedings against the party apprehended or convicted,—but it is the Act which is subsequently extended; and it is declared, that in the action for or on account of any such conviction, although it may be quashed, the party shall not be entitled to recover any more or greater damages (this necessarily imports that there is to be a trial) than the sum of twopence, nor any costs, "unless it shall be expressed in the declaration in the action whereon the recovery shall be had, and which shall be in an action upon the case only—(that is, a proper action for trial laid on the special facts)—that such acts were done maliciously, and without any reasonable and probable cause." Here a trial is assumed to be essential, and the provision is merely that more shall not be recovered, unless the declaration sets forth the malice and want of probable cause, which must be in an action on the case, which, though an English phrase, is, I believe, the same as a proper action of damages with us on account of the alleged injury. This is a Statute applicable to Great Britain and Ireland. Such actions are now jury actions in Scotland; and if the declaration or summons in the action alleges that the acts were done maliciously, and without reasonable and probable cause, I hold that the party has an absolute right by Statute to attempt to recover damages through a jury, if the jury think damages ought to be given. What more is the party bound to aver in the action? It is not enacted that the acts must be shown upon the face of the action to be illegal. They are averred to be illegal, and the pursuer undertakes to make that out. The legality of the acts does not necessarily exclude the action from a jury, or form a defence in bar, if malice and want of reasonable and probable cause is averred as leading to practical oppression. Here there is a statutory declaration as to the requisites to entitle a party to recover damages, if that allegation shall be made out. On what ground can the Court intercept this case from trial? The 9th of Geo. IV. c. 29, § 26—a Statute applicable to Scotland—extends the Statute to all "inferior judges and magistrates in Scotland, in regard to any sentence pronounced, or proceeding had in any criminal trial." I am ready to hold this to go beyond the case of the party apprehended or convicted, as in the British Statute, and to give to the defenders the benefit which they ask—viz., that it applies to any thing done in the course of a trial. The 11th Geo. IV. and 1 Will. IV. c. 37, § 13, clears this up, by declaring that the protection shall extend to all acts done in regard to any criminal cause or proceeding. Holding the case, then, though a proceeding as to a witness, to be within the protection of the 43d Geo. III., yet the party has averred that the act which he alleges was illegal and oppressive, was done maliciously, and without any reasonable or probable cause, and has a title thereby under the Statute to recover damages, if the proper tribunal for taking cognizance of the damages are of opinion that they are due. I am of opinion that, with the effect of this Statute, it is not competent for the Court to interfere, and that on this

ground alone the interlocutor must be altered. The incompetency of intercepting the case from trial, even under these Statutes, will more clearly appear, when I notice the objections. The interlocutor, in my opinion, is clear and insurmountable in point of statutory incompetency, under the ordinary system of jury trial in Scotland. With a view to that question, it is necessary to see what the statement in the summons is, and what is the supposed point of irrelevancy on which the interlocutor is founded. I take the fair meaning and import of the summons to be clear. The counsel of the defenders took the same view of it in argument; and if there was any doubt as to what the party meant, certainly I think that of itself would be a sufficient reason for a condescendence before answer;—the more so, as the only result would be a new action setting forth the pursuer's meaning in a way to avoid mistake or doubt. The pursuer states "that he is a native of Ireland, and professes the Roman Catholic religion. When he was called upon to give evidence in the trial in question" (the summons states), "some discussion ensued as to the form in which the oath should be administered to him." I can interpret this only to mean, that being and professing to be a Roman Catholic, a question arose how he should be sworn. I shall speak presently to the distinction in the note, of being sworn as a Protestant or as a Catholic. But here, in the outset, the party who is to be sworn, and whose religion I think the statement imports was known, tells us that it was matter of discussion how he was to be sworn. Then the summons goes on to say, that "the pursuer expressed himself willing either to be sworn in the legal form recognised and required in the courts in this country, or, if the Magistrates required, in the form of the English law, which" (the summons states expressly) "is also that followed in Ireland, the pursuer's native country. That after some consideration, the said John Anderson, one of the magistrates, administered to the pursuer the oath usual in the Courts in this country; and the pursuer took and emitted the same." What is the meaning of this declaration? It is, I think, that he declared that he held either form of oath to be equally obligatory; and that, if sworn in either way, he would be bound thereby. This is a very important point. What more could be done before swearing him, unless there had been an inquiry instituted into his own opinions, or those of his persuasion? The pursuer was willing to take the oath in either of the ways above proposed or talked of; thus declaring that the Scotch form was binding on his conscience, if taken. According to this statement (and we must go entirely upon the allegations in the summons,) the pursuer was, in my opinion, legally and effectually sworn, and in the way, moreover, *first*, in which he had a right to be sworn; *2dly*, in which the Magistrates were bound to swear him, though a Catholic, if required, and no reason to the contrary proved; and *3dly*, in the way which the Magistrates, after consideration, and in the knowledge of the facts, decided to be proper and fitting. The pursuer having been willing to take it in the mode which he alleges is used in Ireland, and which we must for the present hold to be the mode in Ireland, What is it that the summons next states? (Read summons, p. 2). Then the summons avers the imprisonment under the commitment, and that the same "were grossly illegal, nimious and oppressive, and were done maliciously, and without any reasonable and probable cause." This is the specific and substantive averment. What follows is only amplification. I cannot take this case from a jury, and shall deeply deplore for the interests of the subjects of the country, if this interlocutor shall stand. The pursuer was regularly and deliberately sworn (of course I take the summons as a statement merely, but as the statement on which we must now go), and after consideration as to the manner in which he should be sworn. Then he was sworn according to the law of the land,—legally, effectually, religiously sworn. Then a party present makes a statement, the most injurious and insulting which can be conceived, and one directly striking against the religious faith and opinions of the pursuer, and that statement, accordingly, as a gross libel, remains for trial. But what is done? Upon this statement, that not a word of truth could be got from the pursuer after he had been so sworn, the Magistrates are moved to swear him again, and in a particular form,—and this, the summons states, upon the false and erroneous assertion that such was, and is the form required by the pursuer's creed.

So far as this is matter of averment—and I think it is wholly averment—it is enough for me to say that the pursuer avers, and offers to prove, that no such form of oath is required by the religious faith of Catholics. Now, this is a most vital part of the case. The only pretence for making a man take an oath different from the legal oath, is, that his religious faith is such that he can only be bound by an oath in a particular form. If that ground is not true, then swearing him in that manner is against law. If that ground is not true, the act is further illegal; because, if a person takes the oath prescribed by law, he cannot be legally compelled to be sworn again in a way different from the legal form, and against his religious opinion. If that ground is not true, there was no contempt: and so the Lord Ordinary seems to hold. Now, it is one thing to administer an oath different from the legal form, if the party is willing to take that oath, and acknowledges it to be binding,—and another to compel a party, under the penalty of contempt, to take such an oath, when he is willing to be sworn in the way the law prescribes, and objects to the other form; nay, when he has been sworn in the legal way after discussion. Whether this was a form required by the pursuer's creed, is matter of fact, and most important matter of fact; for it was the ground of the motion pressed upon the Court. I hold this must and ought to be matter of proof. On that ground, I am unwilling to say a word upon the subject; but I think it right to state, that after all the examination in my power, I am satisfied that the sign of the cross is no part of the mode of administering an oath in Catholic countries, or under the Catholic faith; and that they hold a person to be religiously sworn by our oath, and without the sign of the cross. Further, I am satisfied that this extraordinary plan of pasting a piece of white paper, cut in the shape of a cross, upon a Bible, is regarded by intelligent Catholics as a gross and wanton insult to their faith. The sign of the cross is made in token of reverence by the party himself on certain occasions—by the priest in certain religious rites. But to suppose that they hold that to put the hand on a symbol of the cross made by a Protestant clerk,—a cross in paper, or as in Mr Neaves' Bible in ink, on one page,—is a religious form, is truly to ascribe to them the admission of gross idolatry. If Catholics choose to take it, good and well; but the law administered to the pursuer must be the law equally for every Catholic of every station; and shall it be said, that if a Catholic takes the oath according to the law of the land, he can be again sworn, upon the allegation that he would not be bound by the oath in the way here proposed, and if he declines, be committed to prison instantly for contempt of Court—by a refusal which only the more proves that the man is actuated by sincere and rational religious belief. I put the case that this had been a Roman Catholic bishop, or a learned and intimate friend of mine, a member of the bar,—is he to be so dealt with by an inferior magistrate, because somebody in Court utters a gross and wanton libel upon him, equally injurious to his character and to his religious opinions, and that, when he seeks redress, alleging that the act was oppressive and illegal, as well as malicious, and without reasonable or probable cause, he can be told this was a contempt of Court, and to a jury we will not send you. The very case lately occurred before my learned friend, the late Sheriff of Perthshire, where a Catholic clergyman was to be examined as a witness. The Bible with a paper cross was tendered to him. He declared that no consideration would induce him to take an oath in a way so revolting, and which his faith abjured. He was much pressed by one of the bailies, but the Sheriff justly declared that he could not, and would not, compel him to take the oath in such a form. The legal qualities under the protecting Statutes being averred, the summons further avers that what was done was illegal and oppressive. How can this be decided until the facts are proved? The pursuer says there was no inquiry. Is that not a particular fact? Is the whole character of the scene—the precipitancy, harshness, and manner in which the thing was done—of no moment, especially in at once holding that there was a clear contempt, without any further inquiry? So far from thinking that there was contempt, on the showing of the summons, I should say the pursuer acted legally, honestly, and from religious motives. As a proof of the necessity of knowing the facts, I recollect Mr Macfarlane pressed upon us, in behalf of the Inferior Court prosecutor, McCulloch the Pro-

curator-fiscal, that he could not be suspected of any undue feeling against the pursuer, for the prosecution originated in the pursuer's own complaint of an assault committed on himself, which he was adduced to prove. That fact would be a most excellent observation to a jury; but would it not just weigh greatly in considering also whether the man's refusal to be sworn, proceeded from any desire to defeat justice, or from an honest feeling that he had been regularly sworn, and that the proposal was a gross attack on his religious opinions? Whether the thing was done oppressively and illegally, I hold to be a matter on which the opinion and estimate of a jury must be taken. A thing might be legal, and yet, in the circumstances, most grossly oppressive; nay, might originate in the bitter spirit of intolerant Protestant bigotry; and whether it was oppressive or not, I apprehend this Court is incompetent in law to decide. Whether it was illegal, combines a great variety of mixed matters of fact and law, and on which I equally think that it was essentially necessary that the opinion of a jury must be taken under the guidance and direction of the Court as to law, so far as there is pure law in the case. But the view of the Lord Ordinary converts the question into a point of law, and one of the very deepest importance. He says that the man was sworn as a Protestant, and that he was ordered, and competently ordered, to take another oath, because a Catholic, which he had no right to refuse. I have already shown that the fact that he was a Catholic was known before he was sworn, according to the summons. But what is this rule of law that is to subject a man to contempt of Court and summary imprisonment, upon the ground that he has been sworn as a Protestant, and will not be sworn, as it is called, as a Catholic. I am not aware of any law making a distinction as to a witness being sworn as a Protestant or as a Catholic. I do not understand the distinction. The law requires witnesses in Scotland to be sworn in a particular manner. Whether there is any prescribed form of oath in England or not, there is in Scotland; and the form in Scotland is of the more importance that the Judge administers the oath. Statute has made exceptions for Quakers and another sect. The common law of this country, and of every country in Europe, as Lord Stowell has beautifully pointed out in a very striking judgment, has made an exception in regard to Jews, who have been allowed to maintain their peculiar laws and customs, even as to marriage, entire and inviolate in the very heart of the most artificial and most intolerant systems in Christendom. A special rule was introduced in England as to Mahomedans (Morgan's case, 1 Leach, 64) by the Supreme Court, after full discussion, and after deliberate inquiry. But we admit of no exceptions in regard to Catholics any more than Episcopalians. They must equally take the ordinary oath, if required. In practice, those who have been in the habit of being sworn by holding and kissing the Bible, as being natives of England, are often indulged by being sworn in that way,—a practice of doubtful authority and expediency. I do not say that if it should be established upon proper and full inquiry in the Supreme Court, that any particular individual, or at least sect, did not regard an oath as obligatory unless administered in a particular way, it would be incompetent at least for the Supreme Court to administer the oath in the way that was ascertained to be in the understanding and principles of particular sects, alone binding on their members, although no such case has yet occurred, or has ever been mooted. And it must be kept in view, that this comes to be a very delicate subject with us, when the Judge is the party who administers the oath, and may thus be called on to be participant in forms of putting the oath indecorous for the dignity and gravity of the bench. But as to any such distinction in regard to divisions among Christians, as Protestants and Catholics, I know of no authority for such a doctrine, or which sanctions the notion that the law is to be accommodated to vagaries or mummeries of every sect, or of every individual—much less is it to compel Catholics to take an oath different from that taken by Protestants. I find no trace of such a doctrine in Hume; and though there is a loose expression in Burnet, it is inconsistent with the very doctrine which he himself lays down. Indeed it would be difficult to say to what length the Court might be called upon to go, if it once departed from the principle (which certainly the special Statutes seem expressly to assume), that the form

of oath prescribed by the law of Scotland must be taken by all witnesses who do not fall within the admitted exceptions. Are we, in swearing a German Pandour, to adopt the notion and practice of Hayraddin Maugrabbin in Quentin Durward—to face him to the east, and to swear him by the Seven Sleepers in Cologne, as the only oath which we believe likely to bind him. I own I do not see where we are to draw the line, or refuse to adopt special forms of oath when said to be obligatory on the individual, if we once adopt the notion of varying the oath for any sect or individual. But, still more, I cannot find the slightest trace of authority for the doctrine, that if parties are ready to be sworn according to the Scotch form of oath—be they Presbyterian, Episcopalian or Catholic,—it is competent to compel them to take another oath without any inquiry either as to their individual opinions, or as to the opinions of their sect. The Lord Ordinary holds that a Catholic is not duly and religiously sworn, if sworn as a Protestant is; and that, because he is a Catholic, he can be compelled to take another oath. My Lords, I own that proposition is perfectly new to my mind. That in the Justiciary of late years, a form of oath has been administered to Catholics willing to take it, I know; but that is a very different matter. The law lays down a form of oath, the great characteristic of which is, that it is tintured with no peculiar tenets, and is based simply upon a belief of an Almighty Being, and of the future accountability of man. It is framed for the purpose of being taken by all; and I do not find the slightest authority for holding that the law admits that any who take that oath are not religiously sworn, or recognises the right to refuse to administer that oath to those who are willing to take it. I apprehend that every man has a right to be sworn in the way which the law has provided. To subject him to any other oath is in itself a strong proceeding. To do so upon the imputation that he does not recognise the obligation of such an oath, and without inquiry, is a still stronger act. I would require deliberate inquiry into the opinions of such a body as the Catholics, before we, Protestants, are to hold that our Scotch oath is not binding on them. We know that the peculiar form of holding and kissing the Bible is the usual form in England and Ireland. It is even believed, that owing to the unimpressive way in which an oath is muttered over by an officer in the English courts, some natives of both countries—Episcopalians as well as Catholics—(the former probably more than the latter), imagine that if they do not kiss the book, the oath is not administered. But in giving either the option of such an oath, one is, in truth, showing questionable deference to the established and legal form in England and Ireland—not devising an oath for the supposed opinions of one set of Christians. But, while there is a separate and distinct mode of administering an oath to Catholics, by which alone they can be religiously sworn, and to fasten down upon that large class what is not attempted either in England or Ireland—the exhibition and the touching the sign of a cross as an article of their creed, without any investigation, and as a part of the oath to which they must submit,—seems to me one of the most intolerable acts of oppression which I ever heard of. I can only view it as religious persecution. And yet, farther, if a man—I must assume of respectability—known to be a householder—is called as a witness—is known to be a Catholic, and after some discussion as to how he is to be sworn, and he professes himself ready either to take the Scotch oath, or to be sworn according to the way in which the oath would be administered in Ireland—his native country,—and he is then deliberately sworn according to the laws of Scotland,—is there warrant for the notion, that an inferior magistrate (without even that inquiry as to the belief of particular sects as to oaths, which is not fitting for such tribunals, and without inquiry as to this man's faith), can turn round, and upon an expectation that the person will be guilty of perjury, order him, under pain of contempt, to take another oath in a way which, to that person's religious opinion, is an insult upon his faith? It does humbly appear to me to be at variance with every principle of law. On this part of the case, I am decidedly of opinion that there is no power to compel any person to take an oath different from that prescribed by the law of the land, unless it shall be solemnly decided after full inquiry, as in the case of Omishund and Barker (1 Atkins, 21) in England, by autho-

ritative inquiry in the Supreme Court, that the religious tenets of some particular sect require a different form of oath; and, *2dly*, that when a party, after discussion as to how he should be sworn, has been deliberately sworn according to the law of Scotland, it is incompetent—before any thing occurs in his examination to create suspicion, without inquiry into his individual opinions, or that of his sect, but upon the avowed and public imputation that he will not feel the obligation of the oath which he has taken—to order him instantly to take another oath, in a form and manner as unknown to him as it is to the law. So far from thinking his conduct, in refusing, to be contempt, I regard the act of which he complains (if I am driven now to give an opinion upon it,) to be not only illegal, but as intolerable oppression as, in a free country, can be practised. I regard it as religious persecution, or magisterial despotism. It is said he did not state the oath to be against his faith. It would be somewhat singular to require from a poor man, in such a situation, to state all, or the best defences in law open to him. He says—(See.) That was enough. The Magistrates took his risk of going wrong, if he compelled him to be sworn again. But then I return to the point, that the whole of this discussion is incompetent and premature, and can only arise before the jury—as it is only fit and proper for a jury. I had at one time intended to go through the various clauses of the Acts of 1815, 1819, 1825 and 1830; and perhaps that is not the less necessary, owing to some very contradictory judgments in the House of Lords, pronounced on a very imperfect statement of the clauses in these Statutes. But these various enactments are well known to the Court, and I shall not go through them. But it is very necessary to advert to the Judicature Act, which, singularly enough, has not been adverted to in some of the incidental notices of these matters in the House of Lords—nor the distinction between the cases appropriate for jury trial, and those not appropriate, sufficiently or at all brought out. The general principle I apprehend to be clearly this: that in the cases appropriate for trial, they can only, upon the merits, be disposed of by means of a trial. The decision in the case of Kerr establishes that point as the general rule. But further, the second section of the 1st William IV. c. 69, plainly lays that down as the principle applicable to all the appropriate causes. Exceptions there are in which it is perfectly competent to decide the appropriate causes on matters of law; but these are limited and peculiar;—limited in character, and peculiar as to the form of procedure. In the *first* place, the provision in the 59th Geo. III., as to raising questions of law or relevancy on the summons and defences, was repealed by the Judicature Act, § 28: and none of these provisions are now in existence. I entreat your Lordships' attention to that important point. The Judicature Act made separate and distinct provision for the exceptions. I am quite aware that of late years, since the separate Jury Court was abolished, we have been a little apt in practice, but with the consent of both parties, and without the attention of the Court being called to the point, to confound the proceedings in the Judicature Act as to the preparation of ordinary cases in the Court of Session with those cases that are appropriate to jury trial; and the regulations as to which begin with the 28th section. I beg the Court to observe, that all the prior sections relate to the cases that are not appropriate to jury trial; and in particular, the 16th section, as to the discussions of questions of law and relevancy previous to trial, under which this interlocutor is truly pronounced as if competent, relates solely to the causes not appropriate, but which may depend on fact. It has no application to the appropriate causes. There is a totally separate and distinct set of regulations for the appropriate causes, as distinct as any two matters under one Statute can be. By the 29th section they are to go to the Jury Court; and then the 33d section contains the following provision—(read section 33). This is now the only provision. It will be observed that this provision, as to the appropriate causes, admits of the determination of such questions of law and relevancy only on a completed record. No doubt the parties have sometimes been willing and anxious to get the matter decided at once; but whenever the attention of the Court has been called to it, this has been uniformly attended to, and there has been no interlocutor, when the notice of the Court was directed to the matter assuiling, pronounced, except on the closed record.

In the case of *Scott v. Carle*, where a point of law was raised as to a process-caption, the record was prepared—the case retransmitted to the Court of Session roll, and this Division, on advising minutes of debate, remitted to the Lord Ordinary to close the record and sustain the defences. My attention has been directed by one of your Lordships' number to the case of *Bell v. Mylne*, 15th June 1838; but there there was a record. I was for the pursuer. We were most anxious to have the question of law decided. The session papers state that to be the desire of both parties. The necessity of going to a jury was never raised in this Court. There was a proper question of law for determination,—viz., whether, on the terms of the minute of appointment, the teacher was removable, and the point, that the case ought to have gone to trial, was raised in the House of Lords without ever having been stirred in this Court, and against good faith,—nay, against positive consent. It is plain that the point had not been argued on sound grounds in the House of Lords, for Lord Cottenham seems to think that it was optional to send all cases to a jury; and that a party can insist to show a *prima facie* case for damages. The point came to be raised in the House of Lords very obviously, in consequence of a view which had in the interval been thrown out by Lord Cottenham in the case of *Montgomery v. Boswell*, in which his Lordship, to whom the distinction between the cases appropriate under the Statutes, and those which the Court may remit to trial when they are found to depend on matters of fact, and prepare for trial accordingly, and which, to the last, are under their discretion, was not (so far as I see) distinctly pleaded, appears to hold that a case—not one of the appropriate causes—once remitted to the jury roll must be tried, contrary to innumerable cases with us, and universal practice. In the case of *Bell v. Mylne*, Lord Cottenham certainly takes a very different view; but as the distinction I have alluded to was not pressed on him, he seems to hold, that as to all cases, even those appropriate for jury trial, the Court may decide them if they choose, without a trial. If the distinction had been pleaded, then it would at once have been seen that *Bell v. Mylne*, as one of the appropriate causes, had been brought within the 33d section of the Judicature Act, and so was competently dealt with by the Court as it was: So, in *Findlater v. Duncan*, there is an incidental remark by Lord Cottenham (in which I observe that Lord Brougham does not intimate any concurrence), that the point might have been decided on the summons and defences; and I admit that the question might, in that case, have been decided on the record; for the point was a distinct and proper question of law, separate from the merits,—viz., whether an action will lie against road trustees to recover out of the trust-funds. In this case the action is disposed of as an ordinary Court of Session cause, under the first sections, under the Judicature Act. I think that is manifestly incompetent. There must be a completed record before the party can be assuiled upon any question of law, in any of the appropriate causes. This distinction was not lightly adopted by the commission which suggested that Statute. It was done upon two broad principles: 1st, That in the appropriate causes for which a jury was the proper tribunal, questions of law and relevancy were not to be raised until the precise state of the facts was obtained by the precision and accuracy of a record, with the deliberate intention of excluding such attempts as are made here to arrest these cases, and exclude trial; and 2dly, for the purpose of having the proper separation of law or relevancy from the fact brought out by means of a record, so as to prevent the Court usurping or encroaching upon the functions of a jury, and defeating jury trial. These were wise principles. They are embodied in the Statute. I think this case, and the note of the Lord Ordinary, illustrates their value forcibly. No doubt actions of damages are often raised, which the counsel for the pursuer know had better be brought to issue as speedily as possible, and at the earliest stage. In several cases that have been before the Court, the counsel on both sides have concurred—for the pursuer as much as for the defender—in wishing to sink the distinctions under the Statute, as to the manner, and the stage of the cause in which, in the appropriate cases, questions of law and relevancy might be raised, for the laudable purpose of bringing to a speedy result a doubtful or desperate case. I have done so frequently myself, when, along with the counsel on the other side, we knew we were quite out of form. But in

all these cases, the question on which the judgment of the Court was asked was a proper question of law or relevancy, separable from the facts,—not the whole merits of a mixed case, such as the present. And the determination of such questions in no degree imported the superseding the functions of a jury. In the case of *Bell v. Mylne*, the teacher in the Dollar Academy held his office by written appointment. His record stated, that there was no power to dismiss him under that written document, and he therefore claimed damages. There there was a question of law clear from facts. In the case of *Findlater v. Road Trustees*, the point might have been raised before trial, that an action did not lie against road trustees. That was a separate question of law;—or, in the class of questions which arise very conveniently in framing issues, whether the action is relevant without malice—there again is a proper and separate question of relevancy;—or in this case, if the statutory averments had been left out, and if twopence had been tendered, that the action would not lie for more might be pleaded as matter of law. Neither do I wish to say at present, that when the record is prepared, questions might not be brought out in this case, on which a proper question of law, entirely separate from fact, may not be brought out. But the judgment of the Lord Ordinary is precisely of the character of a verdict upon the merits—the mixed merits of fact and law. I have examined every case which has occurred, in which any of the appropriate cases have been disposed of on questions of law and relevancy, and I cannot find one in the least degree analogous to the sort of question raised in the present case, in which the cause is to be at once decided, not on any proper and distinct question of law or relevancy separable from the general merits of the case, but on the view which the Court may take of the merits, or probable merits of the cause, without trial and without a jury. How many cases have there been of the alleged illegal and oppressive use of diligence, or of irregular warrants, and similar actions of damages, in which it might have been very easy for the Court, upon summons and defences, to dismiss the action—and probably very much according to the law and justice of the case—upon the sort of a general view of the whole merits that is here taken. No doubt there is a practical suffocation of these cases in the Issue-Chambers, where the jury clerks, in the exercise of that superintendence which has been so highly beneficial, and been conducted with so much sagacity, refuse to give issues, and the party generally finds out, and is advised, that the nature of his case is such that he ought to acquiesce, and is not likely to take much by an appeal to the Court: and when the case comes the length of issues, it will be open to contend, after a full statement of the facts, that there is no issuable matter. But what I object to as utterly incompetent under the Statute—as perfectly new in a disputed case—and as most dangerous, is, *first*, the decision of the matter in the present stage of the cause; and *secondly*, the confounding a general view of the merits of the whole case with a proper distinct question of law and relevancy, separated for the Court from any matters of fact, or any estimate of, and opinion on, the effect of the facts averred. I must conclude with declaring, that to the disposal of this case I look with the greatest anxiety. I have seen as much of vexatious actions of damages as any man, and I know how much the system of jury trial has suffered from this evil, peculiarly incident to the first introduction to such a system. But these are small matters when weighed against the general principles on which the system is based. The cognizance of cases of oppression and wrong by a jury, is a most invaluable part of the administration of justice. Judges are not the best fitted for estimating rightly the motives in which wrong originates, or the character of the acts in which it consists. We are apt to lean too much to the side of authority. We are apt to judge of the probable merits of a case too much from previous experience of other similar cases. We are the better of the aid, and concurrence, and check of a jury in disposing of such cases. Our function is best discharged in stating the law for them, in the first instance, to apply; and if, in the outset of such causes against Magistrates, before even we have the benefit of the statutory check of a completed record, we constitute ourselves the Judges of what was oppressive or not, and of the general merits of the action of damages, I fear that one of the greatest uses of jury trial, and one of the best safeguards for the liberties of the subject, would be soon

defeated. In the present case—where there is a certain, and very great protection given to inferior magistrates, but where the party, in terms of the Statute, undertakes to prove that the act was not only illegal but oppressive, malicious, and without reasonable or probable cause,—I hold it to be entirely beyond the power of the Court to intercept the case from trial, on its own view of the facts and general merits of the action. I see no question of law or relevancy separable from the estimate which the Court take of the propriety and character of the acts done, in which the oppression is stated to consist.

Lord Moncreiff—This appeared to me to be a short and very simple case, but the opinion now delivered renders it one of vital importance to the law. I thought we were to judge on the facts set forth in the summons; and the question is not, what is the proper form in which an oath is to be administered to Roman Catholics, or whether the Magistrates exercised a sound discretion in the manner in which they acted here; but the question is, whether magistrates, sitting as Judges, and pronouncing judgment, must, in every case where a party avers malice, go before a jury? If it appear expedient to the Lord Justice-Clerk and Lord Medwyn, I am willing to go to the whole Court for their opinion on the matter. After the cases of *Duncan* and *Bell*, I entertain no doubt that it is not only competent to, but is the bounden duty of the Court, where no case is stated on record that ought to go to a jury, to give judgment without allowing it to go farther. In *Duncan's* case it was held by Lord Cottenham that the Court ought to have disposed of the case on the summons and defences; and he reversed the interlocutor, remitting the cause to a jury, holding that no relevant case was set forth in the summons. I don't know whether he proceeded accurately upon the Statutes, but it is evident he considered them carefully, and so decided. In the case of *Duncan*, the wrong was committed by servants, and it not being averred that it was done through the fault of the trustees, the action was held to be irrelevant. Here it is attempted to make Judges liable for what was done in the judicial seat. In the case of *Bell*, Lord Cottenham repeats his law, that it is within the competency of the Court to take cognizance of the relevancy of the action on the summons and defences. In *Forbes v. Allison*, 1823, it was said there was no relevancy in the action, and it was so found. This was done upon the issues; and according to the uniform practice, the record is not closed till the issues be settled. Having these authorities, I am not called upon, nor entitled to go into the terms of the Statutes. Holding that it is within our competency to decide upon the relevancy, I hold that there is no case against the Magistrates which can be sent to a jury. They were sitting as Judges, and the thing complained of is, that they ordained the pursuer to be imprisoned for contempt of Court; that is, that they pronounced a judgment against which the pursuer complains. But there must be some specific statement of wilful illegality. The Magistrates cannot be liable for error of judgment. There must be illegality in the thing done; and it won't do to say the Judges decided maliciously,—otherwise, every party who loses his cause might drag Judges before a jury in an action of damages. It is easy to put in the word maliciously; and if a party were to say a legal sentence was pronounced maliciously, would that suffice? Illegality must first be established, and so clearly, that Judges could not have so acted in *bona fide*. I think the thing complained of here was injudicious, but it was not illegal. How can I say that it was, when it is in accordance with an established practice, not of yesterday, and frequently resorted to? It occurred in the noted trial of *Burke*, where a witness was sworn in the ordinary way; but it having turned out that he was a Roman Catholic, he was asked if he wished to take the oath a second time in another form? He said he did not know; but he was afterwards sworn in the form here complained of. It is the general practice to swear Catholics on a representation of the cross; and the clerks of Justiciary carry with them Bibles marked for that purpose. Now, I am not going into the question whether this be a right practice or not. It is not needful for the determination of this case; and it is not stated in the summons that no such practice obtains. If Hare, in the case referred to, had refused to take the oath a second time in the form proposed, it would have furnished an additional reason for insisting upon his compliance; and had he refused, he would have been committed.

If it had not been insisted in, how would the matter have stood before the jury? It has been the practice since, and must have been in observance before; and it is not spoken of as a novelty. It may be wrong, and founded on a mistake, as to its not being contrary to the Roman Catholic creed. But the Judges only propose an oath in the form recognised by practice, and the witness refuses. It is said that it was suggested in insulting terms, but the case against Lawson is reserved. The Procurator-fiscal moves the Court to administer the oath in a different form; and the Justices require Mone to take it; he refuses, and it is said the requisition was insulting to his feelings. But suppose it were, where is the illegality in the Magistrates having ordered his imprisonment? It may be he has a right to refuse, and henceforth, it may be proper to say to Justices, you shall not enforce the taking of this form of oath; but meanwhile, how can I say that it was illegal? He does not say that it was contrary to his conscience, but merely that he had been already sworn. Nothing is averred to bring it within a case of malice. On the summons and defences there is no relevancy; and, according to the case of Duncan, we are not only entitled, but bound to dismiss it.

Lord Meadowbank absent.

The Court pronounced the following interlocutor:

"Adhere to the interlocutor complained of; refuse the desire of the note, and of new find expenses due; allow the account to be given in, and remit the same, when lodged, to the auditor to tax and report."

Lord Ordinary, Cockburn.—*For the Pursuer, Maitland; John Cullen, W.S., Agent.*—*For the Justices, Rutherford, Handyside; Wotherspoon and Mack, W.S., Agents.*—*For Procurator-fiscal, Macfarlane; Lockhart, Hunter and Whitehead, W.S., Agents.*—*B. Clerk.*—[J.W.]

2d March 1842.

FIRST DIVISION.—(H. B.)

NO. 143.—WILLIAM MURRAY, *Pursuer, v. MISS ANNE MATILDA MURRAY and OTHERS, Defenders.*

Entail—Fetters—Resolutive Clause.—*Held that a power of sale was effectually excluded by an entail, which, after prohibiting "to sell, alienate or dispose," resolved the right of the party doing any thing "in the contrary of the said provisions, either by alienating or disposing," without mentioning selling,—and irritated "the debts, deeds, crimes, and delicts" of the party doing any thing "in the contrary of the said provisions, either by alienating or disposing," "or contracting debts," or by committing the crime of treason, or any species thereof, or any other crime or delict, or doing any other deed, civil or criminal."*

In 1825, William Murray of Polmaise, the heir in possession of the entailed estate of Pitlochrie, obtained an Act of Parliament empowering him to sell that estate, and apply the price in the purchase of the estate of Cockspow belonging to himself in fee-simple, of which he was bound to execute an entail at the sight of the Court of Session, "containing all clauses needful in favour of the heirs called to the succession by the aforesaid entail of the estate of Pitlochrie, and according to the same series and substitution, and under all the provisions and conditions, declarations, and clauses prohibitory, irritant and resolutive, that are contained in the said deed of entail; and which entail shall bind the institute as well as the substitute, so that the said lands and estate of Cockspow, and others so to be conveyed, may be enjoyed by the same persons who would, under the said deed of entail of Pitlochrie, have enjoyed the said entailed estate, to be sold as aforesaid." When this Act was obtained, it was believed that the entail was perfectly valid; but Mr Murray, having been advised that it was defective in

the resolute and irritant clauses, brought the present action of declarator, in which, subsuming that the fetters did not apply to sales, he concluded to have it found and declared that he has "full and undoubted right and power to sell the said lands," and that certain missives of sale, entered into between him and John Murray, merchant in Liverpool, "constituted a valid sale;" and further, that he "has sole and exclusive right" to the price, and that the same is his "absolute property." At the same time with the declarator an adjudication in implement was brought by John Murray the purchaser.

The fetters of the entail are as follows:—It is "provided and declared, and shall be so declared by the infetments to follow hereupon, and by the services, retours, precepts, and instruments of sasine, of me, or of the succeeding heirs of tailzie in all time coming, that it shall be nowise leisome nor lawful to, nor in the power of me or the heirs, male or female, of my body, nor of the other heirs of tailzie above written, nor the descendants of their bodies, to sell, alienate, or dispose the lands and others before rehearsed, or any part or portion thereof, either irredeemably or under reversion, or to grant wadsets or infetments of annualrent furth of the same, or to burden the said lands with any servitude or other burdens whatsoever; nor to set nor grant any tacks of the same above the space of ten years, and not under the ordinary rent; neither shall it be lawful to them, nor in the power of them or any of them, to contract any debt whatsoever, nor to commit any crime of whatsoever kind, and particularly the crime of treason, or any species of it, or to do or commit any other fact or deed, civil or criminal, whereby the lands and others before mentioned, or any part thereof, may be apprized or adjudged, or any other manner of way evicted, forfeited, or become caducary, or the order of succession hereby set down anywise altered, innovate, or infringed, in prejudice of this present tailzie, or of those who shall succeed in virtue thereof; and if I or any of the heirs of tailzie, of whatsoever sex, that shall happen to succeed by virtue of these presents in time coming, or my or their descendants, shall do anything in the contrary of the said provisions, either by alienating or disposing the lands and others before written, or any part thereof, or contracting debts, either real or personal, or by committing the crime of treason, or any species thereof, or any other crime or delict, or doing any other deed, civil or criminal, the said debts, deeds, crimes, and delicts, and all and every one of them, shall not only *ipso facto* become null and void, in so far as concerns the lands and others before written, so that they shall be nowise affected or burdened therewith, in prejudice of the succeeding heirs of tailzie and provision; but also, the contraveners shall not only forfeit, amit, and tye their right to, and interest in the lands and others before specified, but likewise to the mails, duties, rents, profits, and casualties thereof, and the same shall be nowise affectable by the contravener's creditors, nor shall they be affectable by them, nor fall under their single or liferent escheats, and the said haill lands, and mails and duties thereof, shall *ipso facto*, from and after the respective deeds of contravention, be devolved upon, and pertain and belong to the person that shall be next and have right to succeed by virtue hereof, free from all debts, deeds, crimes, and delicts done, contracted, and committed by the contraveners, and it shall be lawful to the person having right to succeed, to use any legal or formal method for establishing the right of the said lands in their person, in respect the contravener's right will be resolved and extinct from the time of the contravention, as if he were naturally dead."

The substitute heirs *pleaded* in defence—1. That the entail of the lands of Cockspow contains an effectual prohibition against the heir in possession selling the estate, and that consequently the pursuer, in entering into the missive of sale libelled on, acted beyond his powers, and in contravention of the entail: 2. That, at all events, the pursuer is not entitled to have it declared against the defenders, that he has right to grant dispositions of the entailed lands: 3. That the pursuer

is barred, *personali exceptione*, from violating the prohibition of the deed of entail executed by himself. 4. Even if the sale of the lands were found good, the pursuer is bound to reinvest the price for the benefit of the substitute heirs.

The Lord Ordinary, in reporting the cause on cases, issued the following note:

"The present question relates to the validity or sufficiency of the resolute and irritant clauses of a tailzie. The Lord Ordinary is inclined to think that the leading plea of the pursuer is well founded; but as the case is not precisely similar to any that have recently occurred, though it turns on the same principles of nice construction which have ruled many other cases of tailzie during the last half century, while there is one decision of this Court (not carried to appeal) adverse to the first plea of the pursuer, it is thought most suitable in every view to report the cause to the Court.

"I. The *resolute* clause is objected to on this ground, that while the prohibitions of the tailzie are so conceived as to prevent the heirs, in express terms, 'to sell, alienate or dispose' the said lands, the resolute clause only takes effect if the heirs 'shall do anything in the contrary of the said provisions, either by alienating or disposing the lands and others before written, or any part thereof, or contracting debts, either real or personal, or by committing the crime of treason,' &c. As the resolute clause is thus framed, not simply by a general reference to the prohibitions, but by a *repetition of particulars* in which 'selling' is omitted, it is argued that sales are not rescinded. To this it is answered, that 'sales' are synonymous with *alienations* and *dispositions*, and as these latter acts are specially resolved, the clause is sufficient to include sales.

"Now, if this be held as an open point, the Lord Ordinary must own that he does not consider the answer sufficient. It humbly appears to him the words 'sell, annailzie or dispoine,' are neither *synonymous* and exchangeable terms in themselves, nor does the Act 1685 authorise them to be so treated. For the Act carefully sets forth the three words *successively*; and it is difficult to hold that any party can make the restraint complete without using the whole words of the Statute. Take the case that a proprietor, in framing a tailzie, limited the prohibitory clause to the case of 'selling' only, would that reach a *free gift* by disposition *inter vivos*? It is thought that it would not, though, of course, a prohibition against *disposing* would effectually apply to such a case. Again, if a prohibitory clause were directed against sales only, would it reach an alienation by *feu-contract*? The Lord Ordinary is inclined to think that it would not.

"It is hardly thought that this question is determined by the cases of *Queensberry* (1 Bligh, 339), and of *Stirling* (Fac. Col., 20th February 1821); in both of which a prohibition against 'disposing' was held to strike against *long leases*, and even stated to be equivalent to a prohibition against alienations. Though 'disposition' and 'alienation' may be equivalent terms, it would not necessarily follow that *sales*, and *dispositions*, and *alienations* are also synonymous. A sale may notoriously be effected by *minute*, or by *articles of roup*, or by an *obligation* to sell, on which adjudication in *implement* may be pursued by the purchaser without the heir himself executing the direct act of alienation or disposition.

"Still the question remains, whether the point be open? In the case of *Humbie*, in 1758 (Dict. p. 15,510), it was certainly found by this Court that the prohibition to annailzie and dispoine in an entail, 'implied a prohibition to sell'; but when the case was carried to appeal, their Lordships waived deciding that point, and affirmed the judgment of this Court, on the ground that an entail without a resolute clause, was not protected by the Act 1685, which rendered it unnecessary to consider any other ground of reduction.

"But undoubtedly the very question which here arises, occurred in 1803 in the case of *Stobbs*, (Dict., p. 15,542,)—it seems then to have undergone an elaborate discussion by the first counsel at the bar; and the Court found that an entail containing a distinct prohibition against selling, while the resolute clause was directed against *disposing* only, was nevertheless

effectual. That case, however, was not carried to appeal, and under the literal rules as to the construction of tailzies, which have been more fully recognised since 1803 than they were previously understood, the Lord Ordinary greatly doubts if the single decision now referred to, ought to be held as settling the law upon an entail expressed in its different clauses as that now before the Court has been framed.

"II. The next objection urged against the tailzie, is founded on a supposed defect or insufficiency in the *irritant* clause. It is contended that this clause, as expressed, is incomplete, as it cannot be held in strict construction to irritate the right even of a party alienating and disposing.

"This is evidently a point of nicety and difficulty. The irritant clause, as expressed, declares, that 'the said lands, &c., shall *ipso facto*, from and after the respective *deeds of contravention*, be devolved upon, and pertain and belong to the person that shall be next, and have right to succeed by virtue hereof, free from all debts, *deeds*, and delicts done, contracted, and committed,' &c. And the pursuer argues that the word 'deeds' must be construed, as it was in the cases of *Adam* and of *Lang*, to mean only deeds of feudal delinquency.

"But there are terms used in the irritant clause here, which create some distinction between the present case and those referred to. For example, in the outset of it, the forfeiture is declared to commence 'from and after the respective *deeds of contravention*,' which certainly is a very comprehensive term, and may and probably must be construed to apply to all acts of contravention struck at by the prohibitory clause. If so, when the clause goes on to declare that the next heir shall have right to the succession, 'free from all debts, *deeds*, and delicts done, contracted and committed,' it may perhaps be justly inferred that the deeds here struck at were part of the same deeds as those comprehended in the preceding line of the same clause. Indeed, had there been a slight transposition of a single word—in particular, if it had been said that the next heir should succeed 'free from all *deeds*, debts, and delicts done, *contracted*, and committed,' &c., the case would have come very near indeed to the case of *Finzean*, very lately decided by this Court, (17th June 1840.) See 2 D. B. and M. Reports, p. 1162.

"At the same time, the clause as it stands, certainly does bear a very remarkable similarity to the irritant clause in the case of *Lang*, and still more to that of *Blairadam*, in both of which the irritancies were held by the House of Lords to have been imperfectly expressed. But there is a difference here which it is of great importance for the Court to keep in view, so as to make the determination of the present case perfectly reconcilable with those in the cases of *Finzean*, *Auchindoir*, &c., which have been recently before the Court.

"In conclusion, it may be proper to observe, that there is one branch of the defenders' argument founded on the validity and efficacy of destinations *inter hæredes*, when accompanied by *prohibitory* clauses, but unprotected by effectual irritant clauses, to which no answer is made in the pursuer's revised case. But if the resolute or irritant clause be held defective, the pursuer has a legal power to sell the estate in the meantime; and he cannot be bound (as found in *Ascog*) to reinvest the price during his own life. If, however, the sale shall be only colourable, and if any competition as to the estate, or possibly, in certain circumstances, even as to its price, shall arise between the heirs of entail and the pursuer's heirs as *gratuitous* disponees under *mortis causa* deeds, it is thought that such questions should be reserved. The entail here is at least equivalent to a destination fortified with a prohibitory clause; and the doctrine of all the institutional writers on the law of Scotland—(See *Erskine*, B. III. t. 8, sec. 23, and *Bell's Principles*, No. 1717), has not been abrogated, declaring that a party possessing on such a right, cannot alienate the estate by gratuitous deeds to take effect after his own death *inter hæredes*. On the contrary, in the late case of *Strathbrock*, this was declared by the House of Lords to be still an open point (See 1 *Robinson's Reports*, p. 908.) From the very general and comprehensive terms of the conclusions of the supplementary action in the present instance, it is apprehended that the power of the pursuer as to the sale of the estate, and disposal of the price, should be limited to onerous or gratuitous deeds, to take effect during his own life;

reserving all questions *inter heredes*, if any such should ever occur."

When the cause came to be advised, the Court ordered it to be laid, for consultation, before all the Judges.

The following opinions were returned:

Lord Moncreiff, concurred in by *Lords Meadowbank, Medwyn, Jeffrey, Cockburn and Murray*:

"The object of this action is to have it found and declared, that the pursuer has power to make an effectual sale of the lands of Cockspow and others, in which he stands invested under a disposition and deed of entail executed by himself, in obedience to the express provisions of an Act of Parliament of the 57th Geo. III. The summons sets forth, by a recital of the terms of that entail, that the pursuer had succeeded to the lands of Pitlochrie and others, as an heir-substitute of entail, under a deed executed by Patrick Murray in 1727; and that, having become proprietor of the lands of Cockspow and others in fee-simple, he had obtained an Act of Parliament for enabling him to sell the said lands of Pitlochrie and others, at the sight of this Court, on condition that the price should be applied in the purchase of the lands of Cockspow and others, and that these lands should be entailed on the same series of heirs,—he being bound to execute, at the sight of the Court, a deed of entail, 'containing all clauses needful, in favour of the heirs called to the succession by the aforesaid entail of the estate of Pitlochrie, and according to the same series and substitution, and under all the provisions and conditions, declarations, and clauses prohibitory, irritant and resolute, that are contained in the said deed of entail, and which entail shall bind the institute as well as the substitutes,' &c. It is further set forth, that the sale took place, and that the entail of Cockspow was executed in terms of the Statute, on which the pursuer was infest. Then the summons states, that the pursuer has entered into an onerous contract for the sale of these lands of Cockspow and others, and proceeds to conclude to have it found and declared—1st, 'That the pursuer has full and undoubted right and power to sell the said lands of Cockspow,' &c., 'in any way he may think proper, at a fair price or other onerous consideration;' and 2d, 'that the foresaid mis-sives of sale, entered into between him and the said John Murray as aforesaid, constitute a good and valid sale, and binding on the said pursuer,' &c.

"It certainly presents a remarkable peculiarity in this case, that the pursuer, after having found it necessary, with the consent, it may be presumed, of the substitute heirs of entail, to obtain an Act of Parliament for enabling him to sell the lands of Pitlochrie which he held under an entail said to have contained precisely the same clauses which, in terms of that Act, were made to constitute the conditions of the entail of Cockspow, should now bring an action to have it found by this Court that, notwithstanding those clauses, he has power to sell the lands of Cockspow absolutely and unconditionally. The meaning of this, however, is plain enough. It must be supposed, either that the pursuer has now discovered some essential defect in the entail, which was not observed while he held the lands of Pitlochrie, or otherwise, that the law and the principle of judgment in such cases have been changed since the time when the Act of Parliament was obtained, and the new entail was executed under the authority of this Court. Whatever may have been the decisions pronounced in particular cases, and however it may be thought that there is difficulty in this as in other branches of law, in reconciling all the decisions, I cannot assent to the proposition, that the law, or the principle of judgment in the application of it, has undergone any change. But it is a possible thing that the discussion of other cases may have disclosed a legal defect in this entail, which had not before occurred to the party or his advisers: And if it be so, it is perfectly fair for the pursuer to try the question concerning the extent of his power with reference to onerous deeds of sale.

"It seems to be very clear, on the one hand, that the pursuer can be in no better situation, as the *fiar* in possession under the entail of Cockspow, than he was as the entailed proprietor of Pitlochrie. All the restraining clauses being, as the Act of Parliament required, expressly applied to him as *institute*, he

can have no power which he would not have had as the *substitute* heir under the entail of Pitlochrie; and it is impossible that, by the change of the lands, effected only at his own desire with the consent of the heirs of entail, and by the force of a Statute, all being completed in due form and in compliance with the Act 1685, he can have obtained any advantage against the heirs of entail which he did not possess before in regard to the lands Pitlochrie. But, on the other hand, it does not appear to me that he can be in a worse situation with regard to any question of power, according to the legal import of the entail. For although the Act of Parliament was no doubt applied for, and obtained, in the belief that the entail of Pitlochrie contained effectual restraining clauses against all sales and alienations, yet, if it should appear that it was not *de facto* and *de jure* effectual for that purpose, it must then be held, that the pursuer might have sold Pitlochrie without asking for any Act of Parliament, and might still have possessed Cockspow in fee-simple. And it does not appear to me, that the mere circumstance of the entail of Cockspow having been necessarily executed by the pursuer himself under the Act of Parliament, can have any effect in the question concerning the legal construction of the entailing clauses as they stand. I do not think, therefore, that the plea last insisted on in the case for the defenders (the 3d plea in law in the record), could be available against the second declaratory conclusion of the summons, if that conclusion should be found to be in itself well founded. Every thing must depend on what the legal effect of the entail really is.

"The question then is, whether this entail is effectual to prevent a sale of the estate? The pursuer takes two points—1st, That there is a defect in the *resolutive* clause; and 2d, That the *irritant* clause is also insufficient.

"1. The objection to the *resolutive* clause is no new discovery. It is, that whereas the prohibitory clause prohibits the heirs to *sell, alienate, or dispose* the lands, the *resolutive* clause, which is combined with the irritant, only declares that the heirs shall forfeit if they 'shall do any thing contrary to the said provisions, either by *alienating or disposing* the lands,' &c., the word *selling* not being repeated. If this objection were well founded, it probably would apply to both the clauses. But as the very point has occurred, and has been decided both by this Court and in the House of Lords, even with reference to a more doubtful case, and as there is yet no decision whatever to the contrary, I am of opinion that the plea cannot be sustained.

"It appears to me that the present case must be ruled by the two judgments in the case of Elliot & Stobbs, the one in 1803, and the other by the House of Lords in 1821; and that it is too late to argue this question as a matter of abstract law. The question in the case of Elliot, May 19, 1803, was identical with the point raised in the present case, with only the important difference, that, in the *resolutive* clause of the Stobbs entail, the word *alienate* did not occur. The prohibitory clause prohibited the heirs 'to *sell, annaillzie, wadset, dispose, dilapidate, and put away.*' The *resolutive* bore only the words 'or who, whether male or female, and I, shall *dispose* the said lands and estate,' &c. Sir William Elliot had entered into a minute of sale, as the pursuer has done. The purchaser suspended, on the ground that Sir William had no power to sell; and Sir William brought a declarator to have it found that the entail was not effectual to prevent a sale. The Court sustained the defences, holding the entail to be good. I can see no difference between that case and the present, except a difference which is very strong against the pursuer, that here the word '*alienating*' is in the *resolutive* clause. I am not aware that it has ever been doubted that *sales* are comprehended under the word *alienating*. But in Elliot's case the term *dispose* alone was held sufficient.

"The discussion on that entail was renewed in 1818, in relation to the validity of a long lease. This proceeded on the notion that, however the word *dispose* might be sufficient to cover *sales*, it was not equivalent to the term *alienate*, under which the Court had found in the Queensberry cause that long leases were effectually prohibited. This argument prevailed in this Court at the time. But the case having been appealed, the Lord Chancellor Eldon, on very deliberate consideration, reversed the judgment, and found *in terminis*, 'that, according to

the true construction of the deed of entail of the estate, the prohibition to *dispose* extends to the lease in question, and that the irritant and resolutive clauses do so refer to the specific prohibition to *dispose*, as to render the same effectual against third parties.' (1 Shaw's App. p. 17, 14th March 1821.) It is impossible not to see that this judgment was a great deal stronger than the decision in 1803. It had long before been decided in the case of *Humbie*, that a clause prohibiting to *dispose* was sufficient as a prohibition against sales; and the judgment in 1803 simply held the same term to be sufficient in the resolutive clause to cover sales. Lord Eldon's judgment, again, in express words declares the irritant and resolutive clauses, expressed by the term *dispose*, to be sufficient, by relation to the same term in the prohibitory clause, to secure the entail against third parties. But it was evidently going a step farther to hold that, under an entail which prohibited to sell, *annailzie*, *wadset*, *dispose*, &c., the term *dispose* alone, in the resolutive clause, was sufficient to cover the case of a long lease. Yet there would have been no question there, if the term *alienate*, as well as *dispose*, had been in the resolutive clause as it is in the entail of *Cockspow*. It is, however, also of the greatest importance that the Lord Chancellor, in pronouncing that judgment, referred expressly to the numerous previous decisions on the effect of the word *dispose*; and though, among those quoted to him, the case on the same entail in 1803 was very prominently presented, there is no trace of his having expressed the least doubt concerning the soundness of the judgment pronounced in it. There is, besides, another case, in which all the same doctrine concerning the import of the term *dispose* was in express terms confirmed. *Stirling v. Dun*, House of Lords, 22d June 1829. W. and S. III. p. 462.

"Holding, therefore, that the answer to the pursuer's objection in the present case follows *a fortiori* from the decisions; and, being farther of opinion, that, even independent of them, the terms of the resolutive clause in the entail of *Cockspow* are sufficient, I think that this plea on the part of the pursuer must be rejected.

"2. The special objection taken to the validity of the irritant clause is of a different nature, and may admit of more doubt. It seems to have been suggested by the late decision in the House of Lords in the case of *Lang* against *Lang*. But, as it appears to me that the terms employed in the present case are of a very precise and determinate nature, and that there is an important difference between it and the case of *Lang*, I am not able to come to the opinion, that the irritant clause is not sufficient to protect the estate and the heirs against a sale or alienation.

"After the prohibitory clause, the entail proceeds to provide, that if I or any of the heirs of tailzie, &c., 'shall do any thing in the contrary of the said provisions, either by alienating or disposing the lands and others before written, or any part thereof, or contracting debts, either real or personal, or by committing the crime of treason, or any species thereof, or any other crime or delict, or doing any other deed, civil or criminal, the said debts, deeds, crimes, and delicts shall not only *ipso facto* become null and void in so far as concerns the lands and others before written,' &c., but also the contravener shall forfeit the whole lands, which shall *ipso facto*, 'from and after the respective deeds of contravention,' devolve upon the next heir who shall have right to succeed, 'free from all debts, deeds, crimes, and delicts, done, contracted, and committed by the contraveners,' &c.

"There can be no doubt concerning the obvious meaning of these clauses. But I fully agree in the statement, that in such a question of construction, the mere intention to be discovered, from a comparison of the different clauses of the deed, is not sufficient. It is quite unnecessary to go into any detail of the authorities in this matter. I only think it necessary again to observe, that I cannot entertain the idea, that any of the later decisions which have been pronounced in this Court, or in the House of Lords, have made any change on the rule or principle of the law for the construction of such deeds, as being *strictissimi juris*. The application of the principle to particular cases is often a matter of great difficulty; and in reviewing such cases, it may be thought by individual lawyers, that in some of them it has not received full effect, and in others has been carried too

far. But the principle itself is fully recognised throughout them all, and in truth has never been disputed in any one of them, though parties may have contended, and Judges may have thought, that it was sometimes strained to excess, and sometimes did not receive the effect due to it. And it appears to me, that any of the late decisions, which are supposed to have altered the principle of judgment, are no more than exemplifications of the application of the principle of strict construction, always acknowledged, according to the view taken of the special case before the Court.

"Waiving any further discussion on this subject, let it be observed, that the passage of the entail from which the above excerpts have been made, constitutes one unbroken sentence, embracing both the irritant and resolutive clauses, and that the full legal import of it cannot be seen without taking into view the whole parts of it. It is all governed by the hypothesis with which the clause begins—'If I or any of the heirs,' &c., 'shall do any thing in the contrary of the said provisions,' &c. This is no doubt followed by an enumeration of particulars, which, according to the rule established at least since the case of *Tillicoultry*, does and must qualify the general term. But, unlike the clause in *Tillicoultry*, the special acts here enumerated do comprehend the case of sales. Not to go back on the point already considered, the words are express, that if the pursuer, or any of the heirs, shall do any thing in the contrary of the provisions, 'either by alienating or disposing the lands,' &c., which words, even in an irritant and resolutive clause of an entail, which in the prohibitory clause has the word 'sell,' must be held to be sufficient to comprehend sales. The second case in the hypothesis is—'or contracting debts.' There is a third case, that of committing treason or any other crime. And then there is a fourth more general and comprehensive supposition, viz., by 'doing any other deed, civil or criminal'—that is, any other deed contrary to the provisions. It is of very great importance that all these cases or supposed acts of contravention are alike under the form of the first words—'If I or any of the heirs' 'shall do any thing contrary to the provisions, either by selling,' &c. The clause, being so far made special by the enumeration, must be so regarded and dealt with; and all the cases are covered alike by the words 'If,' &c. Now it must certainly be supposed, in giving effect to such an express provision as this, that 'something is to follow in all and each of the cases stated, and more especially in those which are specific and definite—'alienating or disposing'—'or contracting debts.' The sentence is not completed till that consequence is laid down. It is possible, no doubt, that by confusion or inadvertency, the words employed may be insufficient. But the question is, whether they are so or not? If they are in their nature and import sufficient for the natural purpose of covering the supposed acts of contravention, and so completing the sentence with reference to all of them, there is here no confusion or cause of ambiguity, to make it the duty of the Court to refuse effect to them in any particular case. The consequence, then, is thus laid down,—'the said debts, deeds, crimes and delicts, and all and every one of them, shall not only *ipso facto* become null and void,' &c. That the word *deeds* is in itself technically sufficient to comprehend all deeds of alienation or disposition, and so to cover the special case in the first part of the hypothesis put, which again is equivalent to sales, will not admit of any serious doubt. For many entails, which have been sifted to the uttermost, had no other word to protect them against sales; as in the *Roxburgh* entail, in which the irritant clause was simply 'all *whilk* deeds so to be done,' &c. Neither in the present case is there any room for the construction, which has been applied in some other cases, that the words have reference only to the last member of the enumeration—'or doing any other deed, civil or criminal.' The whole structure of the sentence forbids this. But it is also excluded by the circumstance, that *debts* and *crimes*, which stand before that clause, are clearly and expressly included in the declaration of nullity. The word 'debts' is not in the general clause; and the specification of them may have seemed to be necessary with reference to the contracting of personal debts, as to which no deed or writing of any kind may be executed.

"But it is to be observed that this declaration of nullity does not terminate the sentence. Other consequences are to



follow, which all hang upon the same hypothesis, and are also evidently dependent on the nullity of the deeds. The clause goes on—'but also the contraveners shall not only forfeit' all right to the estate, but likewise to the rents, &c.; and the lands and maills, &c., 'shall *ipso facto*, from and after the respective deeds of contravention, be devolved on and pertain,' &c., to the next heir, free 'from all debts, deeds, crimes and delicts, done, contracted, and committed by the contraveners,'—that is, *applicando singula singulis*, deeds done, debts contracted, or crimes committed; and it shall be lawful for the next heir to establish his right as if the contravener were naturally dead. This completes the sentence; and it will be observed, that all the last words are perfectly general, and cannot by possibility be confined in their application to any particular part of the hypothetical cases of contravention stated in the first part of it. They evidently do and must apply equally to them all. Yet they only follow, and are dependent on the irritancy or nullity first declared, proceeding on the entire hypothesis in the first part of the sentence.

"From the peculiar structure, therefore, of the whole clause in this entail, it seems to me to be impossible, on any construction, however strict, to hold that there is not a complete and express irritant clause applying to all deeds of alienation or disposition, wherein sales are necessarily comprehended.

"The case which apparently gives the most probable support to the pursuer's argument is that of *Lang v. Lang*, 23d November 1838, as decided in the House of Lords. I am bound to hold that case to have been rightly decided, though the judgment of the Court here was different; and I do so hold it. But there is the most marked difference between it and the present case. The clause is constructed in an entirely different manner from that followed in the entail of Overtown. In general, the safest form for making an effectual irritant or resolutive clause, is to rest on a general assumption of any contravention of the conditions or provisions before laid down; because, in any special enumeration, there is always a danger of some important article in the prohibitory clause being omitted, which no general words prefixed or added to the enumeration will in that case legally supply. But there is a different danger in the other form. If care be not taken, in the position and terms of the general clause of irritancy, to make it expressly and necessarily apply to all the parts of the prohibitory clause, and to exclude any more limited application, the principle of strict construction may make it necessary to understand it in a more limited sense in favour of freedom, because the words admit of such an interpretation. This seems to be the principle of the case of *Lang*, as it was of that of *Adam v. Robertson Barclay*. The entailor had confined himself to general words immediately following the last part of the prohibitory clause—'and if they do in the contrary, it is declared,' &c. The question was, whether these general words, in connection with the special consequences laid down, necessarily applied to everything within the prohibitory clause, or might be construed as being confined to the last member of that clause, with which they stood in immediate juxtaposition. It was held, as I understand the case in this point of it, that they did admit of this last construction, and that the words 'if they do in the contrary,' all such debts and deeds shall be intrinsically void and null,' were to be taken as limited in their application to the immediately preceding substantive prohibition—'nor to contract debts, nor do any other deed, whereby' the lands might be evicted, &c.

"Whatever opinion shall be formed of the present case, it cannot, in my apprehension, stand on the same ground with that of *Lang*. Even if the entailor had here rested on the general words in the beginning of the irritant clause, they are such that it would have been difficult or impossible to confine their application in the same way as the simple words 'do in the contrary' were confined in *Lang's* case. For they are, if I or any heir 'shall do any thing in the contrary of the said provisions,'—words which plainly relate to the whole limitations laid down. But the irritant clause itself here contains an enumeration of the cases to which these general terms were expressly meant to apply;—and the very first is that of 'alienating or disposing.' The declaration of irritancy is express, that if the party shall act 'contrary to the provisions, by alienating or disposing,'—in that precise case the consequence declared shall take effect. It

is very true, that if the words in which that consequence is expressed were not in themselves sufficient to comprehend deeds of alienation or disposition, there might be a failure from the want of apt and proper terms. But this would be quite different from the result obtained in the case of *Lang*, and must be rested on a different principle. And if, on the other hand, the words, or any of them, are in themselves sufficient for the case of alienation or disposition, which I apprehend they clearly are, it cannot in this case require or warrant a more limited construction of them, that the term *deeds* is necessarily connected with debts and crimes, in whatever order, with reference to the other cases of contravention in the enumeration; or that there is in that enumeration a general clause added to the contraction of debts, of doing any other deed, civil or criminal. The entailor has expressly said, that the consequence shall follow in all or any of the cases hypothetically assumed; and therefore, holding it to be clear law, that acts of alienation or disposition are comprehended under the term *deeds*, I cannot, without rejecting what appears to me to be the plain declaration of the entailor, come to the conclusion that this irritant clause does not effectually reach any act of alienation or sale.

"In truth, the point as to the effect of the irritant clause in *Lang's* case could only have become of any importance, if the other point which occurred in that case, as to the want of a substantive clause against altering the order of succession, had been determined differently from the judgment regarding it. When it was decided that there was no such effectual clause, and consequently that the heir in possession could at once extinguish the interest of all the substitutes, by a gratuitous act of alteration, the effect of the irritant clause ceased to be of any practical consequence. Still the point was solemnly determined: and I have so considered it.

"The case of *Adam* was of the same nature with that of *Lang*. But it appears to me to have been a stronger case in favour of the judgment; the general words—'all which debts, deeds, and contractions'—plainly admitting of a fair application to the special class of debts or deeds immediately before mentioned, viz., debts or deeds before the heir's succession. There was, altogether in that entail, an inaccurate disorder in the clauses, which fairly unbinged the entail on sound principles.

"On the whole, I am of opinion that the conclusions of the summons cannot be acceded to, and that the defences ought to be sustained."

Lord Cuninghame:

"I am now satisfied, on the grounds stated by Lord Moncreiff, that the doubt which I expressed in a former stage of the present case, as to sales being included in a prohibition 'to dispose,' is not now an open question; and therefore upon that, as well as on other points of the case, I concur with Lord Moncreiff."

Lord Ivory:

"I had at first some difficulty in this case, looking to the very severe application of the principle of strict construction, of which the judgments on the *Blairadam* and *Overtown* entails are illustrations. But I have at last come to be satisfied that the present case is distinguishable.

"The question is, whether the irritant clause, in so far as it declares 'the said debts, deeds, crimes, and delicts, and all and every one of them,' to be null and void, is to be construed as exclusively confining the operation of these words to the special cases mentioned in the LATTER BRANCH of that portion of the clause which immediately precedes, viz., to the 'contracting debts, either real or personal, or committing the crime of treason, or any species thereof, or any other crime or delict, or doing any other deed, civil or criminal,'—or whether, on the contrary, it is not rather to be held as riding over and including the WHOLE preceding portion of the clause, and thus, as reaching whatever is comprehended under the leading and general enunciation (with which the clause sets out), of 'any thing done IN THE CONTRARY OF THE SAID PROVISIONS,' at least, as sufficiently doing this, to the effect of covering all the enumerated cases, which the entailor gives as exemplifications of what he himself held and intended to fall within this general enunciation, and so of comprehending the case of 'alienating and dis-

posing the lands before written, or any part thereof,' not less than the other cases of 'contracting debt,' &c. If the first construction were to be adopted, the principle of *Blairadam, Overtown, &c.*, would directly apply, and a corresponding judgment would fall to be here pronounced. If the second, there is no room for the objection which ruled these cases, and an opposite judgment would be the result.

"I am now of opinion that the latter is the sound alternative. Looking to the irritant clause in its whole context, and having regard also to the phraseology of the resolutive clause, into which, without interruption of the sense, or any proper break of the sentence, the irritant runs, I am satisfied, that without any departure from the principle of a strict construction, and without resorting to any mere implication or inference in order to get at the meaning, there is clear ground, within the four corners of the entire sentence, for holding that the entail, in levelling his irritancy against 'the said debts, deeds, crimes and delicts, and all and every one of them,' used the words, not as restricted in their operation to any one, but as extending to, and comprehending within their scope, all the previously enumerated examples of those acts of contravention which he had begun the clause by more generally describing as 'any thing done in the contrary of the provisions;' in short, as being in this respect synonymous with the words 'deeds of contravention,' and again, 'all debts, deeds, crimes, and delicts, done, contracted, and committed by the contraveners,' as these expressions are afterwards introduced and applied in subsequent passages of the same continuous sentence. The reasoning of Lord Moncreiff's opinion appears to me to this effect conclusive.

"On the other branches of the case, as disposed of by that opinion, I have never entertained hesitation, and entirely concur with his Lordship."

The Court pronounced the following interlocutor :

"Sustain the defences; dismiss the action and supplementary action of declarator, and also the action of adjudication in implement; assoilzie the defenders from the conclusions of the said actions, and decern."

Lord Ordinary, Cuninghame.—Act. Solicitor-General (McNeill), J. Moncreiff; Alexander J. Russel, Agent.—Alt. Moir; John Archibald Campbell, Agent.—B. Clerk.—[H.B.]

2d March 1842.

FIRST DIVISION.—(H.B.)

No. 144.—ALEXANDER DINGWALL, Pursuer, v. ALEXANDER DINGWALL, Junior, and CURATORS, Defenders.

Entail—Fetters—An entail prohibited, inter alia, "to sell, alienate, impignorate or dispose,"—resolved the right of the party contravening "the before-written provisions, conditions, restrictions, limitations, and others herein contained,"—and further declared, that "in case any adjudication, apprising, or other legal diligence" shall be used against the estate "upon any debts or deeds" of the institute or substitutes, "not only shall such debts or deeds, with the adjudications, apprisings, or other legal diligence, be void and null," but the contravener "shall ipso facto forfeit his or her right" to the estate—Held that the entail effectually excluded sales.

The lands of Rannieston and others were entailed in 1778 by a deed, of which the fettering clauses are as follows :

"It shall not be lawful to, nor in the power of the said Arthur Dingwall" (the institute), "or any of the heirs of tailzie and substitutes called to this succession, to alter, innovate or change this present tailzie, or the order of succession before prescribed, or to do or grant any fact or deed that may import or infer any alteration, innovation or change of the same, directly or indirectly: And with this further limitation and restriction, that it shall not be in the power of the said Arthur Dingwall, nor of any of the heirs of tailzie or substitutes, to sell, alienate, impignorate or dispose the said lands and estate, or any part thereof, either irredeemably or under reversion, nor to burden

the same, in whole or in part, with debts or sums of money, infeftments of annualrent, or any other servitudes or burdens whatsoever (except as hereinafter excepted), nor to do any other act or deed, civil or criminal, directly or indirectly, in any sort, whereby the said lands and estate, or any part thereof, may be affected, appraised or adjudged, forfeited or become escheated or confiscated, or any otherwise evicted from the heirs of tailzie, or this present entail, or the order of succession herein contained prejudged, hurt or changed: And with and under this condition and provision, that it shall not be in the power of the said Arthur Dingwall, or the heirs of tailzie and substitutes before mentioned, or any of them, to set tacks of all or any part or portion of the said lands for a longer space than nineteen years, and the lifetime of the granter, or for the space of thirty years certain, from the commencement," &c. : "And further, with and under the conditions, and under these irritancies, that in case the said Arthur Dingwall, or any of the substitutes or heirs of entail, shall contravene the before-written provisions, conditions, restrictions, limitations and others herein contained; that is, shall fail and neglect to obey, fulfil or perform the said conditions and provisions, or any one of them, or shall act contrary thereto; then and in any of these cases the person or persons so contravening, failing to perform, or acting contrary as said is, shall, for him or herself only, ipso facto amit, lose and forfeit all right, title and interest he, she, or they have to the said lands and estate," &c. : "And with and under this irritancy, as it is hereby provided and declared, that in case any adjudication, appraising or other legal diligence, shall happen to be obtained or used for or against the fee or property of the said lands and estate, or any part thereof, upon any debts or deeds of the said Arthur Dingwall, or for any debts or deeds of any of the other substitutes or heirs of entail, done or contracted before or after their succession to the said lands and estate, not only shall such debts and deeds, with the adjudications, apprisings or other legal diligence, be void and null in so far as they may affect the said lands and estate, or any part thereof: But also the said Arthur Dingwall, and the whole substitutes and heirs of entail respectively, upon whose debts or deeds done or contracted as aforesaid such diligence has proceeded, shall ipso facto forfeit his or her right to the said lands and estate, and the same shall devolve, fall and accresce to the next heir of tailzie, in the same manner as if the contractor of such debts, or the granter of such deeds, were naturally dead, and that free and disburdened of such debts and deeds, adjudications, apprisings or other diligence led or deduced thereupon: And with and under this farther irritancy" (that any of the heirs of entail committing treason should forfeit): "But with and under this exception from the whole of the said irritant and resolutive clauses, that the said Arthur Dingwall," &c. (should have power to grant liferent infeftments by way of provisions for wives and husbands to the extent fixed by the deed, the entail barring all provisions in favour of younger children): "And also with and under this provision and condition, as it is hereby expressly provided and declared, that upon every contravention that may happen by and through the said Arthur Dingwall, or any of the substitutes and heirs of entail their failing to perform all and each of the conditions, or acting contrary to all or any of the restrictions, it is hereby expressly provided and declared, that not only shall the said lands and estate not be burdened and liable to any of the debts and deeds, acts and crimes of the said heirs of tailzie, but also all such debts, deeds and acts contracted, granted, done, or committed contrary to these conditions and restrictions, or to the true intent and meaning of these presents, shall be of no force, strength or effect, and shall be unavailable against the other substitutes and heirs of tailzie, and who, as well as the said estate, shall be nowise burdened therewith, but free therefrom, in the same manner as if such debts and deeds had not been contracted, made, granted or committed."

Alexander Dingwall, the heir in possession, having been advised that the entail did not effectually exclude sales, sold the lands to James Dingwall, merchant in Hamburg, and brought the present action of declarator, of which the leading conclusion is, that the said

entail "is not a valid and effectual entail according to the law of Scotland, or according to the Act of Parliament 1685, c. 22, or at least that the prohibitions, limitations, or restrictions of the said disposition and tailzie are not duly fenced by valid and effectual irritant and resolute clauses; and in particular, that there are no clauses in said deed valid and sufficient to restrain the pursuer from selling, alienating, or disposing of the said lands and estate, or any part thereof, for onerous causes."

Defences having been lodged by Alexander Dingwall, junior (one of the substitute heirs) and his curators, the Lord Ordinary reported the cause on cases with the following note:

"The inclination of the Lord Ordinary's opinion is for the defender. But he has thought it right to report the case without a judgment, both that the parties may have the benefit of a final decision with as little delay as possible, and because it appears to him that some of the points that are raised in it are attended with considerable difficulty, and bring the question, as to the just and sound limitations of the doctrine of strict and of reasonable construction, to a more critical issue than on any former occasion.

"He is quite aware that it would be difficult *entirely* to reconcile all the decisions of the Court upon this most important question, or even all the recent decisions; and that the distinctions which may be attempted to be drawn between the cases, for example, of Barclay, and Lang, and Sharpe, which were decided in one way, and those of Elibank, Farquharson, Lumsden, and others, which were decided in another way, are very shadowy and unsubstantial. The Lord Ordinary is of opinion that, if there be any conflict of principle in these cases, the sounder view was taken in those *last mentioned*; and it is very much under this impression that he would now be disposed to repel the objections to the validity of this entail, and especially that to the sufficiency of the *irritant* clause libelled.

"The point is no doubt a narrow one. But the Lord Ordinary thinks it was substantially fixed by the decision in the case of Farquharson; and although the words in the present case are not merely, as in that former one, '*all debts, deeds and acts contrary to the above conditions and restrictions, or to the true meaning of these presents*,' but '*all such debts, deeds and acts contrary to those conditions and restrictions, or to the true intent and meaning of these presents*,' he cannot persuade himself that the mere insertion or addition of the word '*such*,' in such a context, should at all affect the construction; being satisfied that the true meaning of that word in the present entail, is merely *all such debts, deeds or acts as shall be contrary to any of the prohibitions, or to the object and intent of the deed*. In the cases of Barclay and of Lang, the words '*such debts, deeds or contractions*,' stood in *immediate contact and sequence* with prohibitions, in which those very words were indisputably used in the limited sense of acts or deeds by which the estate might merely be burdened or exposed to diligence. But here (even more strikingly than in the case of Farquharson) the irritant clause in question is separated and disjoined by a great interval, and the interposition of many independent provisions from any clause in which these words (or any of them) occur in such a limited sense, while the irritant clause itself, which is entirely insulated and complete *per se*, sets out and begins with an express declaration, that it was meant to apply to every contravention which might happen 'by any of the heirs either failing to perform *all and each* of the said conditions, or acting contrary to *all or any* of the said restrictions.' When this is considered, and taken along with the words which immediately follow the mention of the debts, deeds and acts which are to be annulled, and again describe them as '*contrary to the conditions or restrictions of the entail, or to its true meaning and intent*,'—to which, either in the antecedent or the subsequent part, there is nothing at all parallel in the cases of Barclay or of Lang,—it is thought that there can be no reasonable doubt that the word *such* in the present case has reference only to those antecedent and subsequent words in the body and

substance of the irritant clause itself, and not to any mention of debts, deeds or burdens in a more limited sense, in some distant and irrelative parts of the deed.

"With regard to the only other substantial objection of the pursuer, or that which relates to the sufficiency of the *resolutive* clause, as virtually restrained in its operation to cases of mere omission to comply *actively* with the *conditions* or *injunctions* of the entail, and not extending to violations of its *prohibitions*, the Lord Ordinary must say, that though it is very learnedly and ably argued by the pursuer, he has not been able, for the reasons stated by the defenders, and the near analogy of the case of Farquharson, to think that it ought to be sustained. The introductory words of the clause, which expressly set forth the intention to forfeit the right of any heir who should '*contravene any of the forewritten provisions, conditions, restrictions and limitations, and others herein contained*,' sufficiently settle in what sense the shorter resumption of these things, by the name of '*conditions and provisions*' only, must be understood; and the expression being that he shall forfeit, not merely if he *fail or neglect to perform* those conditions, but also '*if he acts contrary thereto*,' it would seem impossible to give any intelligible meaning to the whole clause if the limited construction of the pursuer were to be adopted. The argument by which he attempts to show that it was very probably the actual intention of the entailer to confine the forfeiture to cases of mere non-implementation of active injunctions, though very ingeniously put, is yet more remarkable, the Lord Ordinary thinks, for extravagance than ingenuity."

The Court ordered the cause to be laid before the other Judges for consultation.

The following opinions were returned:

Lord Justice-Clerk (Hope), concurred in by *Lords Meadowbank, Medwyn and Cuninghame*:

"This is an action of declarator raised by the late Alexander Dingwall of Rannieston, to have it found and declared that a certain deed of entail, executed in the year 1798, and under which the pursuer's titles were made up, 'is not a valid and effectual entail according to the law of Scotland, or according to the Act of Parliament 1685, c. 22, or at least that the prohibitions, limitations or restrictions of the said disposition and tailzie are not duly fenced by valid and effectual irritant and resolute clauses; and in particular, that there are no clauses in the said deed valid and sufficient to restrain the pursuer from selling, alienating, or disposing of the said lands and estate, or any part thereof, for onerous causes.'

"The summons recites that the pursuer has accordingly entered into a minute of sale of the entailed estate, and of another estate which must be disposed to him by trustees in terms of the entail, and concludes to have it found that he has full right and power so to sell the lands; that the sale is valid; and that he is under no obligation to lay out or invest the price.

"The pursuer having died, his trustees were allowed to sist themselves, without objection, as pursuers of the declarator; and it is presumed that the minute of sale was so absolute and complete, that no objection could be taken in this case to the title of trustees to follow out this action after the death of the heir in possession.

"The objections taken to the entail are:—

"1. 'That the irritant clause cannot, by sound legal construction, be held as *directed against sales*.'

"2. 'That the general irritant clause is defective as regards sales, in respect of its not containing a proper declaration of nullity; and,

"3. 'That the resolute clause of the deed cannot, by sound legal construction, be held as *directed against sales*.'

"There are thus *two* objections to the irritant clause;—*one* to the resolute.

"As the resolute clause occurs in the deed before the irritant, it will be convenient to consider that objection in the first instance (although not the order in which the pursuer argues his case), especially as the objection to the resolute is founded upon a general view of the structure of the deed, and of the particular acceptation, in which it is contended that certain expressions, in themselves of the most comprehensive

signification and import, are alleged to be used in this particular deed of entail, so as to fix upon them a special and limited meaning.

"In reference to both objections, there appears to be forced upon the Court, by the argument of the pursuer, the necessity of some explicit and general exposition of the principle of the strict construction of tailzies, and of the true import and effect of that doctrine.

"The pursuer, in order to establish the particular objections which he takes to this entail, avails himself of a variety of detached sentences in different opinions delivered in previous cases, both in this Court and in the House of Lords, with a view of rearing up a kind of judicial necessity for denying effect to the legal and ordinary import of technical expressions in the particular context in which they occur, provided that, by any possible construction, the result can be obtained of defeating the entail,—which result the pursuer maintains has been declared to be the object and governing rule of judicial construction. There are put together, accordingly, with care, a variety of detached expressions in former opinions, which are taken as intended to be general expositions of the doctrine—'as the existing canons' (as the pursuer says) 'of our law of entail.'

"Many of these detached expressions appear to be strained to an extent not intended by the Judges by whom they were used, and in all of the opinions from which they are extracted, passages will be found which plainly show that, strong as they are, they were always used with reference to the particular case then under consideration.

"The same course of argument is adopted in some other cases before the Court in different shapes, and an attempt is plainly made, by accumulating such incidental expressions, to force the Court on to an application of the doctrine of strict construction, not warranted by any principle of judicial interpretation. It seems to be this rather startling array of *dicta* which led the Lord Ordinary, in reporting this case, to suppose that there was a marked discrepancy between some of the recent decisions of the Court, and to doubt the soundness of his own judgment in the case of Lang, though affirmed in the House of Lords, and of some other decisions—(See Ordinary's note). Few, if any, of the passages quoted were intended to be an exposition of the doctrine of strict construction. Holding the doctrine of strict construction to be fixed, the opinions in question bring it to bear upon the particular case, with that variety or intensity of expression which the nature of the points or of the pleas of parties, naturally prompted.

"The exposition by Mr Erskine appears to be well considered and valuable:—'Entails of this rigorous kind, as they impose an unfavourable restraint upon property, and become frequently a snare to trading people, are *strictissimi juris*. An heir of entail has therefore full power as far over the entailed lands to which he succeeds in every particular *where he is not fettered*.' Ersk. B. III. 8, § 29.

"He then gives instances in illustration of the last remarks, viz. of acts which may be done, because not expressly prohibited. He then adds—'Upon this principle, no restraint, though evidently intended by the maker, nor any prohibition or irritancy, is to be raised against an heir of entail *from implication or inference*.' And he then gives a variety of instances in illustration of that part of the doctrine.

"To this statement of the principle, there may, without impropriety, be added as authoritative, the last sentence of a note in Lord Ivory's edition:—'It is enough, however, that the act prohibited be specified in such intelligible words, as to bring it substantively within the fair and obvious construction of the clause: there is no technical language, or set form of words, in which the clause must necessarily be expressed, in order to be effectual.'

"The doctrine is well stated by Lord President Blair:—The general principle of the law of Scotland, on which the petitioner founds, is, that restrictions on the use of property are not to be extended by implication,—a principle which never has been, and never will be altered. But although restrictions are not to be created or extended by implication, or presumed will, *de casu in casum*, yet, where limitations exist, these are to be construed according to the usual and legal import of the words. Upon this ground, a lease for more than the usual length was con-

strued as coming under a prohibition to alienate.—Duke of Queensberry v. Earl of Wemyss, 17th November 1807.' Fac. Col. Gordon v. Gordon of Ellon, 24th January 1811.

"And again, there is an important passage in the opinion of the consulted Judges in the case of Hope Vere, which bears to be an exposition of the meaning and import of the principle of strict construction:—'There is no doubt that in this question the pursuer is entitled to a strict construction. For though there is a declarator *inter hæredes* only, the question relates to the imposition of fetters or restraints upon the right of property; and in all such questions a strict interpretation must be given. We understand the principle, as established by the authorities and decided cases, to mean, not merely that without direct words such limitations cannot be imposed from presumed or implied intention, but that, even where there are words within the deed having a certain tendency to indicate the intention of the grantor, they may, under the strict construction of the law of entail, fail of effect, either from want of technical precision, or from error in the form and manner in which they are introduced.' Hope Vere v. Hope, 5th March 1833; 11 Shaw, p. 525.

"The opinion from which the above is quoted, after stating the general doctrine, gives at the same time a variety of illustrations of the necessity of attention to that particular construction which the context requires.

"The expressions, which are quoted from other opinions, for the purpose of proving that if any particular terms are susceptible of two meanings, one supporting, the other defeating the tailzie, such terms must, by a *fixed and inflexible canon*, be interpreted in the way which will defeat the tailzie, do not warrant any such deduction. It is not to be presumed that there was any intention in these opinions to alter or enlarge the doctrine of strict construction of entails. On the contrary, the opinions refer to the doctrine as one established early, and firmly rooted in the law. The expressions quoted are used manifestly with reference to the manner in which the particular terms under consideration were introduced in the context in which they occurred, and to the construction reasonably open for adoption without any violence or injustice to that context. Accordingly, in one of the passages from Lord Brougham's opinion in the case of Lang, which is much founded on, in order to support that sweeping rule of interpretation, (viz.—That whenever terms are susceptible of two meanings, the Court is bound to adopt the meaning which will defeat the tailzie)—what his Lordship says is introduced with the guarded and significant condition—'If there are two constructions open,'—thereby denoting most distinctly, that on an attentive consideration of the context in the particular deed, the Court is first to be satisfied that two constructions of the terms employed are open for their adoption;—and then Lord Brougham states the effect, in that case, of the doctrine of strict interpretation (for he is in truth stating the effect, and not professing to give a general exposition of the principle), in terms exactly in conformity with all prior authorities, when justice is thus given to his opinion.

"In every case the context, in which the expressions or the clause to be construed, occur, must be carefully attended to, and a forced and strained construction is not to be given to that context, because the particular terms or clause might, in other places or other deeds, and when detached from or interpreted without connection with the context, bear one interpretation as much as another. The sense in which terms, particularly of known legal effect, are used in the context in which they occur, is one leading and most necessary rule of interpretation. And it is in truth on that very rule that a limited meaning has been attached, in the case of Lang and others, to terms which, though capable in themselves of a larger meaning, were so fairly connected in the context with the antecedent which immediately preceded them, as to lead (on the doctrine of strict construction) to the interpretation which held them to refer only to that antecedent, and not to a variety of other antecedents, to which a general view of the party's intention might, in other deeds than a tailzie, have warranted the Court to hold that they did refer.

"The context is the leading matter attended to in those cases,—such as the Tillicoultry case,—in which general words of reference, though combined with an enumeration of particular

prohibitions, have not been held to have reference to *other* and different prohibitions than those specially enumerated. On this point reference may be made to the opinions of Lord Moncreiff, in *Lockhart*, 20th May 1841—*Fac. Col.* pp. 652–3; and of Lord Fullerton, in *Lumsdaine*, 26th November 1840—*Fac. Col.* p. 73.

“After full consideration of all the authorities, it would appear that the true meaning of the doctrine of strict construction of entails may be thus stated:—That the Court is never to adopt a construction for the purpose of effectuating the general intention and object of the entail:—That if there is another construction of the words employed which,—placed as they are, in the context in which they occur,—may be adopted without any violence to, or perversion of, the import and effect of the terms such as they occur, that meaning is to be taken, since the deed is not in doubt to be interpreted so as to aid intention. But the Court are not to do violence to, or disregard the context, in which certain words are introduced, because those terms are flexible, and because, in *other* deeds and in a *different* context, they have received the limited meaning, of which they are in the abstract susceptible, as much as of a larger and more comprehensive signification. On the other hand, while taking the context as the guide for attaining the meaning of particular terms therein employed, the context is not to be used generally in order to suggest or support any implication necessary to enforce the prohibitions or the irritancies,—because the Court is not to arrive at restraints constructively. The Court are not to aid the entail, by supplying, by implication however plain, what is imperfect,—by solving, however easily, in favour of the fetters, what is ambiguous,—or by explaining, by reference to plain intention, however readily it may be done, what is doubtful in the language and expressions which he chooses to employ, and also to employ in a particular way and order and collocation. The Court are not so to aid him in order to carry out his purpose, because no fetters are to be imposed by any implication. Hence, if in his deed words are employed, which, in the place where they occur, and consistently with the context, may be construed in either of two senses, the Court are then to take what he has not made plain, in the sense which is limited and in favour of freedom, and not in the larger and broader sense which a general view of the maker's objects and intentions would more readily suggest; for the latter view would proceed on the notion of effectuating his intention by taking one instead of the other of the two constructions. The true meaning of the doctrine of strict construction is best brought out by this statement,—that the Court is not to construe in any case for the purpose of effectuating intention, but to construe in favour of freedom, consistently with the context, with the known import of words, and with grammatical rules.

“To the resolute clause the pursuer objects,—‘That in sound legal construction it cannot be held as directed against sales.’

“The resolute clause is in the following terms:—“And farther, with and under the conditions, and under these irritancies, that in case the said Arthur Dingwall, or any of the substitutes or heirs of entail, shall contravene the before-written provisions, conditions, restrictions, limitations, and others herein contained,—that is, shall fail and neglect to obey, fulfil, or perform the said conditions and provisions, or any one of them, or shall act contrary thereto, then and in any of these cases, the person or persons so contravening, failing to perform, or acting contrary as said is, shall, for him or herself only, *ipso facto* amitt, lose, and forfeit all right, title, and interest he, she, or they have to the said lands and estate, and the same shall devolve, accresce, and belong to the next heir of tailzie appointed to succeed, albeit descended of the contravener's own body, in the same manner as if the contravener was naturally dead.”

“Taking this clause by itself, it is not supposed that the reading of it could suggest the slightest doubt.

“But the pursuer says that the dispositive, prohibitory, and irritant clauses speak of the ‘conditions, provisions, restrictions and limitations’;—that the resolute drops this full enumeration—is directed against ‘conditions and provisions’ alone,—that, ‘according to the formula or technical vocabulary’ of this deed, ‘conditions and provisions’ mean something different from ‘restrictions and limitations,’—that the prohibition against sale

is called in this deed, in the prior place where it is introduced, a ‘restriction or limitation,’—not a ‘condition or provision’;—and hence, that as the resolute clause does not apply to ‘restrictions and limitations, sale is not prevented.

“(1.) It is not a sound construction of the resolute clause to hold that this full enumeration is really dropped, even assuming that the repetition of tautological and superabundant substantives in each sentence, and each clause of the same sentence, had added any thing in point of meaning. When the resolute here says, in its second clause, ‘that is, shall fail or neglect, &c., to perform any of the said conditions and provisions,’ it is plain that this relates to the mode of contravention, and that the terms, ‘the said conditions and provisions,’ are applicable to all the declarations or fetters referred to before the words ‘that is,’ whatever other terms are used to denote them.

“(2.) This deed, exactly as is done in the style of an entail furnished as a model in the last edition of the Juridical Styles, varies and changes the terms descriptive of the conditions, in every instance in which reference is made to them. In the dispositive clause they are described by a string of expletives. A very few lines further on, in the obligation to infeft, the expressions are varied. And so on. Sometimes ‘clauses irritant and resolute’ are omitted, and ‘irritancies’ are introduced: Sometimes ‘reservations’ are introduced, and others omitted: Sometimes, and in an important passage, ‘restrictions’ is left out: Sometimes in the same, and that too a very short sentence, as in the obligation to insert the conditions of the tailzie in the titles, the substantives are varied. And the result plainly is, that so far from the deed having laid down an inflexible ‘technical vocabulary’ for itself, which gives a special fixed and peculiar meaning to the terms ‘restrictions and limitations,’ as essentially different from ‘conditions and provisions,’ the deed uses all these expressions as exactly of the same import and meaning, varying in the most unnecessary manner the terms employed, but in a way which leads to a conclusion the very opposite from that which the pursuer urges.

“(3.) But this objection proceeds on a very serious error as to the legal meaning and import of the terms ‘conditions and provisions.’

“The Act 1685 declares, that it shall be lawful for the lieges to tailzie their lands in favour of substitutes, ‘with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolute clauses.’

“Whatever fetters, restrictions, or limitations are introduced into an entail, are the ‘provisions and conditions’ of the tailzie. If there can be supposed to be a restriction or limitation which is not a condition or provision, it would not be lawful. But call them what the maker chooses, all prohibitions or restrictions are the conditions and provisions under which he makes his grant: These conditions are enforced by irritant and resolute clauses which are to affect the tailzie.

“The redundancy of the language employed in many deeds, and the useless variation of expressions in the same deed, leads to (the selection it cannot be called, but) the accumulation of a number of terms descriptive of the conditions and provisions: But whatever declaration or prohibition or limitation is introduced, must under the Statute be, and in law is, a condition or provision of the grant. The proper legal terms in an entail to describe these restrictions and declarations, are ‘conditions and provisions.’ Hence, when these terms are used, they do denote and include by force of the meaning which the Statute has annexed to them, and by reason of the thing (for restrictions are conditions), all the restrictions, limitations, prohibitions, burdens, fetters, declarations, reservations, and obligations previously mentioned, however great the variety of expressions employed to describe them.

“It is possible that a deed may be so framed, that a certain fixed meaning in that deed may be given to many of these terms; and it is true that all restrictions are not reservations, and that obligations to do certain things may not be limitations, and so forth. But all these are ‘conditions and provisions.’ And no instance has ever occurred in which these general and statutory terms (appropriately used in the Act 1685 to denote the conditions of the grant), have, when employed in a general clause in a deed, been held from reference to other particular passages

in that deed to bear not their technical, and statutory, and obvious meaning, but to be applicable only to *some*, and not to all of the conditions of the tailzie.

"II. To the *irritant* clause the pursuer objects—

"1. That it is not directed against sales.

"2. That at all events it is defective, so far as it does not, in regard to sales, contain a declaration of nullity of the acts done in contravention of the prohibition against sales.

"It is necessary to observe how the *irritant* clause in this entail is introduced.

"After the *resolutive*, there occur very full *special* *irritant* and *resolutive* clauses, each applicable to the special case of diligence done on debts, and to debts themselves—declaring and providing, that in the event of adjudication or any legal diligence being obtained or used against the fee or property of the lands and estate, or any part thereof, upon any debts or deeds of the institute or substitutes, whether contracted before or after their succession, not only *such debts and deeds* (the relative *such* having there clear grammatical reference to the antecedent of the debts and deeds in the immediately preceding clause of the sentence on which diligence might follow) shall be void and null, but also that the institute and heirs on whose debts and deeds the diligence has proceeded, shall *ipso facto* forfeit right to the lands which shall devolve on the next heir of tailzie, free from all such debts and deeds, &c.

"Now, here it is to be observed—1. That this clause completely satisfies the object and purpose both of an *irritant* and *resolutive* clause for the case of *debts*; and it is not a warrantable inference to hold, that if in an after part of the deed, an *irritant* clause is introduced *apparently general*, it is to be regarded as *directed only* against debts which had been specially provided for before. And, 2. That the expression *such debts and deeds*, when used in a limited meaning of the term *deeds*, has clear reference to an antecedent which fixes, upon the term *deeds* in that context, the meaning of '*deeds*' on which diligence may follow.

"Then there is introduced a *special* *resolutive* clause applicable to the case of treason.

"Then there are introduced certain provisions declared to be exceptions from the whole of the said *irritant* and *resolutive* clauses, allowing *liferent* infestments of specified amount in favour of wives and husbands, with a variety of declarations as to the same. Then further on, there is a long explanation of the grantor's peculiar views as to the expediency and moral effect of provisions for younger sons, and of the reasons why he wishes his heirs of tailzie to make their younger sons imitate his own example, and earn their fortunes, as he did, out of nothing. Then there is a declaration as to arrears of non-entry, &c.

"And then, after two pages of these special provisions, at a great distance, and quite disjoined from the general *irritant* clause, and also at a distance and disjoined equally from the *special* *irritant* and *resolutive* clause as to debts, occurs as a substantive distinct independent clause, not connected with, or having reference to, any particular antecedent, and in no connection whatever, either in expression, meaning, substance, or grammatical reference, with the clauses which immediately precede it,—the general *irritant* clause commencing with the most comprehensive expressions, 'and also with and under this provision and condition, as it is hereby expressly provided and declared, that upon any contravention that may happen by and through the said Arthur Dingwall, or any of the substitutes and heirs of entail their failing to perform all and each of the conditions, or acting contrary to all or any of the restrictions, it is hereby expressly provided and declared, that not only the said lands and estate shall not be burdened and liable to any of the debts and deeds, acts and crimes of the said heirs of tailzie, but also all such debts, deeds, and acts contracted, granted, done, or committed contrary to these conditions and restrictions, or to the true intent and meaning of these presents, shall be of no force, strength, or effect, and shall be unavailable against the other substitutes and heirs of tailzie, and who as well as the said estate shall be no-wise burdened therewith, but free therefrom in the same manner as if such debts or deeds had not been contracted, made, granted, or committed.' Then follows a clause which is of importance as a part of the context, and as a sequel or supplement

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to the above,—'And with and under this provision and declaration, that it shall be free and lawful to every heir of tailzie, though a minor or pupil at the time, who shall have a title by and through any contravention or irritancy incurred by a former heir, and whether descended of the contravener's body or not (except in the case of treason as aforesaid), to sue and obtain declarator upon the contravention, and upon the irritancy of the contravener's right, or to serve heir to the person who died last vest and seized in the said lands and estate preceding the contravener, and thereby, or by adjudication, or any other formal or legal way or method, to establish in his or her person the right and title of, and to the foresaid lands and estate, and that without being subjected to the debts or deeds of the person contravening or irritating their right, and without regard to any alterations made or intended, acts done or deeds granted by the contravener, contrary to the conditions and restrictions before written; and all the heirs and substitutes succeeding upon any contravention, and the heirs succeeding to them, shall be subject and liable to the same conditions, restrictions and irritancies throughout the whole course of succession for ever.'

"This *irritant* clause, then, stands out by itself as a substantive and distinct and *general* clause, introduced *as such*, and which cannot, either by reason of the place in which it occurs, or of the antecedent which goes before, or of the expressions with which it commences, be restrained and confined to any special and limited object, unless it shall be found that in the course of it the phraseology is inapplicable to a general *irritant* clause. With the antecedent which goes before, it has no connection whatever.

"That the expressions with which it *opens* are quite general—comprehending, and making apt, clear, and complete reference to all the conditions of the tailzie—and that the introduction (one of the most significant parts of such a clause) is applicable to '*any* contravention,' as it expressly states, is matter too clear to admit of illustration.

"Is then the object of a general clause subsequently departed from? And is the subsequent phraseology of such special meaning as to warrant the inference, that the terms employed fall short of the entailor's declared object, so that, unless a construction, founded on the principle of effectuating intention, is resorted to, the remainder of the clause cannot extend to, and cover the consequences of '*any* contravention' of all and each of the conditions' of the tailzie referred to.

"The clause goes on to provide—1. That the lands shall not be *burdened* or *liable* to any of the debts, deeds, acts, or crimes.

"It is contended, in the *first* place, that the words '*burdened* or *liable to*' are not apt, and proper, and adequate terms to reach *sales*; and in support of this remark, some observations are founded on, which Lord Brougham is said to have used in the Hoddam case, as to what *would have been* the legal construction of the clause in that entail, *if it had been complete* as a sentence. But it would not be fair, in any case, to hold a mere illustration in argument, not absolutely essential to the support of the judgment, as a deliberate and final expression of the opinion of any Judge. Still less ought that to be held in reference to the case founded on, as the honourable and learned Lord took occasion, in a subsequent case, to mention an inaccuracy which had *per incuriam* crept into the phraseology of the judgment in that very case of Hoddam.—See *Monypenny v. Campbell*, 16th August 1839, (M'Lean and Robinson, p. 908), while in the more important case of Warrender, his Lordship has complained of great inaccuracy in the report.

"The term *burden* is often used in Scotch conveyancing in a much wider sense than its ordinary vernacular meaning. There are many entails in which the prohibitions are called *burdens*; and when it is said that an estate shall not be *burdened* with any of the deeds of the contravening heir, reference is really made in the use of the word *burden*, to the passing of the estate from the contravener to the next heir, entire, such as it was entailed. It does not follow that, in using the term *burdened*, distinction is intended to be drawn between the character of some acts as *incumbrances* or debts remaining on the estate, and other acts carrying off parts or the whole of it. No doubt, in many contexts the term '*burdened*' will be found used in reference to debts and *incumbrances*. But the context of each must be the rule of construction.

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"The term *LIABLE* appears clearly to include the effect or operation of any species of deed on the estate. It is quite correct to say, that the lands shall not be liable to a deed of sale,—the expression being used in reference to the power of the heir to grant such deeds, and to the liability of the estate to be so dealt with.

"Then the clause goes on (*secondly*),—'but also all such debts, deeds, and acts contracted, granted, done, or committed contrary to these conditions and restrictions, and to the true intent and meaning of these presents, shall be of no force, strength, or effect,' &c., as above.

"On this clause it is contended, that all such 'debts, deeds, and acts,' must mean simply debts and deeds of that character, on which diligence may follow, and does not refer to deeds generally done in contravention of all the prohibitions.

"But, 1. There is no antecedent in the preceding sentence to which this general expression can have such reference.

"2. The context declares expressly that the debts, deeds and acts spoken of, are those done 'contrary to these conditions and restrictions'—which conditions and restrictions are in the context of the same sentence shown to be *all and each* of the conditions and restrictions of the tailzie, and occurring on any contravention that may happen. The context then appears to demonstrate that the terms, *all such debts, deeds, and acts*, are used in a general sense, so as to fix down that sense necessarily on these terms. And there is no warrant for any other construction whatever.

"3. 'All such,' &c. In this context there seems to be no doubt that the relative *such* applies to the debts or deeds done in contravention of the provisions of the tailzie. That is the sense in which, in this case, 'such' is used. No doubt there are many cases in which the irritant and resolute clause so follows, and resumes (as it were) exactly a prohibition against debts immediately preceding it, that the expression 'debts or deeds' comes to have reference, or in ambiguity may warrantably be taken to have reference, to the prohibition against debts; and then the relative *such* fixes the matter. But each context must be looked to: And there is no such ground for that view of this clause.

"4. In many other deeds, nay in some clauses of this tailzie, debts is followed by deeds in such a way as to denote that the deeds then in view are only one limited class of deeds, viz., those on which diligence for debts proceed. But this is not the appropriate or natural sense of the term *deeds*. It receives it in such cases by force and reason of a context, which shows that it is there used in that, a perfectly correct, though limited, application of the term.

"5. Farther, *all* in this context refers to the antecedents, 'any contravention,' and 'all and each of the conditions and restrictions.' Again, what is referred to by *all*, are things done contrary to 'these conditions and restrictions.' Here 'all' is used in its widest sense. The import of 'such' has been already noticed.

"6. Then of what consequence is it that in this context, so unqualified, so general, and comprehensive, after 'all such,' the word *debts* comes first before *deeds* and *acts*? Suppose it had run, *all such deeds, debts, and acts*, the pursuer does not seem to say that he had a case. But surely it would be most unjudicial, in construing this context in such a clause, to allow the mind to be biased by the fact, that in other passages or in other tailzies, 'debts' are introduced before *deeds*, when the object in these cases is to refer only to those deeds which are obligations for debts. In itself, and apart from the context in which it may happen, the mere mention of 'debts' before 'deeds' and acts cannot be of any importance.

"The clause which follows, as to making up titles on contravention, may be referred to, not to solve doubts on terms warranting two interpretations, but (being a sequel of the irritant) to show the deliberation with which the terms in the irritant were used for general objects, *e. g.* the expressions—'subjected to the debts or deeds,' without regard to the alterations made or intended, or acts done or deeds granted contrary to the conditions and restrictions.'

"The other objection to the irritant clause,—viz., that it does not contain a declaration of nullity against acts or deeds of sales,—proceeds in truth on the assumption that the former ob-

jection is good, and that the declaration of nullity which actually occurs, must be read on the view that *deeds* does not include sales. It seems unnecessary therefore to add more on this point.

"On the whole, I am of opinion that judgment must be given for the defender, sustaining the plea in law stated in the defences."

Lords Moncreiff and Murray :

"We concur in the opinion of the Lord Justice-Clerk, that in this case both the irritant and the resolute clauses of the entail are ample, substantive, and sufficient; and that they cannot, by any application of the principle of strict interpretation, be so construed as to prevent their direct and specific force to secure the estate and the heirs of entail against all or any of the things, including sales, to the prevention of which the prohibitory clause is directed."

Lord Cockburn :

"I am of opinion with Lord Moncreiff, that the objections both to the irritant and resolute clauses are bad. In arriving at this conclusion, I acknowledge, and employ, the principle of strict construction, as it has hitherto been understood in our law; but in applying this construction to the words of this entail, I think that these words effectually prevent that from being done which the pursuers wish to do."

Lord Ivory :

"I concur generally with the Lord Justice-Clerk and Lord Moncreiff in holding that there is no solidity in the objections either to the irritant or resolute clause of this entail, and therefore that judgment should be given for the defender.

"I have however to observe, in regard to the irritant clause, that if the words 'the said lands and estate shall not be burdened and liable to any of the debts and deeds, acts and crimes, of the said heirs of tailzie,' were to be construed as applicable only to debts and deeds of incumbrance—(See *Marquis of Breadalbane*, as decided in the House of Lords, 2 *Robinson*, 109)—it might indeed seem difficult at first sight, consistently with the judgments pronounced in *Blairadam*, *Overtown*, &c., to withhold the same limited construction from the words which immediately follow, viz., 'all such debts, deeds, and acts,' &c. At least it would have been so, supposing these latter words to have stood by themselves.

"But 1st, They do not stand by themselves. For the sentence runs on—'all such debts, deeds, and acts contracted, granted, done, or committed CONTRARY TO THESE CONDITIONS AND RESTRICTIONS, OR TO THE TRUE INTENT AND MEANING OF THESE PRESENTS.' And, therefore, the second branch of the sentence, as thus conceived in its entire tenor, being wholly incompatible with the use of the words 'debts, deeds,' &c., as restricted merely to deeds of incumbrance, it must be received as in truth explanatory of the real sense of the first branch;—so that, the two standing together in the immediate connection of relative and antecedent, it is no more possible to interpret, in the restricted sense, the words as they occur in the first, than the same words as they are repeated in the second;—and hence, in both alike, the words must have extended to them the larger and more natural sense—of deeds of general contravention,—which of course would include sales, &c., no less than debts.

"2d, Looking to the whole context of the clause, I am of opinion that, even had the case stood upon the words employed in the first branch of the sentence alone, without the co-relative explanation which they derive from the mode of their repetition in the second branch, it would be impossible, according to any rational principle of interpretation—(not meaning by this that the rules of strict construction are at all to be departed from, or that mere inference or implication is to be received as a guide in such questions)—to construe, consistently with what has been decided in other cases, the words 'burthened and liable,' as confining 'the debts, deeds,' &c., referred to, to deeds of incumbrance exclusively."

(Lord Jeffrey absent from indisposition.)

On advising the cause the Court pronounced the following interlocutor :

"Find the objections stated to the validity and effect of the

entail in question unfounded and groundless; therefore, dismiss the action of declarator, assoilzie the defenders from the conclusions thereof, and decern: Find the pursuer liable in expenses to the defender, and remit the account," &c.

Lord Ordinary, Jeffrey.—*Act.* Dean of Faculty (Wood), G. Bell; W. and D. Allester, W.S., *Agents.*—*Alt.* Moir; John Jopp, W.S., *Agent.*—*B. Clerk.*—[H.B.]

3d March 1842.

FIRST DIVISION.—(H. B.)

No. 145.—GEORGE MARQUIS OF TWEEDDALE, *Pursuer*, v. ALEXANDER BEATSON and OTHERS, *Defenders*.

Superior and Vassal.—*Feu-Duties.*—*Interest.*—*Interest on feu-duties is not exigible previous to a judicial demand.*

Sequel of case (*ante*, p. 83). The pursuer claimed interest on the arrears of feu-duties from 1801, on the ground that they had then been rendered litigious by an action which had been then raised in the lifetime of his predecessor, or at least from 1834 and 1836, the dates of the present and supplementary actions.

The Lord Ordinary pronounced the following interlocutor:

"3d February 1842.—The Lord Ordinary having heard parties on the interest of the arrears, and considered the process, finds the defenders liable in legal interest on their arrears respectively, from and after the 18th of March 1841.

"*Note.*—The Lord Ordinary proceeds on the principle (in which all parties concurred at the debate) that interest is not due on arrears of feu-duties unless it be contracted for, or judicially demanded. Now, there was no contract here, and the judicial demand was only made against Mrs Wemyss in 1836, and against the other defenders in 1834. For the Lord Ordinary cannot act on the alleged process said to have been raised against Mrs Wemyss of Cuttlehill in 1802, and wakened in 1804 and 1812, partly because there is no evidence of the applicability of that action to the particular lands and arrears now in dispute, and partly because there was no judicial demand against those who purchased from that person. And the institution of the existing action in 1834 and 1836 cannot be taken as the period for the commencement of the interest; because even these summonses make no specific demand, and did not put the defenders in *mora*, by enabling them to know what they ought to pay. They only conclude for unascertained proportions of *cumulo* duties, the proportions of which had not been fixed. Each vassal's debt only became clear by the accountant's report, from the date of which (1st March 1841) the true *mora* began."

The pursuer reclaimed, in so far as the interlocutor found the defenders liable in interest only from March 1841,—and prayed to have them found liable "on their respective arrears of feu-duties *simpliciter*."

At advising,

Lord President.—The impression which I had when the case was formerly before us is now confirmed. I cannot see how the parties to the present action can be connected with the action of 1801, so as to warrant a decision against them for the interest of these feu-duties, on the ground that it was then judicially demanded. Had the action of 1801 been generally for the right of the Marquis of Tweeddale as heritable baillie of Dunfermline, and directed as such against all his vassals, there might have been some ground for regarding it as a judicial demand inferring general liability. That, however, was not the case. Neither, I am afraid, can the wakening of the action afterwards in 1804 and 1812 be made available. I do not see, however, why the interest on the arrears should be restricted to the date of the accountant's report. The demand was judicially made against Mrs Aytoun in 1834, and against Mrs Wemyss in 1836; and though a long litigation ensued, that

cannot prevent the demand from taking effect from its date. On this point I have no difficulty. My only doubt is, whether Mrs Aytoun should not be held to have been a party to the process of 1812. There is certainly great reason to presume that she was; but the evidence is not complete, and I am therefore not prepared to alter the interlocutor farther than to the extent now indicated.

Lord Gillies concurred.

Lord Mackenzie.—I am of the same opinion. Whatever may be thought of the equity of the claim, the rule of law unquestionably is, that in the case of feu-duties, where interest is not stipulated, it is not due till a judicial demand be made, and that not for the feu-duties alone, but for the interest in express terms. That was not done here; and I am not satisfied, therefore, that more is due than has arisen since the dates of the present action. On the other hand, I cannot see that the liability of the vassals did not commence as soon as the demand was made, though only in *cumulo*. The superior was not bound to clear the proportion due by the vassals. Their duty was to pay and clear it among themselves.

Lord Fullerton.—I concur. I have no doubt that interest is due from the date of the action for the *cumulo* sums. However difficult the arrangement of the proportions may be, the liability for interest was fixed by the judicial demand. Were it otherwise, a superior might be kept out of his just claims for twenty years by litigation, carried on for the purpose of fixing the respective liability of the vassals. As to the claim prior to the date of the present action, I agree with your Lordship, that the evidence adduced to connect the present parties with that claim, is defective.

The Court pronounced the following interlocutor;

"Alter the interlocutor reclaimed against, in so far as it finds interest not due till the date of Mr Menzies's report, and recal said interlocutor to that extent: Find the defender, Mr Wemyss, liable in interest on the feu-duties due by him, and that from and after the 25th April 1836, being the date of the supplementary action in this process; but find him liable in no prior interest: Find the whole other defenders liable in interest on the feu-duties found due by them respectively, and that from and after 10th November 1834, being the date of the original action in this process: Find Mrs Aytoun of Inchdairnie, and the trustees of Mr Greenhill, liable in no prior interest; but reserve all questions as to prior interest as regards the other defenders who have not yet appeared in this process: *Quoad ultra*, remit the case back to the Lord Ordinary to proceed further with the cause as to his Lordship may seem just, and reserve all questions of expenses."

Lord Ordinary, Cockburn.—*Act.* Rutherford, Anderson; Gibson-Craigs, Dalziel and Brodie, W.S., *Agents.*—*For Greenhill's Trustees*, Thomson; Shepherd and Grant, W.S., *Agents.*—*For Mr Wemyss*, Marshall; H. J. Burn, W.S., *Agent.*—*For Mrs Aytoun*, Moir; James Greig, jun., W.S., *Agent.*—*N. Clerk.*—[H.B.]

3d March 1842.

FIRST DIVISION.—(H. B.)

No. 146.—THE EDINBURGH, LEITH, and NEWHAVEN RAILWAY COMPANY, *Pursuers*, v. DAVID MANSON, *Defender*.

Partnership.—*Statute 6 Will. IV.*—*Railway Company.*—*Proprietorship.*—*Circumstances held sufficient to establish that a party had been properly registered as proprietor, and was bound to pay the calls on his shares in a railway company.*

By the Act 6th Will. IV., incorporating the Edinburgh, Leith, and Newhaven Railway Company, it is enacted, section 50,

"that in any actions or suits brought by the said company, in the manner hereafter directed, against any proprietor or proprietors of any share or shares in the said company, to recover any sum or sums of money due and payable to the said company, for or by reason of any call or calls made by virtue of this Act, it shall be sufficient for the said company to declare

and allege, that the defender or defenders, defendant or defendants, being a proprietor or proprietors of such or so many share or shares in the said company, is or are indebted to the said company in such sum or sums of money as the call or calls in arrear shall amount to, for such or so many sum or sums of money upon such or so many share or shares belonging to the said defender or defenders, defendant or defendants, as the case may happen to be, whereby a right of action or suit hath accrued to the said company by virtue of this Act, without setting forth the special matter; and in such action or suit it shall only be necessary to prove that the defender or defenders, defendant or defendants, at the time of making such call or calls, was or were a proprietor or proprietors of some share or shares in the said company, and that such call or calls was or were in fact made, and that such notice thereof was given as is directed by this Act."

Sect. 53, "That the said company shall, and they are hereby required to cause the names, designations and places of abode, of the several persons who shall be entitled to shares in the said company, with the number of shares, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book or books, to be named the register-book or list of proprietors, to be kept by the secretary or other officer, person or persons, appointed by the directors, and after such entry to cause the same to be signed by the chairman or deputy-chairman; and they shall also cause a certificate, so signed by the chairman or deputy-chairman and secretary, or other officer, person or persons appointed by the directors, and with the common seal of the company affixed, to be delivered to every proprietor on demand, specifying the share or shares to which he, she, or they, is or are entitled in the said company; and such certificate shall be admitted in all courts of law and equity whatsoever, as evidence of the title of such proprietor."

Sect. 54, "That it shall be lawful for the several proprietors, and his, her or their respective heirs, successors, executors, administrators and assignees, to sell and dispose of, or gratuitously to transfer any share or shares to which he, she or they may be entitled therein, subject to the rules and conditions herein mentioned: But it shall, for the purpose of regularity, and the more perfect security of the said company, belong exclusively to the secretary or such other officer, person or persons, as the directors may appoint, to prepare and make out all voluntary transferences and conveyances *inter vivos* to such share or shares." "And in any such sale, the said transference and conveyance (being executed by the seller or sellers, and purchaser or purchasers of such share or shares) shall be indorsed by two of the said directors, and shall be kept by the said purchaser or purchasers, for his, her, or their security, after the secretary, or other officer, or person or persons appointed by the directors of the company, shall have entered into a proper book or books, to be kept for that purpose, a copy of such transference and conveyance, for the use of the said company, and have testified or indorsed a certificate of the entry of such copy on the said transference and conveyance; for which entry no more than five shillings shall be paid; and the said secretary, or other officer, or person or persons appointed as aforesaid, is, and are hereby required to make such entry immediately without any undue delay, and until such transference and conveyance, indorsement and certificate, shall have been made and entered as above directed, such purchaser or purchasers shall have no right to draw any share or shares of the profits of the said company, nor to have any vote as a proprietor or proprietors of the said company."

Sect. 55, "That all and every person or persons, body or bodies politic, corporate or collegiate, or company, whose name or names shall at any time hereafter stand in the said register-book, or list of proprietors, either as a proprietor or proprietors of one or more share or shares in the said company, or as heirs, successors, executors or administrators, or assignees of such proprietor or proprietors, shall be deemed and taken to be the proprietor or proprietors of the several share or shares standing in the said book in their respective names, or in the names of those whom they may represent, and shall be subject and liable to the payment of every call or calls, made and to be made thereon, and to all actions, suits, forfeitures and penalties, to which original proprietors of shares in the said company are made subject

and liable by this Act; and all notices thereof required to be given previous to the forfeiture of shares to the proprietors thereof, shall, if given to the person or persons appearing by the register-book or list of proprietors to be such proprietor or proprietors, or to their heirs, successors, executors, administrators or assignees, or left at, or sent through the post-office to his, her, or their place or places of abode last mentioned in the said register-book or list of proprietors, be in all respects good, sufficient and conclusive; and all payments of dividends due and to become due on such share or shares, shall be made to such person or persons, as by the said register-book or list of proprietors, shall so appear to be proprietor or proprietors thereof; and no transference and conveyance, bargain or sale, of any share or shares, or other instrument proving a title to any share or shares, which shall not have been enrolled or registered, as directed by this Act, shall be admitted as evidence, either to defeat any action or suit, brought or to be brought by the said company, to recover the said calls, or to enable any person or persons to recover any share or shares forfeited to the said company, or to make the said company liable to the payment of the dividends to any other person or persons than such as appear in the said register-book or list of proprietors to be the proprietor or proprietors of the said share or shares; but that in all cases the said register-book or list of proprietors shall be considered as evidence of proprietorship of the said share or shares."

Founding on the powers conferred by the Act, the company sued David Manson, S.S.C., for the sum of £300, as the amount due by him upon calls on twenty-five shares of stock.

The defender was not an original subscriber to the company, but when examined as a haver, deponed, that he

"has trafficked in what is called scrip-shares of the said company, and has bought from stock-brokers and sold to them scrip-shares of the said company; and he got from stock-brokers several notes of sales of scrip-shares, and he now produces three of these documents, which are marked by the deponent, commissioner and clerk, as relative hereto; and when the deponent sold shares, he gave the scrip certificates to the brokers; and with regard to the other scrip-shares, the subject of the present action, so far as he recollects, he gave them to Mr Stodart, then the secretary of the company, before the general meeting held on the 31st October 1836, at which the deponent was present, but he does not know what became of the said scrip shares afterwards."

The pursuers *pleaded*—1. That holders of scrip, after the Act of incorporation was passed, were entitled to be registered as original proprietors in making up the book of registry, whether they were original subscribers to the parliamentary contract or not. And every scrip-holder who produced his scrip to the secretary for registration, being so registered according to the form and practice in all such cases, was entitled to the privileges, and incurred the liabilities of a partner in the undertaking. 2. The book of registry, made up in terms of the Act, is the only authentic evidence of proprietorship. And no regular deed of transference is required until after registry was so completed under the Act. 3. The defender having been registered as a scrip-holder, and having attended a general meeting of the proprietors, and taken a part at such public meeting, is bound to make payment of the calls made by the directors, in terms of the powers given them by the Statute of incorporation.

The defender *pleaded*—1. The defender neither being an original subscriber to the said company, nor having obtained any legal transference, is not liable to the conclusions of this action. 2. The pursuers have produced no legal evidence that the defender is a part-

ner of the said company. 3. The register-book referred to by the pursuers, not being prepared and kept in terms of the Act of Parliament, and being inaccurate, cannot be founded on by the pursuers in support of this action. 4. The proceedings of the pursuers not being in conformity with the Statute, the calls pursued for not having been made, and the present action not having been raised in terms of the Statute, the defender ought to be assoilized, with expenses.

The Lord Ordinary pronounced the following interlocutor:

"9th November 1841.—The Lord Ordinary having heard parties' procurators, repels the defences, and decerns in terms of the conclusions of the libel; finds expenses due, allows an account thereof to be given in, and when lodged, remits to the auditor to tax the same, and to report.

"*Note.*—The register in which Mr Manson's name is inserted is *prima facie* evidence that he is a partner, and liable in terms of the Statute, §§ 50, 53, 54, 55.

"The defender has assumed that there was no regular transference of the scrip to him from the person who held the scrip, and that without such regular transference he could not be regularly registered, and liable to take calls. The Lord Ordinary does not find any authority for that in the Statute incorporating the company. The register is made the rule. If the defender showed that another person was registered for these shares, and continued the proprietor of these shares, his defence would stand on very different grounds. The defender has argued that he is not bound by the registration of his shares, and that it was not authorised by him; but the *prima facie* evidence of the register is confirmed by the minutes, and his own evidence as a baver, and that of Mr Stodart; and there has been no offer made to prove that the register is false, or ground shown for rejecting it."

The defender reclaimed. At advising,

Lord Gillies.—I did not see any difficulty in the case till it was somewhat perplexed by the ingenuity of the defender's counsel. The rule as to transfers applies only after the register was made up. The Act of Parliament declares that the names of the proprietors shall be entered distinctly in a book, and that those so entered "shall be" held to be the proprietors. Now, who are those to whom this "shall be" applies? Why, just those who produce papers like those which were given in by the defender, viz., "the holder of this voucher." After the names were thus inserted in the register, the case was entirely changed. Then—but not till then—it became necessary to have a regular transference. For greater regularity, a particular mode of transference is pointed out; but it is clear that this cannot apply to the case of scrip before the Act was obtained. Till then there was no register, and of course the regulations as to the register could not apply. This is a complete answer to the defender's argument as to the necessity of a regular transference; and that argument being thus untenable, there is no more difficulty in the case. The defender has chosen to invest his property in this form. He has been registered as a proprietor, and, as a proprietor, is bound to pay the calls. He also acted as proprietor by attending a meeting, and taking part in the business. Suppose he had acted in the same manner for half-a-dozen of years, and pocketed ten per cent. profit, and when the concern became unprofitable, had endeavoured to back out by such pretexts as he now uses—could he have done so? He was just as much a proprietor by attending one meeting, as by continuing to attend for a longer period. I do not, however, go on this, but on the Act. I am clear for adhering to the interlocutor.

Lord Mackenzie.—I am of the same opinion. There are here two totally distinct questions; but the defender's counsel has blended them together, and so made complex what is otherwise plain. The first question is, whether it was possible, by any form of conveyance, to make an effectual transfer of scrip? The other question is, whether, supposing scrip to be transferable, the particular shares here in dispute were properly transferred? As to the first of these questions, the plea is

perfectly intelligible, that when scrip has been acquired by subscription, it is absolutely impossible to transfer it. According to this plea, if the transference, instead of being made loosely, had been made in the most exact and formal manner known either in Scotch or English law, it would not have been worth one farthing. This is the length to which the plea must go; and though, as I have said, it is perfectly intelligible, I cannot say that I think it tenable. Were it tenable, it would make scrip differ from all other kinds of property which are transmissible. This at first sight is not likely to be true; and on looking at the Statute, I see no traces of any thing of the kind. On the contrary, I see provisions which evidently imply, that transferees of scrip had taken place, and were perfectly lawful. It was not necessary, indeed, for the Statute to make any distinct provision to this effect, unless proprietors of scrip had been expressly barred from transferring it by other rules of law; but it seems to me impossible to interpret the Statute fairly, without perceiving that transferees of scrip, instead of being excluded, are clearly recognised. This being the case, the only question here is, were these shares effectually transferred? I think enough has been established to make the denial of this impossible. The defender being thus a proprietor of shares, is answerable as partner, in terms of the libel.

Lord Fullerton.—I concur in the opinions which have been expressed. It is clear that the direction as to transfers could only apply after the Act was passed. Till then, none of its machinery was in force. One of the provisions is, that the transfers were to be indorsed by the directors or secretary. But neither directors nor secretary had any existence before the passing of the Act. Therefore, unless it can be shown that there is an intrinsic illegality in the transfer of shares before the Act was passed, or that the Act itself contains an express prohibition against such transfer, the defender's plea is altogether untenable. I know of no such intrinsic illegality; and I see nothing like a prohibition in the Statute. On the contrary, as Lord Mackenzie has observed, the Act obviously implies, that between the applying for it and the passing of it, transferees of scrip might have taken place. No doubt the defender has founded on a declaration made by the directors, that they would not recognise any transfers of shares till the Act was passed. I do not think this declaration conclusive against them. In the first place, it was merely a declaration made by the company for their own convenience, and which, if they saw fit, they might pass from; and in the second place, it does not bear the construction which the defender has put upon it. The directors say they won't recognise transfers before the passing of the Act, but they don't say that after the passing of it, they won't give effect to transfers made before; and this, accordingly, is the way in which these transfers were dealt with. After the Statute was passed, notice was given to parties to come forward to have their names registered. It is impossible to deny that the defender took steps for this purpose. He says, indeed, he does not know from whom he got his shares. It should be easy for him to ascertain the fact, but it has nothing to do with the case. He held the shares. He put them into the hands of the secretary; and this he could have done for no other purpose but to get his name inserted in the register. In these circumstances, how can we listen to the argument that it was the duty of the directors to insert any other name than his? They were to insert the names of the "holders of vouchers," who could only mean the holders of scrip. There is a clear distinction between the present case and that of *Sprot*. *Sprot* had signed the parliamentary engagement. He admitted he had been proprietor, but said he ought not to have had his name inserted in the register, as he had intimated his having parted with them, though without telling to whom. Here the holder of the shares was known, for he came forward himself and asked to be put on the register. In these circumstances, it was unnecessary to make any inquiry after the original subscriber; for though he had been known, the directors must still have inserted the name of the holder who was actually claiming. I am clear, therefore, that the defender is liable, and that the interlocutor of the Lord Ordinary should be sustained. I not only think that there is nothing in the Statute which the directors have not fully complied with, but I am inclined to go a step farther. I have the greatest doubt if all the detailed provisions in the Act can be strictly pleaded

against the company. It is evident, from the nature of them, that they were inserted in the Act for the convenience and security of the company, who are consequently entitled to plead them against others, but might, as it appears to me, dispense with them if so disposed. Take the case that a party, without observing all the details of the Act, goes to the company, and the company consent to receive him as a proprietor without indorsing his shares, and enter his name in the registry,—would not that entry subject him to the provisions of the 55th section? I apprehend it would. He would be a proprietor to all intents and purposes; and I think that neither party could afterwards void the transaction by pleading that the provisions of the Act had not been complied with. In the present case, the only thing that could avail the defender would be, to plead that the company chose to put his name into the register without his consent. But how can that be pleaded here, in the face of the admission that he himself put his shares into the hands of the secretary?

Lord President.—I also have arrived at the conclusion, that the defences cannot be sustained. I think there is a great deal of force in the observations of Lord Fullerton on the 55th section; but it is not necessary to go on that narrow ground. It is quite clear that there is nothing in the Act like an indication that all transfers of scrip made previous to the passing of it were illegal, but that the contrary, if not expressed, is clearly implied. The persons to be registered were the holders of the vouchers; and it is evident from the deposition of the defender, that he came forward in that capacity and gave his scrip to the secretary, obviously for the purpose of being registered. I concur in the view taken by your Lordships, and am clear that, looking both at the steps taken by the defender, and at the spirit and meaning of the Statute, the interlocutor of the Lord Ordinary should be adhered to.

The Court *adhered*, with additional expenses.

Lord Ordinary, Murray.—*Act.* Solicitor-General (M'Neill), Sandford; C. F. Davidson, W.S., *Agent.*—*Alt.* G. Bell, Moncreiff; *Party Agent.*—B. Clerk.—[H. B.]

3d March 1842.

SECOND DIVISION.—(J.W.)

No. 147.—ANDREW ZUILL, *Suspender*, v. M'MURCHY, RALSTON and COMPANY, *Chargers*.

Process.—Parties—Citation—Joint Obligation—Liquid and Illiquid—*A summons was raised against a company, against the individual partners thereof, and against another party, obligants upon a bill, for recovery of a small balance due upon the bill, and also for expenses of diligence which had been used thereon. The summons set forth that all the defenders were conjunctly and severally liable, and the conclusions were so directed against them, but no execution of citation was returned against J. and R. S., the company, and individual partners thereof—Held, in the circumstances, that the execution was defective, and process sisted till these defenders were called.*

Process.—Execution—Statute 1672, c. 6.—*An execution, two lines of which only were written upon the summons, and bearing simply that the messenger had cited the therein designed A, defender, sustained; but expenses refused in relation to an objection to it.*

Process.—Suspension—Caution—*A remit, in a suspension, to the Sheriff to sist process until all the defenders set forth in the summons are called, exhausts the suspension.*

On 7th January 1836, the suspender, along with Robert and James Stewart, by promissory-note of that date, promised jointly and severally to pay to the chargers, by two equal instalments of four and eight months after date, the sum of £40 value received. On the 10th of May, when the first instalment fell due, no payment was made by any of the parties jointly and severally liable. The note was accordingly protested of that date, but the protest was not recorded nor diligence done; and on 6th June the suspender paid to account £10, for which he received credit.

The balance of this instalment forms part of the sum sued for in the Inferior Court, in the action now under discussion. The second instalment having fallen due on the 10th of September, the promissory-note was again protested, and on the 15th of December, horning was raised against the suspender, and the other parties to the note, for payment. A suspension was presented on the 22d December, which was refused with expenses, after a reference of the whole matters in dispute to the oath of the chargers. The principal sum in this diligence being £20, was paid to the chargers on the 18th of February 1837; but the chargers were obliged to extract the Bill-Chamber decret for the expenses of the suspension, amounting, with the dues of extract, to £24. 19. 8. Diligence was raised upon this, but a charge was given to the suspender only, and caption was raised against him, when the amount was paid on 1st February 1838. No part, however, of the expenses of diligence, either on the second instalment or on the Bill-Chamber decree, was paid. For these sums, along with the balance of £10 of the first instalment, an action was raised on the 6th of February 1838 against the suspender, before the Sheriff of Lanarkshire, in which Robert and James Stewart were also included as defenders. The summons set forth, that the whole defenders were conjunctly and severally liable for the sums sued for, and contained relative conclusions.

Besides his defences on the merits the suspender stated two preliminary pleas—1. That the execution, excepting to the extent of about a couple of lines written at the bottom of the last page of the summons, is on a paper apart stitched to the summons, and does not, in terms of the Act 1672, c. 6, contain the names and designations of the parties, pursuers and defenders; and, 2. (which is the third reason of suspension), that although upon the face of the summons the said Robert and James Stewart are set forth as defenders, and as jointly liable for the alleged debt, and the conclusions of the action are directed against them, they are not called as parties to this action, and no execution of citation is returned against them.

On advising the case upon the chargers' replies, the Sheriff-substitute pronounced the following interlocutor:

"Glasgow, 28th March 1838.—Having considered this process, in respect the execution is partly written upon the summons, and in respect the defender is liable, both jointly and severally, with the other parties in the sums sued for, repels the dilatory defences."

Against this interlocutor the complainer appealed to the Sheriff-depute, who, on the 23d of May, pronounced as follows:

"Having considered the interlocutor appealed from, and reviewed the process,—in respect the last page, on which the execution is written, is obviously part of the summons, with the indorsement of the title of the summons written thereon in the same hand as the summons itself, repels the first objection; and in respect the parties are liable under the obligation libelled on *singuli in solidum*, and thus no one can plead as a preliminary defence, that all having an interest have not been called; and in respect the other parties, Robert and James Stewart, cannot be affected by any thing contained in this process, which is *res inter alios* as to them, dismisses the appeal, and adheres to the interlocutor submitted to review."

Condescence and answers having followed, and been revised, and the record having been thereupon

closed, the Sheriff-substitute, on the 25th of July 1838, pronounced the following interlocutor:

"Having considered the revised condescendence, revised answers, productions, and whole process, finds that the sole question at issue in this process is, whether or not the pursuers are enorous and *bona fide* holders of the promissory-note libelled on: Finds that this question has been discussed in the suspension process narrated in the revised condescendence, in which suspension a reference to the chargers' oath was made and sustained, and the bill of suspension refused by the Lord Ordinary on advising the deposition; Therefore, repels the defences; decerns against the defender for £22. 5s., with interest from 7th February 1838, being the date of citation to this action, till paid; and finds the defender liable in expenses; remits to the auditor to tax the account thereof, and also of the expenses of diligence sued for, and to report."

This interlocutor became final. The decree was extracted, and against the charge which followed on it the present suspension was brought.

Pleaded for the suspender—1. The Sheriff ought to have sustained the objection of no process, in respect that all proper parties were not cited. 2. It is not relevant, in order to elide this objection, to urge that one party to a liquid obligation, imposing joint and several liability, may be separately sued, seeing that the action sought to constitute two several debts for which decree had not been obtained, or a liquid obligation granted; and the reply is otherwise irrelevant. 3. The execution of the summons was defective, and expressly in contradiction to the terms of the Act 1672, in respect that it did not contain the names of all the defenders, in particular the names of James and Robert Stewart, who were expressly made defenders in the summons, as well as on its partibus when called in Court. 4. The execution was *separatim* null, in respect that, in violation of the said Act, it did not contain the designation of the parties, pursuers and defenders, and that it was written upon a sheet separate from the summons.

Pleaded for the chargers—1. The parties to the promissory-note libelled, being liable jointly and severally, both for the sum contained in the note, and for the other sums concluded for in the Sheriff-court process, no objection lies on the ground that they were not all cited;—more particularly when, owing to the circumstances of the case, it was out of the chargers' power to do so. 2. The other parties to the promissory-note being included in the summons along with the suspender, did not make it incumbent on the chargers to cite them, if otherwise it was not incumbent on them to do so: *Clason v. Campbell*, 21st December 1838. 3. The chargers being under no necessity of citing the other parties mentioned in the summons, it is no objection to the execution of citation that these parties are not included in it. 4. No defence having been pleaded in the Inferior Court to the effect that the execution should have contained the names of Robert and James Stewart, in respect of their names appearing as defenders in the summons, although this would have been a preliminary defence to the action, it cannot now competently be pleaded in this process. 5. The execution of citation being written upon the summons itself, or in any view, at least, partly upon the summons, and partly on the sheet containing the indorsement of the summons, and other markings, it was not necessary that the designations of the parties

should appear in it, nor that it should contain any other names than those of the chargers and the suspender. 6. The onerosity of the promissory-note libelled on, being already established in a competent process between the parties, was *res judicata* in a subsequent action between them.

The Lord Ordinary pronounced the following interlocutor:

"10th December 1839.—The Lord Ordinary having heard counsel on the reasons of suspension, and thereafter considered the record in the Inferior Court, and whole process, repels the second reason of suspension, founded on the alleged informality of the execution annexed to the summons: Sustains the third reason of suspension, and suspends the letters *in hoc statu*, but remits the case to the Sheriff, to sist process till the other defenders, set forth on the face of the summons, are called; with power to the Sheriff to give such judgment as to the expenses in the Inferior Court as to him shall seem just on the conclusion of the cause; and decerns: Finds the suspender entitled to his expenses in this Court, and remits the account thereof when lodged, to the auditor to tax and report.

Note.—The Lord Ordinary still entertains the opinion expressed in his former note, that when *correi* are cited in an action for the constitution of open and illiquid claims, the pursuer is bound to make them all parties, before the action can proceed as to any of them, and he should think it very embarrassing in practice if a different rule were now laid down, after the express decisions of both Divisions in the cases of *Hopkirk and Dewar*, as distinguished from that of *Lady Saltoun and M'Tavish*, 2d February 1821,—all referred to in the former note.

"Had the claim related solely to the *balance of the bill*, a suit or charge against any one of the obligants might have been sustained on the precedent in *Lady Saltoun's* case; but nearly one-half of the sums claimed here are illiquid, and thus the case falls within the rule applied to the cases of *Hopkirk and Dewar*.

"To these cases reference may be added to those of *Reid and Moffat* in 1828 (6 Shaw, 570), *Johnstone against Arnot* (8 Shaw, 383), and *Hamilton* (8 Shaw, 709), cited at the debate, which, as the Lord Ordinary conceives, all support the rule in the later practice of the Court, that in the constitution of an illiquid claim, all the alleged *correi* must be cited. The foundation of the rule is plain. When an action of constitution is pursued, the whole conjunct obligants must be called, *first*, because some may deny their liability, or be able to show that the claim is in whole or in part extinguished; *secondly*, because any *socius* paying the debt is entitled to have an assignment to the pursuer's debt, and a decree against the other *correi*, to operate his relief. But when a claim is wholly *liquid*, as in *Lady Saltoun's* case, the possession of the bond, bill, or decree, affords of itself a proof that the debt is unpaid; and the creditors can in such cases instantly assign any one obligant paying the debt into the *parata executio* which he holds.

"The chargers pleaded, that the cases cited all related to the debts of dissolved companies, between the partners of which there is said to be a certain *vinculum* not applicable to claims against ordinary conjunct and several obligants. But while sundry of the cases did not arise against mercantile copartners, the distinction suggested seems to rest on no legal or intelligible principle. When a company is dissolved, the partners are in the precise situation of ordinary *correi*. Though they subsist as a company to the effect of realising their funds, a constitution can no longer be taken out against the partners under the *social firm*, but they must be all cited, just as other parties alleged to be jointly and severally bound.

"The cases also relied upon by the chargers, instead of being opposed to the preceding doctrine, strongly confirm it. Thus, reference was made to the case of *Walker* in 1805, to show that when the deceased Mr William Walker sued the *Scots distillers*, he brought his action against a few only, and not against the whole parties liable for his account. But it is material to observe, that no dilatory plea seems to have been urged there, and it would not have been consistent or safe for the defenders

so to shape their case. Their main plea was, that there was no conjunct liability, but that each distiller was only liable *pro rata*. Hence they had no right or interest to demand that the other employers of Walker should be called; so that the grounds on which *correi* are entitled to urge a dilatory defence, obviously did not apply to that case. The defenders stated the plea on which they relied as a defence on the merits. The case of Reid and Moffat, again, though founded on by the respondents, is truly a precedent for the suspender, as the report bears that all the creditors *ranked*, who alone authorised the flax to be purchased, were there cited by the pursuer.

"With regard to the objection to the execution, the Lord Ordinary, on hearing the case more fully explained at the bar, has come to be of opinion that the execution may be sustained. But as only *two lines* of the execution are written on the sheet which contains the principal summons, the case on this point is sufficiently narrow, and the mode of extending the execution being new, or at least very loose, no expenses are allowed in relation to this point."

The chargers reclaimed. At advising,

Lord Medwyn.—Strong effect is given to joint obligations. Each obligant in a bill is liable for the whole, and each may be sued: Dict. 14,725, Rutherford. The pursuer who claims from one alone must assign; but he can't be asked to do more. The partners of a company must all be called. Even when dissolved, the company subsists to the effect of winding up the affairs. But I never understood it was necessary to call all the *correi debendi* where they were so only in one transaction: nor in such a case do I think it necessary that the expenses following on the obligation should be liquidated. It is said that one of the *correi* might have a defence unknown to the others; but *correi* are bound to look after one another; and this exception would apply as much to liquid as to illiquid obligations. Though the summons concludes against all, I do not think the pursuers were bound to call all. The parties called will receive an assignation on making payment.

Lord Moncreiff.—On the specialties of the case, there is no avoiding the interlocutor of the Lord Ordinary. It is said that the parties were all conjunctly and severally liable; but the pursuer knew that he must first obtain decree before he could state that they were so. There is the bill on which the diligence was done; but the expenses of execution were never constituted against any; and no decree either fixes the amount, or whether all are conjunctly and severally liable or not. From the cases in More's Notes, it appears that it does not follow that, though parties may be liable conjunctly and severally in an obligation, they are also so liable in expenses consequent upon it. It must appear, by decree or otherwise, that they are liable for the last; and here the summons is raised against the two Stewarts—against Zuill, and against Robert and James Stewart as individual partners. Thus it appears, upon the summons, that the debt is partly a company debt; and having so laid it in the summons, the pursuers execute it only against Zuill, and not against the Stewarts. In that situation, Zuill instantly objects that all parties are not called. The Stewarts are parties to the conclusion in the summons, by which the pursuers seek to find all conjunctly and severally liable, and thus to constitute the debt against all. It is said the Stewarts could not be found; but the messenger's execution ought to have shown this. Upon these specialties, I cannot but acquiesce in the interlocutor, and am not bound to go farther. When all are conjunctly and severally liable, a party may proceed against any one of them; but the debt must be liquid or constituted. In Douglas, 1814, Fac. Coll. (report not correct), it was the case of two companies—one in Glasgow and another in the West Indies; and it was said the partners were the same. A party brought an action against the partners resident in Glasgow. The defence was—constitute the debt against the company, and in the proper domicile of the company. Answered—the partners are the same. When it came into Court, the Lords said, there being no liquid debt, it is the debt of the company and of the whole partners, and when constituted, all shall be liable; but you cannot lay hold of one or more without first constituting;—get decree against all, and then charge any one. In the case also of a bill, it has been

held that the holder might charge any of the partners wherever found. Where the parties are mere ordinary *correi debendi*, alleged to be conjunctly and severally liable, it remains to be shown that they are so by regular decree. The magistrates of a burgh are liable for loss arising from the escape of a prisoner for debt; and an action having been brought against the baillie, the Court said—call all the magistrates in order to constitute the debt against them, and then each will be liable. In the present case, it is said the pursuers were not bound, as in the case of a company, to call all the obligants; but they were. They might charge upon the bill; and it may be also for the expenses of diligence; but that must be established. It might happen that one of the parties had paid the bill; and although the presumption is against payment where the document is held by others, the expenses incurred upon it are in a very different situation. On the specialties and the form of the summons, I agree with the interlocutor.

Lord Justice-Clerk.—I proceed upon the specialties, and not upon general principle; but if I were, I would rather concur with Lord Medwyn. I give no opinion whether, upon the merits, all are conjunctly and severally liable for the expenses of diligence; but it is clear they may or they may not. With this cause or ground of action, the summons subsumes that they are conjunctly and severally liable, and then concludes that they ought to be so found, and asks and obtains warrant to cite all these parties to hear and see the same, or allege reasonable cause to the contrary. This is the summons which the pursuers take out; and they are not warranted, without the execution of the messenger against all, to go on against one. With this execution they would have been entitled to ask decree in absence against the defenders, or against any one of them. But taking out such a summons, the pursuers were not entitled to go on without an execution against all. The summons is a writ of the greatest strictness, which the parties themselves cannot alter. That must be done by the Court, upon proof that the parties could not be found, and on consideration whether all are conjunctly and severally liable. The defence here is good, that all the parties interested were not called. This might have been cured; but it was not. On this special and limited ground alone, I am of opinion that the judgment of the Lord Ordinary is well founded in sustaining the third reason of suspension. I would only add, that I am not prepared at present to concur with the general views expressed by the Lord Ordinary in his note.

Lord Medwyn.—I am glad that the Court proposes to decide upon the specialties of this case. I do not dissent from the greater part of the observations of Lord Moncreiff. There is a distinction as to companies; and I would not have held that a citation against one of the Stewarts would have bound the company of Robert and James Stewart.

The Court adhered.

4th March 1842.

The chargers stated, that if we go back to the Inferior Court, and call all the parties set forth in the summons, we are still in this suspension, and entitled to caution *de futuro*. When the Court remits under a suspension, it is merely a continuation of the proceedings.

Lord Justice-Clerk.—The judgment settles and exhausts all that could be done in this suspension. It is not a remit to do any thing in the cause or on the merits; but the action is to begin *de novo*.

Lord Moncreiff.—If parties are called and don't appear, and if the Sheriff pronounce a judgment against Zuill, and he bring a second suspension, that would not be the same cause.

Lord Medwyn.—If parties are called, and wish to enter appearance, they would enter—not in the suspension, but in the original action.

Lord Meadowbank absent.

The Court, in consideration that the suspension was brought on a mere matter of form, and in consideration of the whole circumstances, modified the expenses to one-half.

Suspender's Authorities.—Bell v. Willison, 8th July 1822; H. of L., and Cases in Note of Lord Ordinary.

Chargers' Authorities.—Ersk. I. 7, 27; III. 1, 15, and III. 7, 4. Dict. 14,706. Bell's Ill. I. p. 74.

Lord Ordinary, Cuninghame.—For Suspenders, Maitland, Patton; Wotherspoon and Mack, W.S., Agents.—For Chargers, Dean of Faculty (Wood), R. Campbell; Bringlee and Douie, W.S., Agents.—[J.W.]

4th March 1842.

SECOND DIVISION.—(J. W.)

No. 148.—ROBERT GLASGOW, *Pursuer*, v. WILLIAM SCOTT MONCRIEFF (*Wishart's Trustee*), *Defender*.

Process.—Record, Opening up.—Production of Writs.—Circumstances in which, of consent, a record was allowed to be opened up and a document produced, on payment of the expenses incurred subsequently to the date of the Lord Ordinary's interlocutor.

This was an action on a bill, resisted principally on the plea of prescription. According to the statement made in the pursuer's minute of debate,—in 1827, Mr Patrick Wishart's affairs became so much embarrassed that he found it necessary to enter into some arrangement with his creditors, and on 7th April 1828 he executed a trust-deed in favour of the defender. This deed was prepared with reference to certain states of his affairs, in which the promissory-note is enumerated as a debt due by him to the pursuer; and in the trust-deed itself the pursuer is named as a creditor in the promissory-note, and for a small balance due on an open account. A relative deed of accession was at the same time prepared, and was signed by the acceding creditors, among others by Mr Alexander Robertson, the pursuer's commissioner and law-agent, in the name of the pursuer, who was at that time abroad.

In reference to this statement the defender replied,—If any thing had followed upon the trust-deed within the six years, of the nature of accession by the pursuer, and of acknowledgment of the pursuer's claim by the trustee and creditors, whereby a *supersedere* of action and diligence might have been held as agreed to, on the footing that the claim was sufficiently instructed, the case would have presented a totally different aspect, and would have admitted of a different line of argument. But here nothing whatever followed upon the trust-deed, either within or beyond the six years, on which the pursuer can pretend to found as acquiescence in, or acknowledgment of, his claim by the trustee and creditors, or as superseding the necessity on his part of duty and timeously constituting his debt. The pursuer did not accede to the trust-deed. He did not so much as make a claim on the estate within the six years, or for a long period thereafter.

The pursuer had not averred upon the record that he had acceded to the trust by signing the deed of accession, and he now craved a diligence against the defender to exhibit the deed, in order to meet his denial of that fact.

It was *objected*, that the summons and the record proceeded upon the assumption that there had been no accession, and that it was now too late to plead it, or to call upon the defender for exhibition of the deed of accession.

Replied—If it was thought, for the satisfaction of the Court, that a document should be produced, they

were entitled to order it *ex proprio motu*: Cuthill, 21st February 1823. In various cases the Court have allowed not only productions after the record was closed, but also the record itself to be amended: Smeaton v. Taylor, 4th February 1832. It is not in this instance averred in express words that the pursuer acceded; but it is a trust, and there is a party claiming under it. He signed the deed of accession, and that being in the keeping of the defender, it was natural enough that he should say nothing about it; but then at last the trustee denies accession, and the pursuer says it is bad faith in the defender to make such an averment, having the deed in his own possession. The production of the deed itself will only be the clearing up of what is implied and assumed in the record.

Answered—One thing is clear, if the deed is to be produced, the record must be opened up. No accession hitherto has been pleaded, and the defender was entitled to say that there was none, and to argue on that assumption. The fact is not *res noviter*: Wilson, 3d March 1827. Syme v. Charles, 11th February 1829, F. C. Thomson, 18th November 1836. Wright, 10th December 1836. Officers of State v. Humphreys, 9th July 1839.

Lord Justice-Clerk.—This is a very special case, and I should not like to consider it as a precedent. The denial on the part of the defender is very strong, and more than is called for by the pursuer's observation in the way of argument. I think a minute before answer ought to be allowed to the pursuer.

Lord Medwyn.—Neither of the cases referred to by the pursuer apply. My difficulty is solely upon the want of averment of accession on the record; and the party ought to have known of his accession.

Lord Moncreiff.—I agree with the Lord Justice-Clerk, and don't wish to go into the state of the record; but can this defender be heard to plead in the face of his own title?

Deas.—I have no objection to consent to open up the record on payment of the expenses subsequent to the Lord Ordinary's interlocutor; after that date the pleadings must be entirely altered.

Lord Meadowbank absent.

The Court accordingly, of consent, allowed the record to be opened up—granted diligence, and remitted to the Lord Ordinary.

Act. Solicitor-General (M'Neill), Robertson Glasgow; James C. Reddie, W.S., *Agent*.—*Alt. Deas*; W. Lorimer, S.S.C., *Agent*.—[J.W.]

5th March 1842.

FIRST DIVISION.—(H.B.)

No. 149.—THE EARL OF HOPETOUN, *Pursuer*, v. THOMAS HORNER and OTHERS, *Defenders*.

Process.—Mandate.—A foreigner, against whom judgment by default had been pronounced for having failed to find a mandatory, was reponed on making personal appearance. Having again failed to find a sufficient mandatory, he offered to find security to the amount of £50 for his presence at all diets of the Court.—Held that, in the circumstances, the amount was sufficient.

The defender in this action, being an Englishman, required a mandatory. At first he failed to find one, and decree having been pronounced against him by default, he presented a reclaiming note, and, by appearing personally in Court, succeeded in being reponed—(*vide ante*, Vol. XIII. p. 567.) He afterwards produced a mandatory, whom the Lord Ordinary, and afterwards the Court, found to be insufficient. He then offered to

come under an engagement to be personally present in Court on all occasions when his presence should be required. The Court, considering the circumstances, judged it necessary that he should give security to this effect. At first, the only security he offered was an obligation by his agent that he would be present, or, in case of absence, would allow decree to go out against him. The Court regarded this as a mere evasion, and ordered him to give in a minute stating the amount for which he was willing to give security for his personal attendance. He accordingly gave in the minute, offering security, as required, to the amount of £50. The pursuer objected to the amount as altogether insufficient, as the expenses of process already amounted to above a hundred pounds.

Lord President.—We have nothing to do with the expenses of process. All we require is security for his appearance at the diets of Court; and I am inclined to think the amount offered is sufficient.

Lord Gillies.—I think it is. In strict law his presence here is sufficient; and it is only on account of the peculiar circumstances that we have thought it necessary to demand security.

Lord Fullerton.—The only question undoubtedly is the amount of caution; but as the security now offered is something like a bond of presentation, which always has reference to the amount of the debt,—ought not the security to have some reference to the amount of the expenses?

Lord Mackenzie.—Our object in demanding security is to prevent the defender from playing fast and loose. And I think the penalty of £50 will check that. The amount is not large; but he will not find it easy to be going back and forward, paying £50 at every turn.

The Court remitted to the Lord Ordinary to repon the defender, on lodging a sufficient bond for the specific amount.

Lord Ordinary, Cockburn.—*Act.* H. Robertson; James Hope, W.S., *Agent.*—*Alt.* Pyper; G. Monro, S.S.C.; *Agent.*—[H. B.]

8th March 1842.

FIRST DIVISION.—(H. B.)

No. 150.—DONALD LINDSAY (*Marquis of Huntly's Trustee*), Pursuer, v. EARL OF ABOYNE, Defender.

Entail—Fetters—Contraction of Debt.—*A prohibition to "burden or affect" the estate, "in whole or in part, with debts or sums of money," &c., held sufficient to prohibit the contraction of debt.*

Entail—Registration.—*A supplementary deed of entail referring in general terms to the fetters of the original deed, but not mentioning them specifically, held not to be duly recorded, in terms of the Statute, in the Register of Tailzies.*

The estates of the Marquis of Huntly having been sequestrated under the Bankrupt Act, Donald Lindsay, the trustee, brought the present action of declarator, concluding to have it found that the estates were open to the diligence of the creditors, inasmuch as the principal and supplementary deeds of entail, under which the Marquis held them, were defective,—the former not containing a specific prohibition against the contraction of debt, and the latter, from not containing a general reference to the fetters of the original deed, not being duly recorded in terms of the Statute 1685.

The fettering clauses of the principal deed of entail are as follows:

"With and under this condition always, as it is hereby expressly provided, that the said George Lord Strathaven, my son (the institute in the deed), and the heirs-male of his body,

and whole other heirs-male called to the succession of my said lands and estate, and having a right to the title of Earl of Aboyne, shall be obliged constantly to use, bear, and retain, in all time after their succession, the surname of Gordon," &c.

"As also, with and under these conditions, that the said George Lord Strathaven, my son, and the whole other heirs of tailzie succeeding to the lands and estate before disposed, shall be obliged to possess and enjoy the same by virtue of these presents, nomination, or other writ to be granted by me, and the infeftments, rights, and conveyances to follow hereupon, and by no other right or title whatever: As also to cause engross, and verbatim insert, the whole foresaid course and order of succession, and any farther or other order of succession to be appointed by me, and the several conditions, provisions, limitations, restrictions, clauses irritant and resolute, declarations and exceptions contained herein, or to be contained in any other writ hereafter to be granted by me relative hereto, and that in the instruments of resignation, charters and infeftments to follow hereupon, and in all the subsequent procuratories and instruments of resignation, charters, special retoured services, instruments of seisin, and other transmissions and investitures of the said lands and estate: And also to purge and redeem, and procure renounced and discharged, in manner after mentioned, all adjudications, appraisings, and other legal diligence and execution whatever, which may happen to be obtained of, or against the said lands and estate, or any part thereof, for payment or performance of any debt or deed payable or prestable by me or my ancestors, or of any real, legal, or public burdens, or other claim or demand whatever, to which the said lands and estate, or any part thereof, are now, or may hereafter happen by law to be subjected or made liable; and with and under the restrictions and limitations after written, as it is hereby expressly conditioned and provided, that the wives and husbands of the several heirs succeeding to the said lands and estate hereby resigned, are, and shall be debarred and excluded from all right of terce or courtesy to or upon the same, or any part thereof, any law or custom to the contrary notwithstanding; and that it shall not be lawful to, nor in the power of the said George Lord Strathaven, my son, nor of any of the said heirs, to alter this present tailzie, or the nomination, or other deed to be granted by me, or order of succession now prescribed or to be prescribed thereby, or do or grant any act or deed which may import or infer any innovation or change thereof, directly or indirectly; but with this exception always, that in case any apparent or presumptive heirs, who might succeed to the said lands and estate, shall be forfeited or attainted of treason, or misprison of treason, or be under any other legal incapacity, which may exclude or disable them from taking, holding, or enjoying the said lands and estate, then, and in that case, it shall be in the power of any of the heirs who has succeeded to the said lands and estate, and shall be in the fee thereof for the time, so oft as such case shall happen, in all time coming, by a deed under his or her hand, to renew this my entail in favour of him or herself, and the other heirs called after them to the succession, according to the order before written, and nomination to be granted by me, who shall be capable to succeed, leaving out, or passing by such apparent or presumptive heir, so rendered incapable of taking and holding the said lands and estate in the same manner as if such heirs were naturally dead, and to settle the said estate and succession thereupon upon themselves and the other substitutes who are under no legal incapacity, but with and under the whole conditions, restrictions, exceptions, and irritancies herein contained: And with and under this restriction and limitation also, as it is hereby expressly conditioned and provided, that it shall not be in the power of the said George Lord Strathaven, my son, nor of any of the other heirs succeeding to the said lands and estate hereby resigned, to sell, alienate, wadset, impignorate, or dispose the same or any part thereof, either irredeemably or under reversion, or to burden or affect the same, in whole or in part, with debts or sums of money, infeftments of annualrent, or any other servitude or burden whatever; but excepting and reserving always full power and liberty to the said George Lord Strathaven," &c., to grant provisions in favour of wives, husbands, and children, of certain limited amounts, to be secured over the estate, but that only in the manner specified in the deed. "And with and under this restriction and limitation also,

that the said George Lord Strathaven, my son, and all the other heirs succeeding to the said lands and estate, are and shall be hereby limited and restrained from doing any act, and granting any deed, directly or indirectly, whereby the lands and estate before disposed, or any part thereof, may be affected, appraised, adjudged, forfeited, confiscated, or be any manner of way evicted from the said George Lord Strathaven, or any other of the said heirs, or this tallie, or nomination, or other writ to be granted by me, or the order of succession there or hereby established, be prejudged, hurr, or changed, excepting as in the cases before excepted: And with and under this restriction and limitation, that it shall not be in the power of any of the heirs succeeding to the lands and estate before disposed, to set tacks or rentals of the same, or any part thereof, for any longer space than ten nineteen years, or for nineteen years and the lifetime thereafter of the tenant in possession at the expiry of the said nineteen years, or to set any tack or rental with a diminution of the former rent, except the same be set without collusion, and by way of public roup to the highest bidder thereat, by reason that a tenant cannot be found at the time who will give the former rent; and providing always, that it shall not be in the power of any of the said heirs to set any tack or rental of the Manor Place or Castle of Aboyne, or office-houses, gardens, plantations, and three hundred acres of enclosed grounds contiguous to the said Castle." (And after certain provisions as to exchanging): "And with and under this restriction and limitation also, as it is hereby expressly conditioned and provided, that the lands and estate before disposed, shall not be affected or burdened with, or be subjected or liable to be adjudged, appraised, or any other way evicted, either in whole or in part, for, or by the deeds or debts, legal or voluntary, contracted or granted by the said George Lord Strathaven, or any of the heirs succeeding thereto, whether before or after their succession to, or attaining possession of, the said lands and estate, or with, for, or by the omissions, acts or deeds committed or done by them, or any of them, prior or posterior to their succession."

These prohibitory clauses are immediately followed up by the following irritant and resolute clauses:

"And with and under these irritancies following, as it is hereby expressly conditioned and provided, that in case any adjudication, appraising, or other legal diligence and execution, shall happen to be obtained of or used against the fee or property of the lands and estate before disposed, or any part thereof, for not payment or performance of any debt or deed payable or prestable by me, or my ancestors whom I represent, or of any real, legal, or public burden, or other claim or demand to which the said lands and estate, or any part thereof, are now or may hereafter happen by law to be subjected or made liable, then and in that case, the said George Lord Strathaven, or any other heir in possession of the said lands and estate for the time, shall be bound and obliged to redeem, or otherwise purge such adjudications, appraisings, or other legal diligence, within three years, if he be within Scotland, and if he shall be forth thereof, within four years at most after the same shall happen to be led and deduced, and final decreet therein pronounced;—and in case of his or her failure to redeem and purge the same accordingly, then he or she, though dying or becoming legally disabled to hold and enjoy the said lands and estate within the space of three or four years, shall forfeit and lose his or her right and title to the lands and estate hereby disposed, and the same, and right of redemption thereof, shall fall and devolve to the next heir capable to take and hold the same," &c. (Here follow the various provisions as to the effect of contravention by not purging adjudications.) "And provided also, that the heirs so redeeming, and all the heirs succeeding to them, shall be liable to the same conditions, restrictions, and irritancies to which the heirs contravening or failing were liable: And with and under this irritancy, as it is hereby conditioned and provided, that in case the said George Lord Strathaven, my son, or any of the other heirs succeeding to the lands and estate before disposed, shall contravene the before-written conditions, provisions, restrictions, and limitations herein contained, or any of them; that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other restrictions and limitations, or any of

them, or shall contravene any other conditions and restrictions to be hereafter added and appointed by me, excepting as is before excepted, that then and in any of these cases, the person or persons so contravening shall, for him or herself only, *ipso facto* amitt, lose, and forfeit all right, title, and interest which he or she hath to the lands and estate before disposed; and as such right shall become void and extinct, so the said lands and estate shall devolve and accresce and belong to the next heir appointed to succeed, albeit descended of the contraveener's own body, in the same manner as if the contraveener were naturally dead, and had died before the contravention: And upon every contravention which may happen by and through the said George Lord Strathaven, my son, or any of the other heirs succeeding to the said lands and estate their failing to perform all and each of the conditions, or acting contrary to all or any of the restrictions before written, it is hereby expressly provided and declared, not only that the lands and estate before disposed shall not be burdened with or liable to the debts, deeds, or acts of the said George Lord Strathaven, or any other of the heirs contravening, as is already herein provided; but also all debts contracted, deeds granted, and facts done contrary to the conditions and restrictions appointed by me, or to the true intent and meaning hereof, shall be of no force, strength, nor effect, and be ineffectual and unavailable against the other heirs called to succeed, and who, as well as the said lands and estate, shall nowise be burdened therewith, but free therefrom, in the same manner as if such debts or deeds had never been contracted or granted, or such acts or omissions had never been done or happened."

The Lord Ordinary reported the cause on cases, with the following note:

"The Lord Ordinary reports this case without a judgment, that it may be decided with the least possible delay. There are points of nicety in it: But, on the whole, he is inclined to sustain the defences."

"Upon the leading question, as to the sufficiency of the prohibition against *debts*, he sees no reason for departing from the authority of the cases of Gala, in 1722, Sheuchan in 1820, and Newhall and Cappedrae, both in 1823; and he cannot consider these cases as at all discredited by the later judgment in the case of Carleton, in 1830; both because there is no mention whatever of *debts* in the leading clauses of that entail, but a prohibition merely against 'burdening with *infeftments of annualrent, or any other servitude or burden*,'—and because there was, in fact, no decision, or room indeed for deciding, whether even these words might not amount to an effectual prohibition of debts; inasmuch as the case was disposed of on the ground that there had in reality been no debt contracted; and that it was consequently unnecessary to determine what would have been the effect if there had. In any question upon the construction of so succinct and imperfectly expressed a Statute as that of 1685, it would be most hazardous to disturb or depart from such a series of decisions; but if the question were open, the Lord Ordinary conceives that effect would now be given to the views on which these judgments proceeded. The very basis of the pursuer's argument appears to him to be unsound. He necessarily assumes that it was really intended by the Statute to prohibit the contraction of *personal debt*; that in strictness of law, every heir who signs a bill or personal bond, or who owes an account to his tailor, has truly incurred an irritancy; and that there is nothing but the *want of interest* in the succeeding heirs that prevents it from being enforced. Now, the succeeding heirs have as little interest in one-half of the irritancies which occur in some entails, as in this of contracting personal debt. But take the most usual and common provisions of irritancy, as by not taking the name and arms, or forfeiting on succeeding to a peerage, or to another estate: What possible interest have the succeeding heirs in the enforcement of these, or of more capricious conditions, which do not in the least affect the integrity or value of the estate, or in any way shake the security of its descent through the whole course of the destination? Yet all these are enforced daily; and are indeed among the most common cases of actual forfeiture. The decisions, therefore, which have settled that no irritancy is incurred by the mere contraction of personal debt, *could not have*

proceeded on the ground of want of interest to enforce it: there being always the solid and sufficient interest to bring the succession nearer to the substitutes who might challenge. And it is plain, indeed, both from the reason of the thing and the reports, that they did proceed upon the more fundamental ground, that it was not the true meaning of the Statute to prohibit such contractions, but only their being allowed to affect or become burdens on the estate. They are truly decisions, therefore, not on the import of clauses in the deeds under consideration, but on the construction of the Act: and to the Lord Ordinary they appear most sound decisions. The Act itself does not, even in terms, prohibit the contraction of debt generally or absolutely; but only the contraction of debt 'whereby the lands may be adjudged, apprised, or evicted—may, obviously meaning *shall actually be*, (or rather be attempted to be) so adjudged or affected; since, on any other view, these most important words would have no meaning or effect whatever; all lawful debts being capable of being made the means of attaching the property. The very best and most accurate formula therefore, for following out this provision of the Statute, would seem to be that adopted (and found sufficient) in the case of M'Kenzie (Newhall), of a prohibition 'to contract debts on the property,' which, in the succeeding case of Cappledrae, was justly thought to be synonymous with 'burdening the property with debts.'

"It is to be observed too, that if these be substantially decisions on the true import and meaning of the Statute, the principle of *strict construction* (so much pressed by the pursuer), is quite as applicable to a Statute limiting the rights of property, as to any private instrument executed under its authority, and is wholly against the interpretation for which he now contends, —it being plainly a far greater infringement of common law rights, and far more penal and odious in itself, to subject a proprietor to forfeiture merely for contracting *personal* debts, than to reserve that penalty for making them burdens on a privileged or protected property.

"These views are probably sufficient for the decision of the present question. But the Lord Ordinary has a strong impression that the reasoning of the pursuer rests on a still more fundamental fallacy. What he chiefly relies on, is an alleged defect in the *prohibitory* clause; and, pretty nearly admitting that the irritant and resolute clauses are sufficient, he puts the case distinctly (bottom of page 26,) on the proposition that a prohibitory clause is essential; and that no form of expression in the other operative clauses can supply its want or imperfection. Now, the Lord Ordinary demurs to the whole of this doctrine. The Statute requires no prohibitory clause, and makes no mention of any such clause; and accordingly the Lord Ordinary cannot now bring to his recollection that he has ever seen an entail in which words of proper *prohibition* or interdiction occur. The most common form of the introductory enumeration of the things to be irritated is, that 'it shall not be lawful' to the institute and heirs to do so and so; or, *as happens to be the case in the present instance*, that 'it shall not be in the power' of the said parties (see printed deed, p. 9, C) to do so and so. But these, it is thought, are in substance *not prohibitory*, but general and preparatory *irritant* clauses. That 'it shall not be lawful' to do certain acts, means only that these acts *shall not be effectual in law*; and that the heirs 'shall not have power' to do them, can import nothing else (since the physical or *actual* power undoubtedly remains), but that they shall not do them *with effect*; or, in other words, that they shall be null, in respect of the declaration of irritancy, to which this statement is but introductory. The Lord Ordinary's notion, in short, is, that the clauses called prohibitory are truly in all cases but preambles to the only really operative clauses, the irritant and resolute; and preambles, too, which might be very safely omitted. For he is of opinion farther, that there is no need, either under the Statute, or in the nature of the thing, for any such introductory specification; and that a perfectly valid entail might be made by proper irritant and resolute clauses alone, without any thing in the nature of that previous enumeration, which the pursuer calls prohibitory, and maintains to be essential. If the maker of such a deed, for example, immediately after disposing the lands to a certain series of persons, under the conditions, provisions, and limitations after written, were

merely to proceed in some such words as these: 'That is to say, that if any of the said persons shall sell, alienate, or dispossess the said lands, or shall burden, or allow them to be burdened with debt, or shall alter the order of succession, &c., then, not only shall all such acts and deeds be null and of no effect against the said lands, but every person so acting shall forfeit all right thereto,' &c.; would not *this* be altogether as good and effectual a deed, as if these irritant and resolute clauses had been introduced by a declaration that it should not be lawful to (or in the power of) the said persons to sell, burden with debt, or alter the order of succession? Now, even assuming that the introductory provision in the present case, that it shall not be in the power of the institute or heirs to burden the lands with debt, would not be sufficient to protect them from adjudication at the instance of creditors, the Lord Ordinary thinks there is enough in the irritant clauses which ensue to effect this purpose.

"First of all, however, there is (at p. 12, E, of the print) a distinct obligation laid on the heirs to purge, within three years of their date, *any adjudications* which may be deduced, not merely for debts or obligations of the entailor himself, or his ancestors (though these are first mentioned), but 'for any legal or public burden, or any claim or demand to which the said lands, or any part thereof, may hereafter happen to be subjected or made liable.' Now, if this is to be read as supplementary to, or exegetic of, the previous provision that there should be no power to burden with debt, it would seem to leave no doubt as to the fact that burdening, and *allowing to be burdened*, were expressly placed and brought under the same category by the entailor.

"But at all events, there is (at p. 12, D) a distinct and independent clause, providing 'that the lands above disposed shall not be affected or burdened with, or be liable to be adjudged, apprised, or evicted (in whole or in part) for or by the debts or deeds, whether legal or voluntary, of the said George (the institute), or any of the heirs succeeding, or by any omissions or acts committed or done by them, either prior or posterior to their succession.' Now, the Lord Ordinary considers this as a proper and *specific, or special irritant clause*, importing in direct terms, that all such debts and deeds shall be null, and of no effect in regard to the said property. And, as it bears no reference to any previous prohibition, or declaration of want of power, he does not see why it should not be admitted to its full effect, exactly as if there had been in the deed no such previous declaration; and then, the only question as to the complete validity of the provision must depend upon its being sufficiently covered by the terms of the *resolute* clause. That clause, however, which immediately follows the two which have been last referred to, is of the most general and comprehensive description; and purports (p. 13, E) 'That if any of the persons so called to the succession shall contravene any of the said provisions or limitations, or shall fail or neglect to obey or perform the whole said conditions and provisions, or any of them,' they shall amit, lose, and forfeit all right to the lands, &c. Now, as it cannot be disputed that both the injunction to purge all adjudications, and the provision that no debts or deeds of the heirs should be allowed to affect or burden the lands, are among 'the provisions, conditions, and limitations' of the deed, it seems necessarily to follow, that any heir who should allow the lands to be affected or adjudged for his debts or deeds, must be held to have 'failed or neglected to perform the whole of the said conditions and provisions;' and consequently to have incurred the full penalties of the resolute clause.

"The whole is wound up by an anxious and comprehensive iteration of the irritant clause; declaring, 'not only that the lands shall not be burdened or affected by the debts or deeds of the said George (the institute), or the heirs succeeding, as is already provided, but that all debts contracted, deeds granted, and facts done, contrary (not to any previous prohibitions but generally) to the conditions or provisions appointed by me, or the true meaning thereof, shall be of no force, strength, or effect, and ineffectual and unavailable against the other heirs and the estate, which shall nowise be burdened therewith, but free therefrom, as if such debts or deeds had never been contracted or granted, or any such acts or omissions had never been done or happened.' The cavil of the pursuer as to the want of the

words 'null and void,' in this most elaborate irritant clause, seems entitled to no consideration; any more than that as to the introduction of the word 'other' in the preamble to the resolutive clause, which manifestly refers, and can only refer to the immediately preceding provision about purging adjudications, and cannot possibly refer merely to future contemplated provisions; inasmuch as the leading words are—'the said other provisions and restrictions, or any of them;' after which it is added, as a separate and alternative provision, 'or any other conditions and restrictions to be hereafter added and appointed by me.'

"The defender's answer to the seventh and eighth pleas of the pursuer is also satisfactory to the Lord Ordinary. He is inclined to hold, however, that the limitation of the power of *leasing* is not so expressed as to affect the institute; but the plea upon this point seems not to be within the libel, and indeed, to be inconsistent with the only conclusion in the summons with regard to it.

"With regard to the supplementary entail of Drumischie, the Lord Ordinary is satisfied, on the whole, with the authorities and explanations of the actual state of the titles furnished or referred to by the defender. He thinks it material, however, to observe, that the only decision which is reported in the case of Broomfield (or Paterson of Eccles), mainly relied on by the pursuer, as of June 1784, was not, in fact, the ultimate decision in that cause, having been recalled by the House of Lords, when the case, in consequence of an appeal against that decision, was remitted for the consideration of this Court; upon which remit appearance was, for the first time, made for the heirs who had been omitted in the second entail, and the ultimate judgment of the Court against its validity was then (March 1786,) specially rested on the ground of that omission; the ultimate finding being, 'that in respect of the alterations in the last deed, and in particular, that certain heirs called in the entail of 1743 are omitted in the disposition of 1758, the said disposition is to be held as a new settlement of the estate, and not being insert in the Register of Tailzies, is not effectual against creditors.' The present Lord Ordinary had occasion to consider the particulars of that case in deciding that of Turnbull and Hay Newton, in June 1836; and his account of it will be found in a note to p. 1033, &c. of the 14th volume of Mr Shaw's Reports. Not having again looked back to the appeal cases, he cannot say positively whether the separate finding in the first judgment of June 1784, on which the pursuer relies (as to the limitations of the one deed being only referred to in the other), was repeated in the ultimate judgment of 1786, which was affirmed *simpliciter* upon a second appeal. But his impression is that it was not. The parties, however, can easily satisfy themselves as to this (if thought material), before the case comes on for judgment."

The Court ordered the cause to be submitted to the other Judges for consultation.

The following opinions were returned:

Lord Moncreiff, concurred in by *Lords Meadowbank, Medwyn, Cockburn, Cuninghame, Murray and Ivory*:

"I. The first question raised in this case by the record and the revised cases is, whether there is a sufficient prohibition in the original entail of 1782 against the contraction of debt?

"I do not entertain the least doubt that a direct prohibition to this effect is indispensable to the validity of every entail, in so far as debts may be contracted to third parties, by which the estate may be affected. Every one understands what is meant by the prohibitory clause. It is the clause which in direct terms prohibits, or declares it not to be lawful for, the heirs to alter the order of succession, to sell or alienate the estate, or to contract debts. It is so described by Mr Erskine, B.III. t. 8, § 23; and I have always understood it to be settled law (as it has been expressed in emphatic words), that the prohibitory clause is the key-stone of the entail. All the cases of Argaty, Roxburgh, Lochbuy, Eastfield, &c., entirely depended on this assumption, and on the question, whether there was or was not a substantive prohibition against altering the order of succession in that which all the lawyers held to be the prohibitory clause; and the same has been the basis of innumerable questions on the sufficiency

of the words to constitute *prohibitions* against sales, against leases, against contracting debts, &c. I could not, therefore, assent to some of the propositions in the Lord Ordinary's note in the present cause, if I rightly understand them. I could not hold, either that the usual clause which has been so denominated is not a prohibitory clause, or that, without such a clause applying to the three distinct classes of deeds, any entail would be effectual to its purpose. More particularly, I could not think that a deed containing merely irritant and resolutive clauses could be effectual as an entail under the Act 1685, if there was no prohibitory clause to which the forfeitures and irritancies declared could be applied. The example of such a thing suggested hypothetically would not, in my humble apprehension, constitute a valid entail.

"In expressing my opinion, therefore, in the present case, I assume the necessity of a prohibitory clause applying specifically to the case of debts contracted. But when this is granted, I am of opinion that there is a sufficient prohibition against debts in the entail now before the Court.

"If this question had occurred for the first time, I might have thought it to be attended with great doubt. But as the matter stands, I think that the point is ruled by decisions to which I see no answer; and being of opinion that there has been no change of the law since those decisions were pronounced, I cannot discover any ground on which the Court can now depart from them. The material words in this entail are, that it shall not be in the power of the heirs to sell, alienate, &c., 'or to burden or affect the same in whole or in part with debts or sums of money, infestments of annualrent, or any other servitude or burden whatever.' Now, in the case of Haggart v. Vans Agnew, December 19, 1820, the words were, 'or to burden the same in whole or in part with debts, sums of money, infestments of annualrent, or any other security or burden whatever.' It is evident that the words in the two cases are the very same. But in the case of Agnew, the Court were clearly and unanimously of opinion 'that the clause in question was quite effectual to free the estate from the claims of Robert Vans Agnew's creditors.' It does not appear that any appeal was taken against that judgment; and it is impossible to deny that it is directly in point to the present question.

"The case of Mackenzie, May 23, 1823, was not exactly the same,—the words being, 'or to contract debts thereon, or grant infestments of annualrent,' &c. But it was held to stand on the same principle; and the Court adhered to the Lord Ordinary's interlocutor, which found that 'the deed of entail libelled is sufficient to protect the estate against being affected, burdened or adjudged by the debts in question.' But the subsequent case of Nisbett against Sir David Moncreiff, &c., June 10, 1823, is again identical with the present case, the words of prohibition being, 'not to burden the same, in whole or in part, with debts or sums of money,' &c., whereby the lands might be affected or adjudged,—which the Court found to be sufficient to prevent the estate from being attached for a personal debt.

"The ground of doubt in these cases was, that as there was not a direct prohibition against contracting debts simply, as the Act 1685 might be thought to point out, but only a prohibition to burden the estate with debt, it might be held that the clause was not direct or explicit against the contraction of personal debts on which adjudication might follow. But the answer was thought satisfactory, that the object being only to protect the estate and the heirs of tailzie against being burdened with the debts of any heir, the words were sufficient for that purpose. The argument of the pursuer in the present case, however ably conducted, is the very same which was employed unsuccessfully in those cases. And the point having been thus deliberately discussed and determined in two if not in three cases, I think it impossible for the Court now to depart from the law so laid down.

"The pursuer refers to the interlocutor of the Lord Ordinary in the case of Cathcart, February 12, 1830. This is in reality no judgment; because, although the Court adhered to the interlocutor in the material part of it, they expressly recalled the findings on which the pursuer founds, and refused to pronounce any judgment on the question whether there was a sufficient prohibition against debts or not. But, in reality, the words of the clause in that case were essentially different from those

which occur in the present entail, or which occurred in those of Sheuchan, Newhall, or Moncrieff. For there was nothing there but general words added to the prohibition against alienation, 'nor yet to wadset or burden with *infestment of annual-rent, nor any other servitude or burden.*' These words are quite general. They occur in almost every entail, quite distinct from the prohibition to contract debt. They are in the present entail; and similar words were in the entail of Sheuchan. But the question here does not depend on any such vague words. The terms relied upon as a prohibition, as they were relied upon in Sheuchan and Moncrieff, are—'or to *burden or affect the same in whole or in part with debts or sums of money.*' This is a very different clause from the more general terms which occurred in the entail of Carleton. And after all, there was no judgment on the effect of it. Whatever I may have thought on that point, I hold the case now before the Court to be essentially different, and to be ruled by the positive decisions in the other cases.

"II. The second question is, Whether, assuming that there is a sufficient prohibition against debts, the resolute clause is so expressed as to be effectual to protect the estate against creditors? I am of opinion that it is sufficient.

"The pursuer's argument against the efficacy of the resolute clause really comes to a very narrow point. The maker of the entail has in some degree perplexed his deed by the anxious introduction of injunctions on the heir to purge the estate of all adjudications which might be led for entailor's debts, or for legal burdens affecting the lands, and a very special and minute resolute clause directed against any failure in that point. It is after that long and particular clause that the general resolute and irritant clauses, in plain terms directed to the fortification of the general prohibitory clause, are introduced. That this is the nature of them is manifest from the introductory words: 'And with and under this irritancy, as it is hereby conditioned and provided, that in case the said George Lord Strathaven, my son, or any of the other heirs succeeding to the lands and estate before disposed, shall *contravene the before-written conditions, provisions, restrictions and limitations HEREIN CONTAINED, or any of them.*' It seems to be granted by the pursuer, and is too clear for argument, that these words are sufficient to cover the whole prohibitions, and that if the clause had gone on directly to the operative part of it without further explanation, there could have been no doubt of its sufficiency. But he maintains that the words which follow are to be taken as explanatory, and that they limit the forfeiture declared in some way which cannot be defined, and really is not easily understood. If, indeed, the clause had gone on to a special enumeration of particulars, and in that enumeration had omitted any of the essential cases, such as sales or the contraction of debts, there would be very good ground for maintaining, that the general words were to be taken as qualified by the special definition, and that the clause could not apply to the omitted case. But in this entail there is no such thing. The object of the explanatory words is merely to distinguish between acts of *omission or disobedience of things enjoined, and positive acts in violation of direct prohibitions*; and it is only by laying hold of a single word, the meaning and effect of which are perfectly clear, that any appearance of difficulty can be raised. The words are—'That is, shall *fail or neglect to obey or perform the SAID other conditions and provisions, and each of them, or shall act contrary to the said other restrictions and limitations, or any of them.*' Some words are added which seem to me to be immaterial—'or shall contravene any other conditions or restrictions to be hereafter added and appointed by me.' Whatever may be the effect of these last words, they can have no influence to hurt the efficacy of the preceding words: And, laying them aside, the clause goes on—'That then *and in any of these cases,*' the person contravening shall forfeit all right to the estate in the most ample terms. Now there is really nothing to be said against this clause as importing any limitation of the general words in the beginning of the sentence, but that the word *other* has been introduced into it. But it is very evident to me, that that word, though unnecessary, rather tends to give precision and definite application to the clause, as relating to the various limitations expressed in the general prohibitory clause. The object and the effect of the word are, to disconnect the clause from the special matters

to which the immediately preceding particular resolute clause relates. It tends to prevent that very ambiguity which has occurred in other cases, by which a clause of this nature has been held or maintained to be restricted to the sort of acts or deeds against which the immediately preceding clauses were directed. But if any doubt could exist about this matter, it would be removed by the words immediately following, which are introductory to the irritant clause; that upon any *contravention* 'by and through the said George Lord Strathaven, &c., or any of the heirs *their FAILING TO PERFORM all and each of the conditions, or ACTING CONTRARY to all or any of the restrictions BEFORE WRITTEN.*' These are plain words; and they define precisely what the contravention is which is expressed in the preceding resolute or forfeiting clause.

"I cannot, therefore, see any reasonable ground for doubt that the resolute clause is sufficient.

"III. A separate objection is taken to the irritant clause, viz., that it does not bear, in so many words, that the acts or deeds done in contravention shall be *null and void.*

"There is no doubt that these words constitute the most common form, and certainly the best style of an irritant clause. They are used in the Statute, perhaps descriptively. But as it is quite settled that the Statute does not prescribe any precise form of any of the clauses, the question must always be, whether the terms actually employed in any particular entail are sufficient to express clearly the thing contemplated in such a clause. Now, the provision here is, that on every contravention, as above quoted, not only the estate 'shall not be burdened, or liable to the debts, deeds or acts of the said George,' &c., 'but also all *debts contracted, deeds granted and facts done, contrary to the conditions and restrictions appointed by me, or to the true intent and meaning hereof,* shall be of no force, strength nor effect,' &c. The clause goes on with other words amplifying the provision—'and be ineffectual and unavailable against the other heirs,' &c., who 'as well as the estate shall be free therefrom, in the same manner as if such debts or deeds had never been contracted or granted, or such acts or omissions had never been done or happened.'

"Thinking that there is nothing in the connection of this clause which can at all limit its operation to any thing less than the infringement of any of the general limitations of the entail, and that the words are sufficient to cover any such contravention, I am of opinion that the words 'shall be of no force, strength nor effect,' must be considered as equivalent to the declaration of nullity contemplated by the Statute and in the principle of such a clause. It is certainly true, that in very many entails the same words occur in connection with the words 'shall be null and void.' But as it is in the nature of such deeds that many terms having the same legal effect may be employed, the question still is, what is the legal import of the words actually employed? and as the meaning of such a declaration of nullity can never be to make an absolute nullity of onerous transactions, but only to render the deeds of *no legal force or effect in regard to the estate entailed*, I think that the terms here employed must be held sufficient.

"I do not find in any reported case, except the late case of *Sharpe*, that the words of the entail in this part of the irritant clause were exactly the same as they are here, though I have an impression that a similar clause had been found to be sufficient. In the case of *Sharpe* (3d July 1832), the same words, 'shall be of no force, strength nor effect,' &c., occurred. But there was a defect in the grammar of the clause,—the nominative, which should have applied to the words 'shall be,' having been altogether omitted. That created the only doubt in this Court; and a very serious ground of doubt it certainly was. It does not appear to have been thought at all doubtful that the words otherwise were sufficient. Another difficulty, certainly, occurred in the House of Lords, arising from the connection of the previous words in that case, and from the mixture of debts, deeds, crimes and acts. The judgment of the Court was reversed—not, as I understand the decision, upon any idea that the words 'shall be of no force, strength nor effect,' would not have been sufficient, if the clause had been otherwise perfect, but on the principle, that in a question of strict entail, it is inadmissible to supply any words, and that the most favourable construction must be given of which the words in connection

with which they stand will admit. But indeed it was afterwards explained, that the judgment in that case was incorrectly drawn up, and that there was no intention to do more than to find that there was no irritant clause in that entail *valeat quantum*: Maclean and Robinson, Vol. I. p. 908.

"On the whole, therefore, though the question is not quite so clear as the points already considered appear to me to be, I think that the irritant clause also, in the present case, is sufficient.

"IV. There is a fourth question of a different nature. That question is, Whether certain special lands, called *Drumnachie*, have been effectually brought under the fetters of the entail?

"This part of the case appears to me to be attended with very considerable difficulty. From the nature of the titles, and the manner in which these lands were dealt with by the entailor himself, I think it impossible to hold that they were validly entailed as *part and pertinent* of the other lands by the mere force of the original entail. The question, therefore, is, whether the supplementary entail, by which these lands were disposed to the heirs called by the former deed *under all the provisions and restrictions of that entail* in general terms, without the limiting and irritant clauses being engrossed in the deed itself, was sufficient to constitute a binding entail *by reference*, in a question with third parties, creditors of the heir in possession.

"It appears that that supplementary deed was recorded in the Register of Tailzies; in which the original entail had also been recorded. But, from the nature of the supplementary deed, the entailing clauses did not appear in it. It is stated, however, that a Crown-charter was obtained containing the whole lands, both those in the original entail, and the lands of *Drumnachie* as disposed by the supplementary deed—which charter contained *ad longum* the whole clauses, prohibitory, irritant and resolute,—applied, as I understand, to all the lands in the charter; and that on the precept in that charter seisin followed,—all the clauses being again repeated in the instrument.

"In this state of the titles, the question seems to me to be, whether it can be held that there is an effectual entail of the lands of *Drumnachie* duly recorded, in terms of the Statute, in the Register of Tailzies; and whether that other provision of the Statute has been complied with, which requires that the clauses irritant and resolute shall be inserted in the *procuratories of resignation*, charters, *precepts* and instruments of seisin? The clauses are not inserted in the procuratory of resignation in the supplementary deed, and they do not, of course, appear in that deed as registered in the Register of Tailzies. It is perfectly true, as the defender argues, that where there is, in one and the same deed, a full recitation of the entailing clauses in the *dispositive* clause or in the *procuratory of resignation*, it has been held, and may be considered as settled law, that it is sufficient if, in the *precept of seisin*, the clauses be referred to in general terms as so before recited. This has been held ever since the case of *Murray Kinninmond*, 5th July 1744, as reported by *Kilkerran*—and also by *Monboddie*, Br. Suppl. V. 739. And therefore it would be no objection to the validity of this entail, that in the charter which followed upon it, the clauses were not *verbatim* recited in the *precept of seisin of that charter*. But this rule of construction in the application of the Statute is distinctly rested on the ground, that where the whole clauses are *within the deed* in which the *precept* referring to them is contained, the whole deed ought to be considered as the precept or warrant for the seisin to follow.

"There is no doubt that it has been found in various cases, that an entail may be effectually made by reference from one deed to another. It was so found in the case of *Don*, 5th February 1713 (M. 15,591), and in the late case of *Hope Vere*, 5th March 1833. But, in both these cases, the question undoubtedly was *inter hæredes* only; so that the proper operation of the Statute, as against creditors, was not brought into discussion. For though, in the last of them, the pursuer concluded in general terms that he was entitled to hold the lands without being subject to any conditions or limitations, there was a qualification even of that conclusion, 'at least subject to no valid prohibition against altering the order of succession;' and the case

was tried simply as a question *inter hæredes*. No sale had been attempted; and it is a mistake to say, as the pursuer does, that if there be an effectual entail *inter hæredes*, the Court will try a question concerning the possibility of a valid sale being made, where no sale has been attempted: They have repeatedly refused to do so.

"The case of *Lawrie v. Spalding*, 24th July 1784, (M. 15,612), is, however, materially different. For, as I read that case, it certainly did come to be a question between an heir-substitute of entail and a purchaser; and one general plea maintained for the purchaser was distinctly, that the entail of the lands of *Erries*, by mere reference from one deed to another, could not be effectual against creditors and purchasers, as not being duly recorded in terms of the Act 1685. The case was perplexed in its circumstances; and there was a speciality strongly urged, which almost certainly affected the decision, that the purchaser had dealt with the heir in possession at a time when he had only a personal right to the property; in which case the general rule is, that the purchaser is affected by all the qualities of his author's title. Accordingly, I find that that case having been appealed, this was the point mainly relied on in the respondent's appeal case. Nevertheless, if there were no authority against it, I should find it difficult to extricate that case from the peculiarities of the titles which had been constituted in the vendor before the question came to be tried.

"But any judgment pronounced in so special a case cannot, I should think, in any view, be considered as sufficient to settle so important a point of law. It appears to me, that the terms of the Statute 1685 require the clauses to be inserted in the *procuratories of resignation* and precepts of seisin of the entails themselves, and not merely in the conveyances and charters and seisms to follow thereon. And it clearly supposes, or rather indeed peremptorily requires, that the entail, with all the clauses expressed therein, shall be recorded in the Register of Tailzies. It is not enough that the clauses are in the Register of Seisms. A special register was provided, that creditors and purchasers might with ease and certainty know what the condition of the party with whom they dealt as a proprietor in the fee was. Such a register would have been a very useless arrangement, if the Act had not required, as an essential quality of the tailzies to be allowed, that all the clauses should be engrossed in the deed to be so recorded. The words of the Act are clear and unambiguous. The clauses must be in the tailzies; but not only so—they must be in the *procuratories of resignation* and *precepts of seisin* in that deed. I have no doubt that this is necessary; and I do not think it at all inconsistent with this opinion, to hold, according to the decisions, that if the clauses be in any part of the same deed, they will be held to be in the procuratory or precept. They will still appear in the deed registered; and the creditor or purchaser, who has no occasion to look farther, will find them there.

"But how does the matter stand on such a deed as the supplementary entail here in question? The clauses of restriction are not in it at all. Let it be recorded; but when the creditor looks at it in that register, he can discover nothing specific to qualify the title of the proprietor in the fee. To refer him to another entail, or another title as to a different estate, is contrary to the Statute. He must find the entail of this estate, in regard to which he contracts, in the register, with all the necessary clauses engrossed; and he can find no such thing. There are thus two departures from the Statute—1. The clauses prohibitory, but more especially the irritant and resolute clauses, are not 'inserted in the procuratories,' &c.; and 2. There is no recorded entail with those clauses so engrossed.

"These considerations present great difficulties in the statutory principle. But the case of *Broomfield v. Paterson* very greatly increases the difficulty. The Lord Ordinary is perfectly right in his observation, that the case as reported (29th June 1784), is only in the first decision of it, and that having been appealed, it was afterwards remitted, and another judgment pronounced, (11th March 1786; affirmed 19th May 1786). But his recollection is wrong as to the result of that judgment. The House of Lords had been led to know that there were parties interested, substitute heirs of entail, beyond those who had first appeared, and against whom complicated grounds of personal exception were maintained; and they remitted the case, in order

that these other parties might be heard. But when they did appear, what was the issue and result? There was considerable difficulty in the question, whether the deed of entail dated in 1758 should be considered as a new entail, requiring to be complete and registered under the Act 1685, to make it effectual against creditors, or was merely a renewal of the original entail referred to. That question was what constituted the whole perplexity of the case. But as soon as that was held affirmatively, the consequences were at once and decidedly declared—1. That it could not be effectual without registration in the Register of Tailzies; but 2. That registered or not, it could not have any effect against the creditors, because the clauses prohibitive, irritant, and resolute, were not contained in it. The final judgment of the Court here was, that that deed was to be considered as a new settlement, 'and not having contained the clauses prohibitive, irritant, and resolute, and not having been recorded in the Register of Entails, is not an effectual entail: Find, that in respect the clauses irritant and resolute in the entail 1743, are not particularly inserted in the disposition 1758, the same, though held as a conveyance, is not effectual against creditors,' &c. There can be nothing more precise than this. I cannot possibly understand it otherwise than as an authoritative judgment, that a new settlement which required registration as an entail, but which did not contain in itself the clauses prohibitive, irritant, and resolute, could not be effectual as an entail against creditors.

"There is no denying that the supplementary entail in the present case is a new settlement. The plea to the contrary is very faint, and evidently not tenable. It is much more decidedly a new settlement than the deed 1758 was in the case of Paterson. For it is a conveyance of lands, which were not comprehended in the original entail, and which but for it, would have stood on the fee-simple titles in the person of the entailor. And if, then, it is within the same rule with that case in the application of the Statute, it cannot be enough to say that, such as it was, it was recorded in the Register of Tailzies: For the very first ratio of the judgment in the case of Paterson is, that the deed itself did not contain the restrictive clauses—the non-registration being put as a separate ground; and then the last finding is pointed and explicit, that in respect those clauses were not inserted in the disposition 1758, the entail was not effectual against creditors. That judgment was simpliciter affirmed on the second appeal—and this, notwithstanding that the very plea now maintained on the efficacy of an entail by reference, even against creditors, was specifically stated in the third reason of appeal, and the case of *Laurie and Spalding* most particularly referred to in support of it.

"I am not able to resist the weight of that authority, more especially as I cannot feel at all confident that there is any authority the other way. Certainly the result in the case of Paterson appears to be the most consistent with the terms and the spirit of the Statute.

"And I am therefore of opinion,—though not without being sensible of the difficulty of the question, that the demand of the pursuer in this part of his case ought to be sustained,—that these lands of Drumnachie are not validly entailed against creditors, and are therefore liable to the pursuer's action."

Lord Jeffrey:

"I incline, on the whole, to retain the opinion expressed in my original interlocutor and annexed note; though with increased difficulty and hesitation as to the lands of Drumnachie."

At advising, the Judges concurred in the opinions of the consulted Judges.

The following interlocutor was pronounced:

"Repel the objections stated to the validity and effect of the entail of the lands and estate of Aboyne, rights and others therein contained; sustain the defences, and assolkie the defenders from the conclusions of the libel of declarator and of the libel of adjudication, in so far as relates to the said lands and estate, rights and others, and decern: But in respect to the lands of Drumnachie, find that the deeds of entail in question are not effectual to save or protect those lands from the acts, debts, and deeds of the Marquis of Huntly; therefore, find and declare that the same fall under the sequestration libelled, and were ad-

judged in terms of the Statute passed in the second and third year of her Majesty, cap. 41, and pertain and belong to the pursuer, Donald Lindsay, as trustee on the sequestrated estates of the said Marquis of Huntly, for payment and satisfaction of the debts due by his Lordship, and decern; and find no expenses due by either party to the other."

Lord Ordinary, Jeffrey.—*Act.* Dean of Faculty (Wood), G. Bell; Weir and Gardiner, W.S., *Agents.*—*Alt.* Rutherford, Sandford; Walter Duthie, W.S., *Agent.*—[H.B.]

8th March 1842.

SECOND DIVISION.—(J.W.)

No. 151.—*MRS MARY CAMPBELL or M'GIBBON, Petitioner and Respondent, v. THOMAS BAILLIE, S.S.C., Respondent and Reclaimer.*

Bankrupt Act, 2 and 3 Vict. c. 41, § 40—Annuity-Bond—Valuation—*The widow of a bankrupt applied to the Sheriff to value an annuity provided to her by her husband, and contained in an annuity-bond. Objections being stated to the validity of the bond, the Sheriff found that "thereby she had acquired right to an annuity of £55" and valued the same at £55. The Court recalled the finding, that thereby she had acquired right to the annuity, but adhered to the valuation.*

The petitioner acquired right to an annuity of £55 Sterling, under an antenuptial contract of marriage entered into between her and Mr Neil M'Gibbon, dated 1st March 1781; and by a bond of annuity, executed on the 20th of April 1779, he increased the petitioner's annuity from £55 to £75 Sterling, and obliged himself to secure her in the same by infestment over his lands of Stroneskar, in virtue of which she was duly infest. By discharge and renunciation, dated the 12th of December 1812, executed by the petitioner, she renounced her security over the lands of Stroneskar; and on the sequestration of the estates of her deceased husband, presented a petition to the Sheriff of Argyleshire to have her annuity valued in terms of the 40th section of the Bankrupt Act. Objections were stated to the validity of the bond, in consequence of an imperfection in the testing clause, and farther, that being a post-nuptial deed, it could not prevail in a competition with creditors.

The Sheriff pronounced the following interlocutor:

"*Inverary, 13th January 1842.*—Having resumed consideration of the foregoing petition, with the several documents therein referred to, proof adduced in regard to the age of the petitioner, and having heard parties' procurators *viva voce*—Finds it proved that the petitioner was seventy-eight and a-half years of age at the term of Martinmas last: Finds that, by an antenuptial contract of marriage entered into between the petitioner and her deceased husband, Neil M'Gibbon, Esq., dated the 1st day of March 1781 years, the petitioner acquired right to an annuity of £55 Sterling, payable from and after her said husband's death; and finds that, by a postnuptial heritable bond of annuity, dated the 20th day of April in the year 1779, the said annuity of £55 was increased in favour of the petitioner to the sum of £75 Sterling, and that the petitioner thereby acquired right to an annuity of £20 Sterling, payable from and after the death of her said husband, in addition to the foresaid annuity of £55 Sterling: Finds that the said annuity of £55 Sterling, from the term of Martinmas last, is of the value of £353. 18. 3. Sterling, and the said additional annuity of £20 from the same term, is of the value of £128. 13. 11. Sterling, and therefore values the said several annuities due to the petitioner from the term of Martinmas last, at the sums of £353. 18. 3. Sterling, and £128. 13s. 11d. Sterling, respectively, all in terms of the Statute mentioned in the foregoing petition, and decerns accordingly."

(Signed) "J. MACLAURIN, S. S."

"*Note.*—The Sheriff-substitute has heard the parties' agents

at great length *vis voce*. A variety of points have been discussed by them which do not appear in the least degree relevant to the case, and to which he need not therefore advert. He will only notice such of them as appear to be of importance.

"It has been urgently proposed by Mr Baillie that the case should be argued by written pleadings, or in other words, that a record should be made up. The Statute is by no means explicit as to the forms of procedure; but it is quite obvious if a record were made up in cases of this kind, that their object would be rendered wholly abortive, for in that event no applicant claiming under an annuity requiring to be valued could ever claim or vote at any meeting for choosing an interim factor or trustee,—a view of the matter which the terms of the Act itself plainly repudiates.

"The most important point of the case regards an objection raised by Mr Baillie to the validity of the antenuptial contract of marriage of 1781, by which the annuity of £55 is created. The surname of the writer of that bond is wanting in the first part of the testing clause, which bears that the deed was 'wrote by Donald, servitor to the said Neil M'Gibbon, &c.;' at the end of the testing clause, however, the writer is again mentioned as the last of the subscribing witnesses, and is designed the said Donald BELL. Here the Christian name is supplied, and except in the case of the person designed servitor, the name of Donald does not occur in any previous part of the deed, so that the word 'said' seems to identify very plainly Donald Bell the witness, with Donald the servitor and writer of the deed. Even had this identification not taken place, the Sheriff-substitute is not prepared to say that the omission of the surname of a writer, where the designation is distinctly given, is a violation of the injunction in the Act 1593. But at all events, where an identification occurs, as in the present instance, he inclines to think that the objection is obviated.

"Another point discussed by the parties is the validity of the postnuptial bond of annuity of 1799, in a competition with creditors. Supposing the antenuptial contract to be a valid deed, as appears to the Sheriff-substitute to be the case, then the objection to the bond that it is postnuptial, can only affect the addition of £20 thereby made to the previous annuity of £55 contained in the contract. Now, there can be no doubt that at the date of the bond the petitioner's husband was not only perfectly solvent, but that he was proprietor of the estate of Glasvar, factor on the estate of Islay, and a law practitioner in extensive business. It is thought, therefore, that the addition of £20, made in 1799, to the previous annuity of £55, was a moderate and reasonable provision at the time it was made, and such as the petitioner is fairly entitled to rank for in competition with other creditors. See the case of Lady Campbell, 26th July 1744, Mor., p. 988; Jeffrey, 24th May 1825; S. and D. M'Lachlan, 29th June 1824. *Ibid*.

"While the Sheriff-substitute has stated these views, in consequence of the objections referred to having been stated by the parties, he is at the same time of opinion, that it is not within his province to enter into the defects of deeds competent in a reduction before the Supreme Court. He apprehends, if a deed appears to be *prima facie* complete, he is bound to give effect to it.

"The values have been made according to the valuations produced by the petitioner under the hands of Mr Thomson of the Standard Office, which the Sheriff-substitute thinks is in conformity with the rates stated in the several tables which he has examined."

Mr Baillie reclaimed, and pressed his objections on the merits.

Answered.—That this was premature; the Sheriff did not decide upon the claims, but only put a valuation upon them, assuming them to be good.

Lord Medwyn.—I think the section of the Act applies only to undisputed annuities.

Russell.—If the creditor go to the Sheriff and ask him to put a value on an annuity, the Sheriff's judgment cannot be reviewed by the trustee; and if we had not brought this appeal, the Sheriff's judgment would have been final on the whole matter.

SCOTTISH JURIST.

Lord Medwyn.—He could not review the valuation, but the right to the annuity itself, or to its amount, would still be open to challenge.

Lord Moncreiff.—I cannot conceive that it was the intention of the Legislature, that on such a clause as this, the Sheriff was to decide upon the validity of the bond. The trustee would not be barred from bringing a reduction of it notwithstanding the valuation of the Sheriff. Assuming that the bond stands, it amounts to this, that the trustee would only be bound by the valuation.

Lord Justice-Clerk.—I think this is an application only to enable a contingent creditor to vote; and I think the view of your Lordships is the most beneficial and sound construction of the Statute.

The Court recalled the interlocutor of the Sheriff, in so far as it finds that the petitioner *had acquired right* to an annuity, and *quoad ultra adhered*. No expenses.

For Petitioner, Solicitor-General (M'Neill), Patton; H. Graham, W.S., Agent.—For Respondent, Russell, Pattison; Party Agent.—T. Clerk.—[J.W.]

3d May 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 152.—LIEUTENANT-COLONEL JOHN GORDON, Appellant, v. JOHN and JAMES GRAHAM, Respondents.

Landlord and Tenant—Sequestration—Reparation—Damages—Process—Jury Trial—A tenant under a lease, which contained an obligation on the part of the landlord to put the houses and buildings in good repair, and to make the fences on the farm fencible "betwixt and the term of Whitunday next," fell into arrear of rent, and was sequestered; on which the tenant's agent, on 18th May, made the following tender in a letter to the landlord's agent: "Stop the roup in Gordon v. Grahams; and since we can't do better, I will advance the arrears and expenses myself, on your client granting an assignation, or giving me an obligation to grant one at my expense. My assignation not to compete with the landlord's right for the balance of the year's rent, of which the above arrears form a part." And on the 24th May he repeated the tender in another letter. The offer was at last accepted, and the sequestration withdrawn on the 28th May. The tenant then brought an action of damages, and obtained a verdict against the landlord for not duly implementing the obligation in the lease relative to buildings and fences, and also for having failed, after the aforesaid tenders of rent, timeously to withdraw the sequestration. Exceptions were taken to the charge of the presiding Judge, inter alia, because he directed the jury, that after the tenders of 18th and 24th May, the landlord was "in law responsible to the pursuer for not withdrawing the sequestration quoad the sums contained in these tenders." The Court of Session, without deciding the question of law as to the landlord's liability involved in the direction, disallowed the bill of exceptions, holding that there were sufficient grounds to support the direction, in the whole circumstances of the case—Held (reversing the judgment of the Court of Session), that the direction was erroneous, in respect there was nothing in these tenders to raise a liability on the part of the landlord.—Observed by the Lord Chancellor, that the direction on the legal question of liability behoved to be judged of on the grounds on which it was put by the presiding Judge, and not in relation to the other circumstances of the case.

Landlord and Tenant—Hypothec, Obligation to assign—Question, Is a landlord bound, on receiving payment of rent past due, to assign his right, or is he bound only to grant a discharge?

The farm of Egypt, in the vicinity of Edinburgh, consisting of about forty-one Scotch acres, was let by the proprietor, Colonel Gordon of Cluny, to John

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Graham and his son James, for the space of nineteen years from Martinmas 1832, at the rent per acre of three quarters of grain, wheat, barley, and oats respectively, payable by equal portions at Candlemas and Lammas. The lease contained the following clause:

"In respect the whole houses and buildings on the said farm are to be put into good tenantable condition, and as the fences round the farm are to be put into good order and made fencible betwixt and the term of Whitsunday first, the said John and James Graham bind and oblige themselves to be at half the expense in keeping all the fences in constant good order and repair during the currency of the lease; as also, to keep and leave the houses in good and tenantable condition (if at any time found otherwise), upon getting a month's warning to make the necessary repairs; if not then done, it shall be in the power of the proprietor to have the repairs made at the tenants' expense."

At the commencement of the lease certain repairs were made, but the tenants complained that they were insufficient, and that neither the houses nor fences were put into the condition for which they had stipulated in the above clause. John Graham accordingly, on 12th April 1833, wrote the following letter to Mr Roy, the factor:

"In answer to your letter of the 6th instant, I am extremely sorry that there should be occasion for this correspondence, as I wish to give you as little trouble as possible, but it is unavoidable on my part. Your letter seems to infer that you have put the houses and fences into proper tenantable and habitable order. I am quite of a contrary opinion; for instance, the roof of the stable is rotten, and won't stand two years, and the sun shining through various apertures, and as to the fences, not a hedge have been cut, or ditch scoured (leaving aside the fences to be built of new, which I am not particularly pushing you with). I am quite willing they should be inspected now, in reference to the lease, and I will be ready any day you may appoint, and the sooner the better, as I want them finished. An early answer will oblige."

In consequence of this remonstrance additional repairs were made, but not to an extent which satisfied the tenants, who seem therefore to have proposed to take the execution of them into their own hands. This was objected to by Mr Roy, who, on 2d November 1833, wrote as follows:

"I have received your card of yesterday's date, and since I saw you I have seen Mr Robertson from Slateford, who gave in the estimates for fitting up the stable at Egypt, &c. He is against doing any thing till the beginning of the spring, as he says a much better job can be made then than can be done at present, and he does not think there is danger to be apprehended from the roof giving way at present; and as it is likely Colonel Gordon himself or Captain Duguid will be here soon, the tradesmen can receive Colonel Gordon's own instructions, or at any rate those of Captain Duguid, and then there can be no misunderstanding on the subject; but if you proceed to do them yourself agreeable to your own plan, most likely the job may not please Colonel Gordon, and he will probably resist the payment unless the work be done agreeable to his own instructions."

"My opinion is, therefore, that you should still delay doing any thing yourself; for let me remark, it will be a bad omen to have any misunderstanding or dispute with your landlord at the beginning of your lease."

In August 1835, William Hunter, a builder, was employed to inspect the stable, and reported:

"As requested, I have examined the stable belonging to you at Egypt. I find the roof fallen in, floor and trevies in a state of ruin, and quite unfit to put cattle in of any kind whatever, and as there is no time for delay, the sooner it is repaired will be the better for the wall, as the scantling will press them out."

Hunter afterwards gave in an estimate of the repairs which he considered absolutely necessary, and executed them. In April 1837, he was employed to inspect the dwelling-house, and made the following report:

"Having carefully, as requested, examined the house occupied by you at Egypt, and find it in a very dangerous and unsafe state to live in, as the greater part of the joist-ends in the walls are gone, and the front wall, part of which is broke through, and from the pressure of the roof may cause the whole to come down, and the consequences will only be known when too late to remedy."

Hunter then made the following offer:

"Having examined the farm-house occupied by Mr John Graham, Egypt, and made out a specification for what I consider making it habitable, and hereby offer to finish the same, in terms of the specification, for the sum of £18. 10s. Sterling."

This offer was accepted; and after the work was finished, John Graham, on 20th January 1837, certified:

"I hereby give it as my opinion, that the work done by Mr William Hunter, in terms of the specification, for repairs done on the house occupied by me at Egypt, is done in a complete and tradesman-like manner."

At the Candlemas preceding the date of this certificate the tenants had retained, or been unable to pay £86 of the half-year's rent. At the Lammas following another half-year's rent became due, but no offer of payment having been made by the 12th August, an application was on that day presented to the Sheriff, and the tenants were sequestrated. They complained strongly of this proceeding as unnecessarily harsh and precipitate; and on the 16th, John Graham addressed Colonel Gordon personally in the following letter:

"16th August 1837.

"SIR,—I request your excuse for the trouble I am reluctantly compelled to give you.

"My son and I became your tenants in the farm of Egypt, at a very high rent, for nineteen years from Martinmas 1832. At our entry the lands were in the worst order, but by unceasing industry they are now in such a state as promise to repay us the sums we have expended upon them.

"We have not received any deduction from the rent we became bound to pay, yet all the arrears we owed previously to the 2d current was £86. 16. 1., about £33 less than a-half year's rent.

"On that day half a-year's rent, or £119, became due, making the whole sum due £205. 16. 4., considerably less than a year's rent.

"Notwithstanding this small arrear, and that there is a crop on the ground much more than sufficient to pay every shilling you can claim, including the rent of the present crop, and that we have a large claim against you for damages for want of fences and for repairs on the houses, which you are bound by the tack to perform, but have not performed, a sequestration of our whole crop, stocking, and furniture has been taken out, without notice being given to us of any kind, and without payment of what we are due being asked. We cannot believe that this has been done with your knowledge, far less with your approbation. We have had the happiness of living on good terms with you, and we have never done any thing to forfeit your good opinion, nor can we conceive any possible justification of measures which are destructive of our credit, and must tend to bring on our total ruin, while they are wholly unnecessary for your security or safety.

"That we have suffered very great damage by the treatment we have received, no one can doubt; but we are unwilling to speak of damages. We hope that yet every thing between us may be amicably arranged. As your tenants, we are entitled to expect from you reasonable protection, and, if you act towards us as we think we have a right to expect, all may yet be well. If our ruin be determined on, we must resort to all our legal claims and means of defence.

"Your answer, which we beg to have in course, will determine our conduct.—I am, with all respect, Sir, your faithful obedient servant." (Signed) "JOHN GRAHAM."

Colonel Gordon's answer was as follows:

"19th August 1837.

"SIR,—To say the least of your letter of the 16th instant, I take leave to inform you that the tone and terms of it have certainly surprised me. You will please to recollect that when I was in Edinburgh last May, you refused either to pay your rent due, or to give a bill for it at three or four months' date, which left me no alternative but to secure my hypothec rent by sequestrating your effects. And I beg leave to remind you, that complaints of being over-rented come with peculiarly bad grace from my tenants, who know, on the one hand, that if they have advantageous bargains, they are secure for the entire endurance of their leases, while, on the other, I am ready to relieve them at any time, on getting six months' previous notice, provided the conditions of lease have been fulfilled in all respects. Your threatened claim for damages gives me no uneasiness whatever. Should you be so ill advised as to carry that threat into effect, I have not the least fear for the result, since you must be perfectly aware that you have not only been upwards of £20 in my debt since 1832, but have also got considerably more extensive repairs on buildings and fences than were promised. I have no desire to be on bad terms, or to quarrel with any of my tenants; but if they are disposed unnecessarily to quarrel with me, I can part with them without regret. I am," &c.

On the 23d August, Messrs M. and J. Lothian, as agents for the Grahams, made a proposal to Mr Gray, the agent of Colonel Gordon, to employ an auctioneer, whose intromissions they undertook to guarantee,

"to sell off by public roup, in a way not injurious to the credit and feelings of the tenants, as much of the crop as will pay, not only the arrears, being somewhere about £205, but also the half-year's rent payable at Candlemas next."

Mr Lothian, not anticipating any objection, advertised the sale, but on the 28th August Mr Gray wrote in answer:

"Captain Duguid, factor for Colonel Gordon, came to town from Aberdeenshire on Saturday night, and he is now with me. Captain Duguid does not approve of your proposal on the part of Messrs Grahams, and he cannot consent to the sale going on as advertised. But he is quite willing to accept of your guarantee to pay the arrears of rent, on caution being also found to pay the current year's rent when due, and Colonel Gordon is quite willing to grant an assignation to the act of sequestration, either to you or to any other person who pays the rent and finds caution, and then the roup may proceed. I shall expect your answer in the course of to-day, as Captain Duguid proposes to leave town this evening."

The original proposal, with a slight modification and the express reservation of the sequestration *quoad ultra*, was ultimately adopted, and the auctioneer proceeded with the sale. On the 18th December 1837, Mr Gray asked the Messrs Lothian to send him the roup-roll, but did not receive it till the 26th April 1838, when it appeared that the amount of the sale was not sufficient to discharge Colonel Gordon's claims, and that a balance of £64 odds, which had become due at the Candlemas previous, remained unpaid. To obtain payment of this balance, Mr Gray, on the 11th May, lodged a minute in the sequestration, and on the 14th, the Sheriff-substitute, in respect no answers had been lodged, granted warrant to roup. The sale was advertised on the 16th to take place on the 23d, but on the 18th, Mr Lothian addressed the following letter to Mr Gray:

"Stop the roup in Gordon v. Grahams; and since we can't do

better, I will advance the arrears and expenses myself, on your client granting an assignation, or giving me an obligation to grant one at my expense. My assignation not to compete with the landlord's right for the balance of the year's rent, of which the above arrears form a part."

On the 23d, Mr Gray answered:

"I mentioned to you that I had sent a copy of the state and expenses which I handed you, to Colonel Gordon; and on calling upon him, he stated that there was a larger balance of rent due than was contained in the state; for that by the lease, the tenants had become bound to pay £6 per acre, for each acre they cropped on the farm different from the stipulations in the lease, and that the tenants had miscropped several acres in the year 1837, as could be shown by a measurement of Mr Knox; and the tenants were bound by the lease to pay £6 per acre of additional rent for each of these acres; and that he also looked to the tenants for payment of all the extrajudicial expense incurred by them, and of which I handed you a copy.

"I wrote Colonel Gordon that I would make a demand upon you for the additional rent, and for payment of the extrajudicial expenses; and if refused, that it appeared to me necessary to present a supplementary petition of sequestration to the Sheriff for the foresaid additional rent, in terms of the lease, and also to claim the extrajudicial expenses from your clients. They have a double of the lease, which you can get from them. In the meanwhile, I annex a copy of the clause in the lease regarding the additional rent. I shall be glad to hear from you in answer.—Yours," &c.

"Excerpt.

"And if at any time after the fourth year of the lease any part of the farm is cropped differently, without written authority from the proprietor or his factor, then the tenants bind and oblige themselves and their foresaids to pay £6 Sterling of additional rent for each acre differently cropped."

On the 24th, Mr Lothian replied:

"I have received your extraordinary letter of yesterday, and sent it to Messrs Graham for information to answer it. In the meantime I have tendered you the whole money for which you have taken warrant to roup, and you declined it, only taking my obligation to pay it. I have now to repeat that I am ready to pay that money to you, or your client Lieutenant-Colonel Gordon, on a receipt acknowledging that the money is paid by me, and binding your client to grant to me at my expense an assignation in the terms mentioned in my said obligation, of which (as I wrote it in your chambers) I have no copy. I will thank you to send me a copy of it. I have only to add, that if the money above referred to be not accepted by you, I will lodge a minute in my own name in the existing process of sequestration, and consign the money with the clerk of Court at your client's expense."

On the 28th, Colonel Gordon granted the following receipt:

"Received from Maurice Lothian, Esquire, solicitor, £64. 10s. 3d., with £1. 0. 3. of interest thereon, being the balance of rent of the farm of Egypt payable at Candlemas last, and interest thereon, for which a warrant to roup was taken against Messrs Graham, the tenants, in a process of sequestration at my instance, reserving any further claims competent to me for additional rent on account of part of the lands being, as I am informed, cropped differently from the stipulations of the lease, and for all expenses incurred by me in regard to the recovery of the rents for which said sequestration was used, and reserving to the tenants their defences against such claims; and I engage to grant to Mr Lothian, at his expense, an assignation of said sums now paid to me, and of the proceedings at my instance under the said sequestration, to the end he may operate his payment from Messrs Graham, but so as not to compete with any claims competent to me as landlord."

On referring to the measurement taken by Mr Knox, it appeared that the allegation of miscropping was incorrect.

The tenants now brought an action of damages, in

which, after narrating the failure of Colonel Gordon to fulfil his obligations under the lease, and the various proceedings which had taken place in the sequestration, they concluded for a decerniture ordaining him, besides implement, to make payment to them of the sum of £500, less or more, in name of damages for the loss and injury which they had suffered in consequence both of his refusal or delay to perform the obligations incumbent upon him, and of the oppressive and unjustifiable measures which he had adopted against them.

The cause was sent to a jury on the following issues:

"It being admitted that under the lease, of which No. 3 of process is a copy, the pursuers became tenants of the farm of Egypt, the property of the defender, for the period of nineteen years from the 22d day of November 1832:

"Whether the defender wrongfully failed to put the houses and fences on said farm in tenantable and fencible condition, in terms of the said lease, to the loss, injury and damage of the pursuers?"

"Whether, on or about the 12th day of August 1837, the defender obtained from the Sheriff of Edinburgh a sequestration of all or any part of the crop and stock of the pursuers on the said farm? and Whether, on or about the 23d day of May 1838, the defender wrongfully failed to relieve the pursuers' said crop and stock from the said sequestration, to the loss, injury and damage of the pursuers?"

"Damages laid at £500."

The jury found for the pursuers, and assessed the damages at £475. The following exceptions were taken by the defender:

"*First Exception*, That thereafter the said Lord President, in addressing the jury, declined and omitted to direct the jury, in point of law, that the obligation on the landlord, in the clause of the lease referred to in the said issue, to put the houses and buildings in tenantable condition, did not require to be implemented within the same time as the obligation as to the fences.

"*Second Exception*, And that the said Lord President did direct the said jury, in point of law, as to the second issue, that tenders of the arrears of rent having been made by Mr Maurice Lothian, in terms of his letters of the 18th and 24th of May 1838, and the sequestration not having been withdrawn until the 28th of that month, the said sequestration ought to have been withdrawn after these offers, and more especially after that of the 24th of May, and that the defender was in law responsible to the pursuer for not withdrawing the sequestration *quoad* the sums contained in these tenders."

On advising, the Court refused the bill, with expenses. See *ante*, Vol. XIII. p. 213.

Colonel Gordon appealed.

Lord Chancellor.—My Lords, this case is comprised within a very small compass. The respondents were tenants of the appellant under a lease, which is printed in the appendix to the appellant's case. The rent having fallen into arrear, the appellant applied to the Sheriff, and obtained a sequestration of the crop and stocking of the farm. On the 18th of May 1838, Mr Lothian, the agent for the respondents, wrote this letter to Mr Gray, the agent for the appellant:—"DEAR SIR—Stop the roup in Gordon v. Grubams; and since we can't do better, I will advance the arrears and expenses myself, on your client granting me an assignation, or giving me an obligation to grant one at my expense,—my assignation not to compete with the landlord's right for the balance of the year's rent, of which the above arrears form a part." The meaning of this proposal is—not that the tenants should pay the rent, but that Lothian, the agent, should pay the amount of the rent due, and take an assignment of the sequestration for his own security. This offer was not accepted; for, on the 23d of May, the landlord's agent wrote a letter declining to accept it. Whether he was right or not in this refusal is immaterial to the disposal of the question before their Lordships, as presented by the bill of ex-

ceptions. Then comes this letter of the 24th May from Mr Lothian to Mr Gray,—“I have received your extraordinary letter of yesterday, and sent it to Messrs Graham for information to answer it. In the meantime I have tendered you the whole money for which you have taken warrant to roup, and you declined it, only taking my obligation to pay it. I have now to repeat that I am ready to pay that money to you or your client, Lieutenant-Colonel Gordon, on a receipt acknowledging that the money is paid by me, and binding your client to grant to me, at my expense, an assignation in the terms mentioned in my said obligation, of which, as I wrote it in your chambers, I have no copy. I will thank you to send me a copy of it. I have only to add, that if the money above referred to be not accepted by you, I will lodge a minute in my own name in the existing process of sequestration, and consign the money with the clerk of Court at your client's expense.” It does not appear that any answer was written to this letter, but an arrangement seems to have been made by the 28th of May, on which day the money is paid, and a receipt granted by Colonel Gordon, containing an obligation to assign the sequestration to a certain effect. This having become the subject of a suit in the Court of Session by the tenants against the landlord, complaining that they ought to be relieved from the effect of the sequestration, and raising another question, which it is not necessary now to discuss, as to the repairs, the Court of Session directed two issues,—*First*, “Whether, on or about the 12th day of August 1837, the defender obtained from the Sheriff of Edinburgh a sequestration of all or any part of the crop and stock of the pursuers on the said farm?” And, *secondly*, “Whether, on or about the 23d day of May 1838, the defender wrongfully failed to relieve the pursuers' said crop and stock from the said sequestration, to the loss, injury, and damage of the pursuers?” Every one would suppose, from reading this issue, that the case set up was, that on the 23d of May the defender was under an obligation to relieve the pursuers from the effect of the sequestration. On the trial of these issues, the Lord President, who presided, as it appears from the second exception, directed the jury in these terms: “The Lord President did direct the said jury in point of law, as to the second issue, that tenders of the arrears of rent having been made by Mr Maurice Lothian, in terms of his letters of the 18th and 24th of May 1838, and the sequestration not having been withdrawn until the 28th of that month, the said sequestration ought to have been withdrawn after these offers, and more especially after that of the 24th of May, and that the defender was in law responsible to the pursuers for not withdrawing the sequestration *quoad* the sums contained in these tenders.” No one can mistake the effect of this language. It contains a distinct exposition of that which is intended to be laid down by the Lord President in point of law, that the tender contained in the two letters of the 18th and the 24th of May, imposed an obligation in law on the landlord to withdraw the sequestration; that the landlord having a sequestration against the tenants, on any one saying I will pay you the arrears of rent provided you will grant to me an assignment of the sequestration, the landlord was bound, by the law of Scotland, to accept that offer. If that be so, the opinion expressed by the learned Judge who presided would be correct, but if otherwise, it would not. It does not appear to me that the language of the letter is open to any ambiguity or doubt; but it proceeds to express the only terms on which the agent of the parties, Mr Lothian, required the sequestration to be withdrawn. There was no payment of rent *qua* rent, but an offer to pay the same sum on the sequestration being assigned. Whether the word “withdraw” had a different meaning from the word “relieve,” is immaterial. With reference to the opinion delivered to the jury by the learned Judge,—for the bill of exceptions must stand or fall by the legal effect of that which was laid down at the trial,—it will not do to support the direction of the learned Judge on other grounds, or other facts; for the learned Judge tells the jury, that the effect of those two letters amounts in law to an obligation on the landlord to comply with this requirement of the letter; but when it comes to the Court of Session, that Court does not profess to support the law as propounded in that opinion. They do not say that it is right, or that it is wrong; but they find, on other parts of the case, and the evidence before the jury, grounds for supporting that opi-

nion delivered by the learned Judge, on a consideration of the whole of the merits of the case on which the jury have come to a decision. Lord Mackenzie, followed by Lord Gillies and Lord Fullerton, founded their opinions not on those two letters which were the foundation of the Lord President's opinion delivered to the jury, but they began with the letter of the 28th of August 1837, which the learned Judge who presided at the trial had not in the slightest degree adverted to. It is unnecessary, therefore, to look at that letter to see what it contained, or whether it could amount to a contract to be carried into effect in 1838, with reference to the then state of the case. That letter is not alluded to in the summing up. The learned Judge does not put it upon that; and the question is, whether the law he lays down to the jury is correct?—not whether the conclusion might be ultimately the same or not? but whether that which he lays down in stating the grounds of his opinion is correct in point of law? I do not find that the learned Judges express any opinion in favour of that which was so laid down, which induces me to look further to see whether it can be so supported. The matter appears to have been withdrawn entirely from the consideration of the jury; they having been told by the learned Judge that, in point of law, after receiving those two letters, the landlord was bound to withdraw the sequestration, or to relieve the tenants from the effect of it; and if that was correct, the jury had nothing to do but to assess the damages. They were told that these letters had raised that responsibility, when, in my opinion, there was nothing in these letters to raise that liability. There appears evidently to have been a mistake. The matter is not disposed of by the Court upon the grounds on which it is put by the learned Judge, that those two letters so promulgated to the jury amounted to an obligation resting on those two letters alone, binding the landlord to withdraw the sequestration, or to relieve the tenants from the effect of it. The consequence of that appears to me, that the interlocutors must be reversed, and the bill of exceptions allowed, and the case must be sent back to the Court of Session to do that which is just.

The following judgment was pronounced:

"It is ordered and adjudged by the Lords spiritual and temporal in Parliament assembled, that the said interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is declared that the bill of exceptions ought to be allowed in respect of the second exception stated therein: And it is further ordered, that, with this declaration, the cause be remitted back to the Court of Session in Scotland, to proceed further therein as shall be just and consistent with this declaration, direction, and judgment."

Brundrett, Randall, Simmons and Brown, *Appellants' Solicitors*.—G. and W. T. Webster, *Respondents' Solicitors*.—[W.H.D.]

8th March 1842.

FIRST DIVISION.—(H. B.)

No. 153.—JOHN GRAHAM and JAMES GRAHAM, *Pursuers*, v. LIEUTENANT-COLONEL JOHN GORDON, *Defender*.

Process—Proof.—*The copy of a lease confessedly genuine, is admissible in evidence, in the absence of the principal.*

Landlord and Tenant—Sequestration—Assignment—Process.—*A landlord is not bound to assign his right under a sequestration to a third party, on offer of payment of the rent due by the tenant. A bill of exceptions sustained, on the ground that the presiding Judge had declined so to direct the jury.*

The present was an action of damages at the instance of tenants against their landlord, and was tried by a jury (*vide ante*, Vol. XIII. p. 213, and immediately preceding case) on the following issues:

"It being admitted that under the lease, of which No 3 of process is a copy, the pursuers became tenants of the farm of Egypt, the property of the defender, for the period of nineteen years from the 22d day of November 1832:

"Whether the defender wrongfully failed to put the houses and fences on said farm in tenantable and fencible condition, in terms of the said lease, to the loss, injury, and damage of the pursuers?"

"Whether, on or about the 12th day of August 1837, the defender obtained from the Sheriff of Edinburgh a sequestration of all or any part of the crop and stock of the pursuers on the said farm? and Whether, on or about the 23d day of May 1838, the defender wrongfully failed to relieve the pursuers' said crop and stock from the said sequestration, to the loss, injury, and damage of the pursuers?"

"Damages laid at £500."

A verdict having been returned for the pursuers, the defender presented a bill of exceptions, which the Court refused; but on appeal to the House of Lords, this judgment was reversed. *Ante*, p. 321.

A new trial was accordingly granted, and the jury again returned a verdict for the pursuers—damages £493. 16s., being just the amount awarded at the former trial, with interest from its date.

The defender presented the following bill of exceptions:

First Exception.—"On the document, No. 3 of process, being tendered by the counsel for the pursuers, the counsel learned in the law for the said defender, did object that the said document, which was only a copy of the lease, was not admissible in the circumstances, in maintenance of the issues on the part of the pursuers. But the said Lord President did then and there allow the same to be produced and read to the jury on the part of the pursuers; and the same was read accordingly."

Second Exception.—"Thereafter the said Lord President, in addressing the jury in reference to the first issue, declined and omitted to direct the jury in point of law, that the obligation on the landlord, in the clause of the lease referred to in the first issue, to put the houses and buildings in tenantable condition, did not require to be implemented within the same time as the obligation as to the fences. To which the counsel for the defenders excepted, insisting that the jury should have been directed, in point of law, to the effect foresaid."

Third Exception.—"And the said Lord President, in charging the jury, in reference to the second issue, declined to direct the jury, that the defender, as landlord, was not bound in law to assign the sequestration on the tender of payment by Mr Lotbrian. To which the counsel for the defenders excepted."

When the bill of exceptions was advised, the defender insisted particularly on the *first* and *third* exceptions,—the *second* having been fully discussed on the former bill, and unanimously refused.

The following opinions were delivered:

(*First exception*).

Lord President.—I have great difficulty as to this proceeding under the bill of exceptions. It does appear to me that if we look—to what we certainly are entitled to look—to certain documents laid before us,—to the defender's deposition as a haver, in which he deposes "that there was such a tack;" and "if the tack be still in existence," it will be either in his strong box, or in the custody of his factor, and that as "soon as he goes to Edinburgh, he is willing to search for, and make production" of such of the documents called for as he finds;—if we look also to the admission of parties, in which the agents agree "to hold all the documents produced by either party as genuine writings," I have an infinite difficulty in allowing the defender to turn round in this way, and maintain that the copy of the lease produced was not admissible. Look to the words which precede the issues,—"It being admitted that under the lease, of which No. 3 of process is a copy, the pursuers became tenants," &c. This is as much an admission by Colonel Gordon as by the other party. Then look to the issues themselves,—"whether the defender wrongfully failed, &c., in terms of the said lease." Now, will any body show an instance in which, after an admission of this nature as to the existence of a lease, and possession following upon it, the copy has not been admitted? No doubt

the defender might have said—not admitted, and put the pursuers to proof. But here he expressly says, “admitted;” and the only question is, whether, “in terms of the said lease,” he wrongfully failed? The question which I have to put to myself is, whether under such circumstances, with all these admissions, and after an appeal to the House of Lords and a return of the case to this Court (all these proceedings taking place on the admission of a lease), the defender is entitled to turn round and say, “That document by which I, the owner of this estate, put my name, and bound myself to you, is good for nothing. True, you the tenant, trusting to my honour and honesty, got your copy, which is just as much the lease as the other which I retain; but now, after questions of damages have arisen, and issues have been adjusted and a trial has taken place, I am entitled to object that your copy is not duly stamped, and cannot be admitted in evidence. You must go and produce the copy which is lying in my repositories.” And why? Because, when it is produced, it will be found to be unstamped, and therefore inadmissible. I go on the clear admission that the lease existed, and that the copy of it produced was a genuine document, and I do not think the objection to its not having been stamped at the date of the trial, is, in the circumstances, worth one straw.

Lord Gillies.—This is a question of some difficulty. There are clear admissions in the record implying that the lease was complete and perfect; and if No. 3 of process were duly stamped, the copy retained by the defender is not one whit better than it is. The one is just as much the lease as the other. It is said, that by admitting the copy, we facilitate the commission of fraud against the stamp laws. I do not see any thing in this; for there seems to be the same door to fraud either way. Be this as it may, the whole objection stated in the bill of exceptions is, that the copy of the lease was tendered in evidence, and admitted. There is not one word more. At the same time, there was an admission that the copy of the lease was a genuine document. This is all which appears to have been known to the presiding Judge. It is not said that he was informed that the principal copy was lying on the table, and that, on looking at it, it would be found to be unstamped. Had this been told to the presiding Judge, he must at once have stopped the trial. He must have said—here is a fraud on the revenue, of which, *ex parte judicis*, I am bound to take notice. The copy now produced cannot bear faith. The fact, however, was not told, but concealed; and in this state of matters, I am clear that the direction was right. There is nothing on the face of the bill of exceptions to show that the copy was not the best possible evidence. There was no offer to produce the original; and there was a distinct admission that the copy was genuine. True, it has now been proved to us, that when the trial took place, the defender's copy was not stamped. I am not quite prepared to say what the consequence of this may be; but taking the facts as they were submitted to the presiding Judge, I am clear that his direction was right.

Lord Mackenzie.—Two questions have been raised here. The first is that which properly arises under the exception; and it is, whether the copy of the lease was admissible in evidence? Here I can have no doubt. The issue supposes that the lease could not be found; and nobody knew that it was unstamped. The assumption that it was a good lease formed the very basis of the issues; for if it was not, there was no room for any trial. In these circumstances, the admission was made that the copy was equivalent to the principal. All parties were bound by it, and the tenants were actually in possession upon it. I cannot see, therefore, how it could be inadmissible. Had the pursuers chosen to read the whole of it at the trial, it could not have been objected to. It is said it was not admissible in evidence. It was certainly unnecessary to bring it forward again as evidence. After it had been admitted, the pursuers would have acted more skillfully in resting satisfied with the admission. But *superflua non nocent*. It may have been a waste of time to tender it again; but the irregularity is not such as to set aside the verdict. The second question is, whether, having now ascertained that when the trial took place the principal lease was unstamped, we are not bound, *ex parte judicis*, to quash the verdict? This is a serious question; but I rather think there is an answer to it.

The lease is now stamped, and this, I think, relieves us from the necessity of interfering for the purpose of preventing a fraud on the stamp laws. On the whole, I am clear that the defender's objection under this first exception cannot be sustained.

Lord Fullerton.—I have a little difficulty, but the whole procedure of the defender is so contrary to justice, and the objection is so very critical, that I am inclined to concur with your Lordships. In the circumstances, I think the copy of the lease was admissible in evidence.

The Court repelled the first exception.
(Third exception).

Lord Gillies.—We have repelled the first exception. The second is not insisted in; and it now remains to decide the third. The objection contained in it is serious, and must, I am afraid, be sustained. A delay of two or three days took place in relieving the sequestration; and as it was for so very short a period, I presume the verdict of the jury was not much affected by it. Still, however, it is impossible to say what the effect would have been if the jury had been directed that the landlord was not bound to grant the assignation; and it is this which makes the objection serious. I think the presiding Judge should have directed the jury, whether or not the landlord was bound to assign to a third party. There could have been no question of damages on this head if the landlord was not so bound; and this being the main question, the defender was entitled to insist for the determination of it by the Judge. In these circumstances, I am compelled to say that I think the exception must be sustained.

Lord Mackenzie.—I am compelled to be of the same opinion. We must look to the proceedings in the House of Lords, where the material point was fixed. In the former trial, the presiding Judge directed the jury, that the defender was liable in damages for not having relieved the sequestration. Then a bill of exceptions was brought, and we, thinking that we were entitled to look at the whole circumstances of the case, found that the presiding Judge was justified in his direction. Then there was an appeal to the House of Lords, who found that we were not entitled to look beyond what was contained in the bill of exceptions. It only remained, therefore, to consider whether; looking merely to the bill of exceptions, the direction was wrong in point of law. Now, it is perfectly clear, that if the House of Lords had thought that the direction was good in law,—in other words, that a landlord, on tender of payment by a third party, was bound to assign—they would not have reversed our judgment. In reversing it, they must have held that the landlord was not so bound. The law was thus fixed, and though I had some doubts of it before, I have none now. I think the landlord is not bound to assign to a third party. The second trial then takes place, and the presiding Judge declines to direct the jury that the landlord was not bound to have relieved the sequestration. He declined, and left the jury to take the law on that point as they pleased. The question, whether or not this exception is valid, is just in other words, whether or not the law so declined to be laid down, was a material element in the cause? If it was not material, I could not think that, in not laying it down, there was any failure to direct. A Judge might be asked to lay down the law on points which had no bearing on the trial; and it never could be maintained, that if parties were so unreasonable as to ask it, he could be bound to read over all Erskine to the jury. But, on the other hand, if the law was important, and a wrong opinion of the jury with regard to it was likely to influence their verdict, I think the declination to direct was a good exception. When the law is material to the cause, the Judge is no more entitled to decline directing than he is to direct erroneously. In the present case, I think the law was material; and I am therefore bound to hold that the exception must be sustained.

Lord Fullerton.—I am of the same opinion. In order to support the exception, it is necessary to make out that the law declined to be laid down was sound and pertinent to the cause. Now, I agree with Lord Mackenzie that the law is sound, and has been fixed by the House of Lords. Before it was so fixed, I held the same opinion. In general, when an assignation is claimed by a party paying a debt, there is merely a question of

equity. The party receiving the payment has no interest to object to the assignation. He has received his money, and while the assignation cannot hurt him, it may be of essential consequence to the third party receiving it. The case of a landlord is different. He has the clearest of all interest to use sequestration for the payment of his rent; but he has, at the same time, the clearest of all interests not to allow the sequestration to be kept up against his tenant after he has received payment. On this ground I think he is entitled to decline granting an assignation. Holding, then, that the law sought to be laid down was good, the next question is, was it pertinent to the cause? It certainly was. The view which the jury took of it must have materially influenced their verdict; and therefore, I think the Judge was not entitled to decline directing with regard to it.

Lord President concurred.

The Court sustained the third exception.

For Col. Gordon, Rutherford, C. Robertson; John Hunter, W.S., Agent.—For J. and J. Graham, Robertson; M. Lothian, S.S.C., Agent.—Jury Clerk.—[H. B.]

8th March 1842.

FIRST DIVISION.—(H. B.)

No. 154.—JOHN KIRKWOOD, Junior, Claimant and Advocate, v. JOHN THOMAS KEELING, Claimant and Respondent.

Service—Brieves, Competing—Succession—*A father having settled his property on his daughter in liferent, exclusive of the jus mariti, and his children in fee; "whom failing before majority or marriage, to the nearest lawful heir or heirs of my said daughter"—Held, on the failure of the children, that the cousin-german of the daughter was preferable to a brother of her husband.*

John Little had an only daughter, Isabella Little, who was married to Thomas Kirkwood, by whom she had two daughters, Isabella Kirkwood and Janet Kirkwood. By deed of settlement, John Little conveyed to Isabella Little

"in liferent, but for her liferent use alienably, during all the days and years of her lifetime, secluding the *jus mariti* or right of administration of her present husband, or any future husband she may have, and after her death (seclusive as therein before and after mentioned), to and in favour of the said Isabella Kirkwood and Janet Kirkwood, as also such other child or children as may be procreated between the said Thomas Kirkwood and my said daughter, without distinction of sex, equally among them, or share and share alike; whom all failing the said children before majority or marriage, to the nearest lawful heir or heirs of Isabella Little, my said daughter, in fee and heritage, heritably and irredeemably, all and sundry lands, heritages, tenements, tacks, and whole other heritable subjects pertaining or belonging, or that may pertain and belong to me at the time of my death, except the liferent provision granted by me in favour of my wife as after specially provided, and particularly without prejudice to the generality," the several subjects therein specially described.

After John Little's death, his daughter Isabella Little or Kirkwood, and granddaughters Isabella and Janet Kirkwood, were infeft in the heritable subjects conveyed by the settlement for their respective rights of liferent and fee.

Isabella Little or Kirkwood died in 1831,—her daughters, Isabella and Janet, in 1837 and 1838 respectively, in minority and unmarried, and shortly after, her husband Thomas Kirkwood.

With the view of taking up John Little's property, as conveyed by his settlement, competing brieves were taken out by John Kirkwood, junior, the only brother

of Thomas Kirkwood, and by John Thomas Keeling, a nephew of John Little by his only sister Jane Little.

The brieves having been advocated from the Sheriff of Lanarkshire,

Kirkwood *pleaded*—1. The claimant, John Kirkwood, junior, as the heir-at-law of Isabella and Janet Kirkwood, is alone in that character entitled to the subjects in question, and to expedite a special service for the purpose of taking them up. 2. The claimant, John Thomas Keeling, not being in fact the nearest lawful heir of Isabella Little, the mother of Isabella and Janet Kirkwood, has no right to the subjects in question, even supposing his construction of John Little's deed of settlement were sound, and is not entitled to oppose the service of the present claimant. 3. Even assuming that the propinquity of the claimant, John Thomas Keeling, were capable of being instructed, he has no right to the subjects in question. By the true conception and meaning of John Little's deed of settlement, the *spes successionis* constituted in favour of Isabella Little's heirs, was made to depend on the condition that her daughters, Isabella and Janet Kirkwood, should fail before majority or marriage; but as these parties did not fail before majority or marriage, but, on the contrary, took up, and died vest and seised in the subjects in question, the subsequent destination in favour of Isabella Little's heirs was evacuated, and came entirely to an end.

Keeling *pleaded*—The testator's only grandchildren, Isabella and Janet Kirkwood, having failed by decease, before majority or marriage, the claimant, by the express destination in said disposition and settlement, is entitled to the fee of the subjects in question, as being the nearest lawful heir of Isabella Little, the testator's daughter.

The Lord Ordinary pronounced the following interlocutors:

"10th February 1842.—The Lord Ordinary having heard parties, and considered the process, Finds that the claimant, John Thomas Keeling, is the person who, if he shall establish the fact of his being the nearest lawful heir of Isabella Little, is entitled to succeed in this competition, and decerns accordingly: *Quoad ultra*, continues the cause until the retour of the brieve shall have been made and reported.

"*Note*.—The question, who is entitled to succeed, is purely a question as to the grantor's intention, as deduced from the whole words of the deed; and if this intention, so deduced, be doubtful, then the most precise language is incapable of expressing the simplest thought.

"The grantor had a daughter, and through her, two granddaughters. He anticipated the event which has actually happened, of the granddaughters dying unmarried and in minority; in reference to which his object plainly was, to keep his property in his own family, instead of letting it go into the family of their father. In order to attain this object, he declares, by the clearest possible mark, who is to succeed after this their failure. He does not leave the law to settle it, but declares it himself; and his destination is to his daughter in liferent, for her liferent use alienably, and her two children in fee, equally; 'whom all failing the said children before majority or marriage, to the nearest lawful heir or heirs of the said Isabella Little' (his daughter.) The grandchildren survived the grantor, and died in minority and unmarried; and it is admitted that the claimant Keeling is the nearest lawful heir of Isabella Little. Nevertheless, he is opposed by the person who, through their father, is the nearest heir, not of Isabella Little the mother, but of the deceased unmarried minors.

"The ground of this opposition is, that the children having survived the grantor, the property vested in them, and conse-

quently descended to their heirs; and in exposition and defence of this construction, recourse is had to all the mysteries of substitution and institution. The answer to all this consists in merely reading the words of the deed. Can failing before marriage or majority be held to be the same with failing *before me*? Is not Keeling the heir of Isabella Little? And is it not declared that the heir of Isabella Little shall succeed, if, as has happened, her children should die before majority or marriage? Other clauses in the deed are referred to, in order to show that this could not have been what the granter meant, but (as the Lord Ordinary thinks) with singularly bad success; for every subsequent word corroborates the dispositive clause."

"10th February 1842.—The Lord Ordinary having heard parties, and considered the process, Finds that the claimant, John Kirkwood, junior, is not entitled to succeed; dismisses his claim, and finds that he has no right to oppose the service of John Thomas Keeling; finds him liable in expenses in this competition, and decerns accordingly: *Quoad ultra*, continues this cause until the retour of the briefs shall have been made and reported.

"Note.—The Lord Ordinary refers to his note in the first case of Keeling against Kirkwood."

Kirkwood reclaimed, but the Court, without calling on the respondent's counsel, *adhered*.

Lord Ordinary, Cockburn.—*For Kirkwood*, Dean of Faculty (Wood), Macfarlane; J. F. Wilkie, Agent.—*For Keeling*, Rutherford, Russell; John Cullen, W. S., Agent.—B. Clerk. —[H.B.]

8th March 1842.

SECOND DIVISION.—(J.W.)

No. 155.—PATRICK MILNE, Pursuer, v. CHARLES MELVILLE, Defender.

Process.—Decreet.—Reduction.—Suspension.—Advocation.—A party presented an application for interdict to the Magistrates of a burgh, which was granted, and afterwards made perpetual, accompanied with certain findings, reserving to either party to take any competent course to have the judgment applied, and allowing extract as of an interim decret. The petitioner extracted the decret, and received payment of his expenses.—Held that a reduction of the interlocutor was competent.

The parties in this action are conterminous proprietors, and the gable which divides their properties is alleged to be mutual. The pursuer having occasion to enlarge his premises, took down the gable with, as he alleges, the consent of the defender; but in the course of rebuilding it, he made the foundation of the new gable six or eight inches thicker than that of the old, and, it is said, also encroached upon some vacant ground. In consequence, the defender applied to the Magistrates of Dundee for an interdict against him, and craved that he should be ordained to restore the defender's property to the same state in which it was previous to the pursuer's operations. The Magistrates granted interim interdict, and on the 14th March 1838, pronounced an interlocutor, finding that whether the gable-wall, mentioned in said action, belonged wholly to the said Charles Melville or not, at least the said Charles Melville had such right in the said wall as deprived the said Patrick Milne of the right of taking down the wall at his own hand, and therefore declared the interdict which had previously been granted perpetual, and ordained the said Patrick Milne immediately to restore the wall as nearly as possible to the state it was in before his operations were begun. On the 24th March 1838, the Magistrates, finding that the interdict applied only to the gable-wall, and not to the projec-

tion on the vacant ground, remitted to Mr William Scott, superintendent of public works in Dundee, to superintend, at the cost of the said Patrick Milne, the restoring of the wall, and carrying of the judgment of the Court into effect. The pursuer having been found liable in expenses, the Magistrates, on the 31st March 1838, approved of the clerk's report upon the account of the same, and decerned. On the 7th June 1838, the Magistrates found, that however clear it might appear that the said Charles Melville would not be injured by the foundation of the wall projecting under ground on his property, yet the said Patrick Milne was not entitled to make such projection to any extent whatever, unless in so far as there was clear evidence that the old wall taken down did so project; that wherever there was doubt or want of evidence as to whether there had been a stooling or otherwise, the presumptions must be against the said Patrick Milne, and decerned accordingly; and, with the instructions therein contained, remitted of new to the said inspector. On the 11th of July 1838, the Magistrates recalled the remit and appointment of the inspector, and of new decerned in terms of the foresaid interlocutors, of date the 14th, 24th, and 31st days of March, and 7th day of June 1838, reserving to either party to take any competent course for having the said judgments applied, and allowed extract of the said decrees to be issued as of an interim decret, after the lapse of twenty-four hours; found the said Patrick Milne liable in the expenses incurred since the last taxation; appointed an account thereof to be lodged and taxed, and decerned. The interim decret was extracted as allowed; and the various sums of expenses decerned for, amounting to £30. 2. 2., were paid by the pursuer.

A second application was made by the defender on the 16th July,—the proceedings on which formed the subject of advocacy—*vide ante*, p. 48.

The present action was brought for the purpose of reducing the interlocutors pronounced under the first.

Pleaded in defence—1. The action is incompetent, in respect that the cause in which the interlocutors or judgments brought under challenge were pronounced has not been exhausted, but is still in dependence. 2. The action is farther irrelevant and incompetent, in respect that the pursuer is barred, by acquiescence and homologation, from challenging the interlocutors and judgments in question, and in respect that he has libelled no relevant grounds to entitle him to insist in any such challenge. 3. There are no relevant grounds libelled under or in reference to which the pursuer is entitled to conclude for repetition of the sums of expenses in question,—these sums having been voluntarily paid by him, and fairly received by the defender, several years ago, without protest, reservation, or qualification of any sort on the part of the pursuer.

The Lord Ordinary pronounced the following interlocutor:

"18th February 1842.—Having heard the counsel for the parties, repels the preliminary defences; and in respect the defender now intimates that he does not mean to acquiesce in this judgment, finds him liable in expenses; and remits the account thereof, when lodged, to the auditor to tax and to report."

The defender reclaimed, and *argued*—That the judgment was only interlocutory, and the decree *ad interim*; reduction therefore was incompetent; and

even an advocacy was so only on special grounds, and with consent of the Inferior Judge: Coates, December 1835. The pursuer must wait for a final judgment; and if he then advocate, he will be required to find caution for expenses.

Answered.—Not an interim decree, but a decree of which an extract was allowed to be issued as of an interim decret. It was extracted, and the pursuer compelled to pay the expenses. This is the distinction between the present and the case of Coates. In the advocacy of the subsequent proceedings the defender pleads *res judicata*; and the pursuer now brings a reduction of the prior judgments. If a decree be not extracted, advocacy is the proper course; and if extracted, suspension. But here the pursuer has paid the expenses, and his only remedy is by reduction. Whether a reduction of an interlocutor is competent or not, depends on circumstances. It has been held, that where an interdict has been made perpetual, the interlocutor may be reduced.

Lord Medwyn.—On the explanation given, I am satisfied the interlocutor is right. The reservation to either party to take any competent step to have the judgments applied, does not exhaust the cause, in so far as it allowed the defender here to go on; but he did not choose to do so. He applied for extract and obtained it, and recovered his expenses. In this situation, is there any thing to prevent the party to proceed by reduction? The rule is, where advocacy or suspension is competent, reduction is not to be resorted to for the purpose of being relieved from finding caution for expenses. But I cannot see that advocacy or suspension are competent after decret has been extracted; and the party has refused to go on under the reservation in his favour. He proceeded in an altogether new action, which is now under advocacy.

Lord Moncreiff.—I have not the least apprehension that we are interfering with the rule as to suspensions and advocations.

Lord Justice-Clerk concurred.

Lord Meadowbank absent.

The Court *adhered*, in respect that the decret was extracted.

Lord Ordinary, Murray.—*Act*. Deas; Brown and Miller, W.S., *Agents*.—*Alt*. Rutherford, Macfarlane; Greig and Morton, W.S., *Agents*.—[J.W.]

8th March 1842.

SECOND DIVISION.—(J. W.)

No. 156.—JOHN BALFOUR, *Pursuer*, v. SIR ARCHIBALD CAMPBELL and OTHERS, *Balfour's Trustees, Defenders*.

Proof.—Presumption.—Debitor non presumitur donare.—Testament.—Legacy.—*A party under an obligation to pay to A, or to the heirs succeeding him in the lands of B, a sum of £3000 on her own death or marriage, bequeathed to him, his heirs, executors, and assignees, a legacy of £20,000, payable the first term after her death—Held that the debt was not extinguished by the legacy.*

The late John Balfour of Balbirnie, the grandfather of the pursuer, died in 1813. A few weeks before his death, being desirous of increasing the provisions previously settled by him on his wife and daughters, he signed an informal writing, dated 4th December 1813, but which was neither holograph of him, except as to the sums of the several provisions, nor duly tested, whereby, *inter alia*, he bound himself to pay to his wife, Mrs Balfour, an additional annuity of £200, and a capital sum of £3000 for enabling her to purchase a dwelling-house after his decease, the rights and titles

to which were to be taken in favour of herself in life-rent, and, after her decease, of Miss Anne Balfour, her youngest daughter, also in life-rent, during her life and remaining unmarried; and after the death both of his wife and Miss Balfour, or at the death of Mrs Balfour and the marriage of Miss Balfour, then to his eldest son, Robert Balfour, or to the heir succeeding to him in the lands and estate of Balbirnie.

Shortly after the death of Mr Balfour, and in fulfilment of the intentions expressed by him, his son, Robert Balfour, then of Balbirnie, granted a bond of provision, dated 31st May 1814, in favour of his mother and sisters. *Inter alia*, he became bound to make payment of the sum of £3000 for purchasing a dwelling-house for his mother,

"the rights and title-deeds of which dwelling-house she should be bound and obliged to take to and in favour of herself in life-rent, during all the days of her life; and after her decease, to and in favour of the said Miss Anne Balfour, his sister, also in life-rent, during all the days of her life and remaining unmarried; and after the death of both his said mother and youngest sister, or the death of his mother and the marriage of his said sister, then to himself, or the heirs succeeding to him in the said lands and estate of Balbirnie, in fee."

In regard to this sum, the interest was regularly paid to Mrs Balfour down to Whitsunday 1819; and the capital itself was shortly thereafter paid to Miss Anne Balfour upon occasion of her purchasing a dwelling-house in Charlotte Square, Edinburgh, in June 1819; the titles to which were taken in favour of Mrs Balfour in life-rent, and of Miss Anne Balfour herself in fee, instead of being taken in favour of Miss Balfour in life-rent, and so long as she should remain unmarried, and to Robert Balfour, or the heirs succeeding him in the estate of Balbirnie, in fee. In consequence of this Miss Balfour granted the following obligatory letter:

"*Edinburgh, 2d June 1819.*—MY DEAR BROTHER, As you have, agreeably to our father's settlement, advanced to me the sum of £3000 Sterling, with which, and £400 more of my own, I have purchased a house in Charlotte Square, and taken the right to it in favour of our mother in life-rent, and of myself in fee, or property; I hereby, in terms also of the said settlement, oblige myself to repay to you or your heirs the sum of £3000 so advanced by you, on the death of the longest liver of my mother and myself, or on her death and my own marriage, and to grant you a regular bond on stamped paper for the money, if you deem it necessary. I am," &c.

(Signed) "ANNE BALFOUR."

Miss Balfour never granted any regular bond,—her letter having been considered as quite sufficient.

By her deed of settlement, of date 28th April 1835, Miss Balfour, among other legacies and bequests, left to her brother, General Robert Balfour, the sum of £16,000, to each of his four sons the sum of £1000, and to each of his four daughters the sum of £2000. By a codicil, dated 9th April 1838, Miss Balfour recalled the legacy of £16,000 to General Balfour, he being now dead, and also the legacy of £1000 to Captain John Balfour, now of Balbirnie, the present pursuer, and in place thereof she legated and bequeathed to him the sum of £20,000. The legacies were to be payable "to the said legatees, and their respective heirs, executors or assignees, at the first term of Whitsunday or Martinmas after my decease." Miss Balfour died in 1839, leaving a trust-disposition and settlement, dated 28th April 1835, whereby she conveyed her whole estate, heritable and moveable, in favour of Sir

Archibald Campbell of Succoth and others, as trustees for the uses, ends, and purposes therein mentioned; and, *inter alia*, for payment of all the just and lawful debts that should be due by her at the time of her death.

The present action was brought for payment of the sum of £3000, in terms of the obligatory letter granted by Miss Balfour to the father of the pursuer.

Pleaded for the pursuer—1. The pursuer, as the heir succeeding to his father, the late Lieutenant-General Balfour, in the estate of Balbirnie, being at the death of Miss Anne Balfour the party in right *destinatione* to the debt of £3000, which, by her obligatory letter, she had bound herself to pay to the said Lieutenant-General Balfour and his heirs, in terms of her father's settlements; and the said debt being still resting-owing, the pursuer is entitled to decree for payment against the defenders, her testamentary trustees, in terms of the conclusions of his action. 2. Under the circumstances which here occur, the terms of Miss Balfour's settlements afford no ground for presuming that she intended the legacy bequeathed by her to the pursuer to be in satisfaction of the debt in question. On the contrary, the presumptions of the case, with reference to the relative situation of the parties—the amount of the residuary funds—the inductive causes expressed by the testatrix for leaving this legacy—the nature, destination, and term of payment of the bequest itself, as contrasted with those of the debt due by her,—are all in favour of an opposite conclusion. 3. Independently of any evidence of intention arising from the terms and tenor of the testamentary deed, and supposing a sufficiency of funds for payment of both debts and legacies, there is no rule of law for holding that a legacy is to be imputed in extinction of a debt due by the testator to the legatee; nor is there any sound principle or reason, in common sense, upon which such a proposition can be maintained.

Pleaded for the defenders—1. The obligation incurred by Miss Balfour, under her letter of 2d June 1819, to repay on her death to General Balfour or his heirs the £3000 received from him, and expended by her in the purchase of a house, has been fulfilled, by the legacy to a much larger amount having been left by her, first to the General, and upon his predecease to his heir the pursuer, and having been paid to the latter. 2. Under the well-known maxim of law, *debitor non presumitur donare*, the presumption is that Miss Balfour meant to include the said £3000 in the £20,000 bequeathed by her to the pursuer, and had no intention that, over and above the said £20,000, he was to obtain payment of the said £3000 from her funds. 3. Not only is there nothing in the terms of the deeds of settlement, or in the facts and circumstances of the case, to exclude the operation of the above-mentioned presumption of law; but, on the contrary, these show it to have been the understanding that Miss Balfour's liberal provision to her brother and his heir, was to sopite and extinguish all legal claim at their instance against her estate, and that the pursuer was not to receive from her funds the said £3000, over and above the £20,000 bequeathed by her.

The Lord Ordinary having appointed mutual cases, made avizandum with the cause, accompanying his interlocutor with the following note:

"This case is taken to report, as it is prepared for the consideration of the Court by very learned and able papers on each side; and no question has occurred in which either the point now at issue, or any one precisely analogous with it, has been hitherto decided in our practice.

"The pursuer, Mr Balfour of Balbirnie, has commenced the present action against the testamentary trustees of his deceased aunt, Miss Balfour of Kingsdale, to constitute a debt of £3000, alleged to have been due to him as representative of his father, the late General Balfour, at Miss Balfour's death. The defenders admit the original constitution of the debt, but they plead that it was *satisfied* and *paid* by a legacy of much larger amount (£20,000), which Miss Balfour directed to be paid to the pursuer, and which of course he has since received.

"There can be no doubt that the maxim *debitor non presumitur donare*, is a rule of admitted authority in our law; and if a legacy, payable under a settlement containing the special clauses which occurs in this deed, had ever been held to sanction the application of this legal presumption, the Lord Ordinary would have readily given effect to it in the present instance, as there are strong circumstances to raise a conjecture in many minds, if not a legal inference, that Miss Balfour really meant the legacy to be a satisfaction of the debt. The claim of the pursuer was not exigible till Miss Balfour's death. But at the first legal term thereafter (*i. e.*, as soon as any creditor could by the law of Scotland demand payment of any debt), she directed a sum more than six-fold exceeding the claim, to be paid to the creditor, and that out of the proceeds of the estate or funds from which the debt fell to be paid. No doubt there was no reference in the settlement to connect the legacy with the debt; but it may not unreasonably be supposed that this was attributable to the circumstance that the debt was constituted by a voucher, written by the lady herself at a distance of time backward, and that it had escaped her recollection at the date of the settlement, and that the voucher written by the testatrix herself, was unknown to the man of business who framed the settlement.

"On mature consideration, however, it may be greatly doubted if the terms and structure of the settlement do not effectually exclude in law the application of the presumption in the present case. Holding that the maker of the settlement, like testators in general, must be presumed to have known the state of her own affairs, she made it a primary direction of this settlement, that all her just and lawful debts should be paid; and thereafter, and as it were out of the *residus*, she legated and bequeathed £20,000 to the pursuer. It is rather thought that the first direction in the settlement, to pay all the debts of the testatrix, is not affected by the subsequent legacy bequeathed to the pursuer.

"With regard to the *authorities*, there does not appear to have been any case in our own Court, in which the effect of a legacy to a creditor, bequeathed under a settlement containing such clauses as the present, has been considered by the Court. But the law has been laid down in the English Courts, in cases approaching very near to the present, and that deserve particular attention, as the same rules of construction of testaments, founded on the presumed meaning and intention of the testator which have been adopted in our own practice from the civil law, appear also to be recognised in the law of England. In that view, the doctrine applicable to this question, in a book of the highest authority in English practice, deserves particular attention. 'The intention of the testator being the prevailing rule to go by in the construction of wills, it has been from thence established as doctrine, that wherever a person, by his will, gives a legacy as great, or greater than the debt he owes to the legatee, that such legacy should be a satisfaction of the debt, on the presumption that a man must be intended just before he is bountiful, and that his intent is to pay a debt, and not to give a legacy.—Bacon's Abridgement, *verba Legacies*,' D.

"But it is afterwards explained that this general rule has long been viewed as resting on a very questionable foundation in equity and right construction; and accordingly, so far back as in 1743, Lord Hardwicke observed, that the maxim '*Debitor non presumitur donare* would not hold, if it was to be reconsidered; for the Court have always shown some dissatisfaction at the rule, and endeavoured, if there is any room, to distinguish cases out of it.' The same very learned Judge added, in a sub-

sequent case, that 'legacies naturally imply a bounty, and therefore, though the Court of late have not altogether disavowed the doctrine of satisfaction, yet they have been very inclinable to lay hold of any circumstance to distinguish the latter from the former cases.' 3 Atkins, p. 96. There do not appear to be any subsequent authorities in England, at variance with the law as laid down in these cases. On the contrary, Lord Alvanley, in 1797, seems to have treated the maxim now founded on as entitled to no extension. 3 Vesey, jun. p. 561.

"From these and other precedents, it appears to be now established beyond question in England, that the maxim now pleaded in defence is not maintainable in certain classes of settlements which deserve to be noted.

"1st, A legacy of greater amount than the debt, cannot be pleaded as a satisfaction of the latter, where the testator has separately directed his debts to be paid. That was laid down in the case of Richardson above cited. "W., by a will, gave to her servant G. £500, to be paid her within three months after W.'s death; and in another part says, 'I give £5 a-piece to the rest of my servants, but not to G., because I have done for her very well before;' and by a latter clause gives her lands in trust to pay her debts and legacies. W. at her death, owed G. £200 on bond. On the circumstances of this will, there is sufficient to take away the presumption that the legacy was given in satisfaction of the debt." Richardson, 3 Atkins, p. 65.

"The preceding case was, to a certain extent, less favourable for the creditor than the present, as the direction to pay the testator's debts in Miss Balfour's settlement, precedes the legacy; while in the case referred to, that direction occurred in a clause of the deed posterior to the bequest. Nevertheless, Lord Hardwicke found both legacy and debt claimable. It is said that this judgment proceeded on the ground that the legacy was granted to a servant, and that a free gratuity is always presumed in legacies to persons of that class; and certainly a part of Lord Hardwicke's remarks affords some countenance for that view of the case. But his opinion takes a wider scope; and when his Lordship observed that the creditor was placed, in respect of her legacy, in a class of parties in the will who were all to receive free donations of a specified amount from the testator; and that it was not reasonable she should get less than the others, which she would do if her prior claim were deducted from her legacy, the same objection applies to all similar cases arising under such settlements as that which is the subject of the present question.

"2d, In the construction of English settlements, the legacy and debt must be payable at the same time, in order to found a plea of satisfaction, on the principle that a debt instantly exigible cannot be held as set off, or intended to be extinguished by a contingent legacy which may never become due. Hence the most slender discrepancy between the date of payment of the legacy and debt, has been held to take the case out of the rule. Thus, in the case of Clark and Sewel, already referred to (3 Atkins, p. 96), it was laid down that 'a legacy that ought to be deemed a satisfaction, must take place immediately at the testator's death; for a debt being due, then the legacy must be so too, and not being payable in this case till a month after, the Court held it to be no satisfaction.'

"This would be a direct authority in favour of the pursuer's claim, if the law of Scotland was precisely the same as that of England relative to the vesting of legacies, and the obligations of executors in the payment of debts. But in Scotland it has generally been held, that legacies bequeathed in the terms used in Miss Balfour's settlement, vest a morte testatoris, while even the onerous debts of the defunct cannot be legally demanded till six months after his decease. If the pursuer's claim, therefore, depended solely on the supposed distinction now adverted to, it would be very doubtful how far it could receive effect, consistent with the recognised principles of our law.

"Generally, it is for the Court to consider whether the rules admitted in English practice, in the construction of such settlements as the present, are sound and reasonable in themselves; and even if they are, whether they be sufficient, on their own merits, to rule the present question."

At advising,

Lord Medwyn.—I have no wish to decide this case upon any

rules in English practice. The principle in our law is to give effect to the intention of the testator; and in determining what it is, the maxim *debitor non presumitur donare* must be attended to. It is, however, only a presumption, and must yield either to a stronger presumption, or to express intention. It is said that in the case of a legacy, the maxim is excluded; but a legacy does not always exclude it: Spaden and Hardie. I do not think the legacy included the debt, and am therefore for repelling the defences.

Lord Moncreiff.—This is properly a question of construction on the deeds and writings of the testator; but it is one of intention. There is no doubt of the rule *debitor non presumitur donare*; but it does not take effect in every case. It is liable to exception whenever circumstances raise a contrary presumption or intention of donation. In all the cases the rule is general, but liable to exceptions; and it were unreasonable to lay it down that the maxim is excluded in *mortis causa* deeds. Smith is directly to the contrary. In that case there was a legacy, and yet the rule applied. Spaden does not apply, in my view. I come therefore to the special case; and it is material that the £20,000 is expressly bequeathed as a legacy unconnected with the debt of £3000. The deed of the father is specific as to the title to the house being taken to the heir; and when a different arrangement was made, the letter granted by Miss Balfour was conformable. If the pursuer had predeceased the testator, the legacy would have been payable to his executors, and not to his heirs. This might have been a different person from the heir of Balbirnie, to whom the debt was specially payable. If so, it is exceedingly difficult to find any link of connection between the debt and the legacy;—both must have been paid. The testator orders the trustees to pay all debts, and this affords an explanation why no special mention is made of the £3000. The presumption is that Miss Balfour knew that it was due, and that she had provided generally for its payment among her other debts. Judging upon the principles of law, and the facts of the case, I don't think that there is room for the maxim *debitor non presumitur donare*. The maxim might apply to such a case; but I do not think it takes effect here.

Lord Justice-Clerk.—I concur. The plea maintained by the pursuer would exclude the application of the maxim—or rather the relevancy of a defence founded on the maxim—in all cases of legacy. But the cases overrule this plea. In all the cases the point is, whether the maxim took effect; but there is no general rule. In each particular case the intention of the testator is to be regarded. We are not driven to adopt the distinctions of the English law. We have not fallen into their error, and do not require to resort to their devices to redeem it. I do not attach much importance to the direction to pay debts. The trustees, by their intromissions, were as much bound to pay, as although expressly directed to do so. I don't profess to lay down any general rule on the matter; and if this be said to leave great uncertainty, the same result seems to obtain in England. I do not see how justice can be attained otherwise than by looking to the case with a view to give effect to the testator's own intention. No doubt, in attempting to ascertain it, we must take along with us all legal presumptions. Under the circumstances, I do not think the legacy included the debt; and if the intention be clear, I do not think the difference in the terms of payment material.

Lord Meadowbank absent.

The Court pronounced decree in terms of the libel.

Pursuer's Authorities.—Ersk. III. 9, 6. Stair, I. 8, 2. Crookshank, Mor. 11,489. Stair, III. 8, 20; IV. 42, 21. Spaden, 14th January 1819; Fac. Coll., and Shaw's Appeal Cases, Vol. I. p. 164, 5th July 1822. Hardie, 17th January 1821; Fac. Coll. Mascard. de prob., Vol. I. Conclu. 333. Summar. 2. Mantica, Lib. X. t. 2, Summ. 1. Roper, 3d ed., Vol. II. pp. 31 to 39, and 50 and 51.

Defenders' Authorities.—Mascardus, folio edit., Vol. I. p. 342, Con. 333. Menochius, Duodecimo edit. p. 1107, Lib. IV. Pres. cix. Williams, Vol. II. p. 929, 2d edit. Roper, Vol. II. p. 28, 3d edit. Wallace, 13th November 1624; Mor. 6345. Davidson, 25th June 1706; Mor. 11,465. Burnet, 24th February 1709; Mor. 11,467. Ersk. III. 3, 93. See Cases in

Mor. *voce* Presumption, § 5. Fleming, 19th November 1661; Mor. 11,463. Greig, 19th February 1768; Mor. 11,454. Fenton, 23d January 1673; Mor. 11,491. Smith, 29th June 1841.

Lord Ordinary, Cuningbame. — *Act*. Solicitor - General (M'Neill), Miller; John Yule, W.S., *Agent*. — *Alt*. Rutherford, Tait; Tait and Crichton, W.S., *Agents*. — F. Clerk. — [J.W.]

8th March 1842.

SECOND DIVISION. — (J.W.)

No. 157. — WILLIAM RATTEAY, *Pursuer*, v. JOHN MEADOWS WHITE and MANDATORY, *Defenders*.

Bankrupt. — Statute 1 and 2 Vict. c. 110 — Assignee, Judicial — Real Estate, Vesting of. — *Held that the vesting order in the Insolvent Debtors' Act, 1 and 2 Vict. c. 110, comprehended the real estate of the bankrupt situated in Scotland, and, being registered in the General Register of Seisins, excluded an action of adjudication at the instance of a creditor competing with the judicial assignee.*

Archibald Torry, formerly merchant in Edinburgh, having gone to London, where he was imprisoned for debt, applied to the Court for the Relief of Insolvent Debtors to be discharged, in terms of the Statute 1 and 2 Vict. c. 110. Whereupon an order was made by the Court, in terms of the Statute, "vesting all his real and personal estate and effects, *both within this realm and abroad*," in Mr Samuel Sturges of Lincoln's-Inn-Fields, as provisional assignee. Afterwards the Court ordered that the defender, Mr John Meadows White of Lincoln's-Inn-Fields, "shall be, and he is hereby appointed assignee of the estate and effects of the said Archibald Torry, for the purposes of the Statute." Both the original order in favour of the provisional assignee, and also the appointment in favour of Mr Meadows White, were recorded in the General Register of Seisins.

The pursuer, Mr Ratteay, as the indorsee or assignee of Thomas Smith Fairley, writer in Edinburgh, raised two several processes of adjudication, as a creditor of Torry, for the purpose of attaching and transferring to him certain decrees of adjudication which Torry had obtained against the Earl of Buchan; and the defender put in a minute to the Lord Ordinary, praying his Lordship to sist him and his mandatory as defenders, and to allow them to put in defences. The pursuer having maintained that the defender, Mr Meadows White, as assignee under the Statute, had no right to claim any part of Mr Torry's real estate in Scotland, the Lord Ordinary pronounced this interlocutor:

"12th February 1841. — The Lord Ordinary having heard parties on the minute, No. 8 of process, by the English assignee, allows him to lodge defences within eight days, but under this explanation, that his being allowed to do so is not to be held as implying that the real estate of the bankrupt in Scotland is vested in him, or as excluding any of the pleas of the pursuer, but is merely intended to put the cause into proper shape for having the pleas of both parties stated and decided."

Afterwards defences having been put in, the record was closed, and the Lord Ordinary pronounced an interlocutor reporting the cause to the Inner-House.

The clauses in issue were: Section 37,

"That all the real and personal estate and effects of such prisoner, both within this realm and abroad (except the wearing apparel, bedding and other such necessities of such person and

his family, and the working tools and implements of such prisoner, not exceeding in the whole the value of £20), and all the future estate, right, title, interest, and trust of such prisoner, in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, &c., shall be vested in the provisional assignee for the time being of the estate and effects of insolvent debtors in England, and such order shall be entered of record in the same Court, and such notice thereof shall be published as the said Court shall direct; and such order, when so made, shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee," &c.

It is further enacted, section 45,

"That it shall be lawful for the said Court for the Relief of Insolvent Debtors, at any time after making any such vesting order as aforesaid, as to the same Court shall seem expedient, to appoint a proper person or persons to be assignee or assignees of the estate and effects of such prisoner for the purposes of this Act; and when such assignee or assignees shall have signified to the said Court his or their acceptance of the said appointment, the estate, effects, rights and powers of such prisoner, vested in such provisional assignee as aforesaid, shall immediately, by virtue of such appointment, and without any conveyance or assignment, vest in the said assignee or assignees in trust for the benefit of the creditors of such prisoner, in respect of, or in proportion to, their respective debts according to the provisions of this Act, and every such appointment shall, after acceptance thereof, be entered of record of the said Court, and such notice thereof shall be published as the said Court shall direct; and every person so appointed assignee, shall be deemed to be an officer of the said Court, and shall be liable as such to the control thereof."

It is further enacted, section 46:

"That a copy of any order, under this Act, vesting the estate and effects of any such prisoner in the provisional assignee of the estates and effects of insolvent debtors, or of the appointment under the provision last hereinbefore contained, of an assignee or assignees of such estate and effects, such copy being made upon parchment, and purporting to have the certificate of the provisional assignee of the said Court or his deputy appointed for that purpose, indorsed thereon, and to be sealed with the seal of the said Court, shall, in all courts and places, and without further proof, be recognised and received as sufficient evidence of such order and appointment respectively having been made, and of the title of the provisional assignee, and such other assignee or assignees respectively under the same; provided always, that where, according to any laws now in force, any conveyance or assignment of any real or personal property of an insolvent debtor would be required to be registered, enrolled, or recorded, in any registry-office in England, Wales, or Ireland, or in any registry-office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to her Majesty, then, and in every such case, such certified copy, as hereinbefore is described, of such order under this Act, vesting the estate and effects of any prisoner in the provisional assignee of the said Insolvent Debtors' Court, and a like certified copy of the appointment of an assignee or assignees under this Act (if any such appointment shall have been made), shall be registered in the registry-office, court, or place wherein such conveyance or assignment, as last aforesaid, would require to be registered, enrolled, or recorded. And the registry hereby directed, shall have the like effect, to all intents and purposes, as the registry, enrolment, or recording of such conveyance or assignment as last aforesaid, would have had; and the title of any purchaser of any such property as last aforesaid, for valuable consideration, without notice of any such order or appointment as aforesaid, who shall have duly registered, enrolled, or recorded his purchase-deed previously to the registry hereby directed, shall not be invalidated by reason of such order as aforesaid, or by the appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them con-

sequent thereupon respectively, unless a certified copy of such order, and a certified copy of such appointment, if any, shall be registered as aforesaid, within the times following; that is to say, as regards the United Kingdom of Great Britain and Ireland, within two months after the date of such order and appointment respectively, and as regards all other places, within twelve months from the date thereof respectively."

The 121st section provides, "that this Act shall not extend either to Scotland or Ireland, except where expressly mentioned."

At advising, 16th November 1841,

Lord Medwyn.—I never considered a case where I had greater difficulty in forming an opinion;—indeed, I can hardly say that my opinion is the same as when I came to Court this morning. Here the bankrupt is possessed of heritable property in Scotland, against which decree of adjudication is sought at the instance of an alleged creditor. Mr White appears in the process of adjudication, and is allowed to lodge defences, in which he pleads, that by the vesting order, the whole of the heritable estate belonging to the bankrupt is vested in him. The terms of that vesting order are very broad; therefore, the question just comes to be, whether, under the 37th section of the Act, the heritable property belonging to the bankrupt is so vested in Mr White as to entitle him to have the adjudication dismissed? Now, I thought that the two sections in the Act (37 and 46,) had a very marked bearing on each other, and would, if we had to deal with them alone, be decisive on the point; and it is to be observed, that the words of the Bankrupt Act are very similar to, and closely connected with, the Insolvent Act;—indeed, the clause in the one seems to be copied from the other. But the great difficulty is occasioned by the 121st section, where it is said that the provisions of the Act are not to extend to Scotland unless where Scotland is expressly mentioned. In the case for Rattray, p. 22, an illustration of the principles of interpretation for which he contends is stated, and 6 Geo. IV. c. 14, § 135, is quoted, where I did not expect to see it, as it occurs to me to be more favourable to the views of Mr White. I cannot go along with the argument in Rattray's case, p. 23, for this simple reason, that the heritable property must first be in the commissioner before it can be reconveyed. If in the English Courts it has been held that the words "within this realm" embrace Scotland, we can scarcely go against that opinion, as, in the event of an appeal, there can be no doubt how the case would be decided; but in neither minute is it said that there are decided cases on this point. I own that I came to the Court impressed with the notion which is assumed in Rattray's case, that the interpretation of the Insolvent Act must be the same as of the Bankrupt Act—(reads 25th section of Bankrupt Act). In the 26th section there is a remarkable change in the diction. But I would be very much guided by the interpretation which the English Courts put upon the Statutes.

Lord Moncreiff.—I have great difficulty in this case; and the Court is placed in a difficult situation, for the Statute is entirely English; and whoever drew it, must have been profoundly ignorant of the mode of transmitting and vesting property in Scotland. I assent to the rules quoted from Bacon as to the interpretation of Statutes; and in conformity with that rule, when I read the words of the last clause of the Act, that none of its provisions shall extend to Scotland unless where Scotland is expressly mentioned,—and when I find that in the 37th section Scotland is not once named, I should have thought that Scotland could not have been intended to be brought within the enactment, and I still incline to think so. My difficulty is created by the clause relating to the registries; but even here it must be observed, that it is only by implication that Scotland is mentioned. This is a strange clause, and one which I don't understand; it is strange if merely registering is to give a title; for nothing is said of infestment. But unquestionably the implication from this clause is, that Scotch heritage was, upon registry of the vesting order, intended to be vested in the assignee. Then, again, the clause in the vesting order covers Scotland under the words "within this realm or abroad." Now, all this is by implication, and it does seem to me that the clause at the end of the Act must just have been put in with the view

of providing for such a case, where, by possibility, Scotland might be supposed to be embraced, and preventing it being so embraced unless specially mentioned. Unless this was the intention in introducing that last clause, I cannot understand its use at all.

Lord Meadowbank.—I have no difficulty in this case. Looking to the whole history of the bankrupt law, both in England and Scotland, I think that, according to the fair and legitimate construction of the Statute, and of its introductory clause, it was intended to vest a bankrupt's real estate in Scotland in the provisional assignee. For a considerable time it was doubted whether a commission of bankruptcy vested the personal estate of the bankrupt abroad in the assignee, and there was much inconsistency in the decisions on this point. But at length it was settled that the domicile of the bankrupt should regulate his personal estate wherever situated, and that when in Scotland, it should be held conveyed by the commission of bankruptcy. At a later period several eminent lawyers wished to assimilate the laws as to the vesting of a bankrupt's real and personal estate; and the case of Stein, quoted in White's case, p. 4, shows the leaning at that time, and which continued till the 6th Geo. IV. c. 16, was enacted; although Lord Eldon, in the case of Selkirk, put to rights certain objectionable doctrines which had been expressed in that case of Stein. Now, observe what was done by that Statute. Lord Moncreiff has expressed a doubt whether it applies to Scotland, but I have no doubt that the Legislature did contemplate real estate in Scotland, and intended it to vest first in the trustees, and upon their denuding, in the assignee. In short, the Legislature wished to put bankrupts in England, Ireland and Scotland, on the same footing. For any difficulty as to the meaning of the words in section 12, "both within this realm and abroad," is removed by the 64th section, where we have "England, Scotland and Ireland" specified,—a clause which would be an absolute absurdity if the Legislature had not meant to convey the whole property belonging to the bankrupt, whether in England, Scotland or Ireland. Now, having got this, we have a parliamentary interpretation of a parliamentary term, and we are bound by it. It has been said that the words "within this realm or abroad" can only refer to the dominions subject to the Legislature, and that it is absurd to give the words a more extensive signification. I am not sure of this. It seems to me quite competent to make such a statutory provision; and the *jus gentium* would lead foreign countries to give the same interpretation to the clause as that designed by the enacting Legislature. I don't say that this would necessarily follow, but merely that such a provision is competent, and not just an absurdity. Now, observe the provisions of our own Bankrupt Act 2 and 3 Vict. c. 41, § 79—(reads).—We are ignorant of the forms for vesting real estates in England, yet it is enacted that the act and warrant of confirmation shall vest in the trustee all the real estate in England belonging to the bankrupt. In like manner, the framers of the English Bankrupt Act were ignorant of the forms for vesting real estates in Scotland, yet they provide for its vesting in the trustee, and upon his denuding, in the assignee. In short, it was just intended to assimilate the two Acts; and the Legislature, without condescending to particulars, considers it sufficient to say, that the real estate is vested in a particular party, leaving it to him to find out the proper mode of completing the conveyance. But this case does not depend on either of those Statutes, but on the Insolvent Act 1 and 2 Vict. c. 110. Mr Torry applied for the benefit of this Act, and the Court pronounced an order vesting the whole of his property, "within this realm or abroad," in the person of the provisional assignee; and by a subsequent appointment Mr White is made assignee in the room of the provisional assignee. Then under the 46th section of the Act, this gentleman records the vesting order in the Register of Sasines in Scotland; and the real question comes to be, whether the 37th section comprehends real estate in Scotland. If this clause had stood alone, and without limitation, it must have been held to comprehend real property situated in Scotland; but it is said that it is controlled by the provision in the last clause of the Statute, which enacts, that unless expressly mentioned, the Act does not extend to Scotland. Now, I lay aside all implication, and ask whether Scotland is expressly mentioned in the 37th section? It does appear to me

to be expressly mentioned, and I am surprised that there should be any doubt of this. One great object of the Act was to enable the insolvent, in the most effectual manner, to distribute among his creditors his estate, whether in England or abroad, and therefore, it would be most extraordinary if Scotland is to be excluded. If, while facilities are afforded for the distribution among his creditors of all the insolvent's property wherever situated, property in Scotland alone is to be exempted from these provisions. This appears to me to be a construction so singular, that if by any of the ordinary rules of interpretation, we can comprehend Scotland, we must adopt that rule. Now, taking the strictest rule of construction, we are not bound by the last clause of the Statute to hold that the 37th section does not apply to Scotland, unless the eight letters of which "Scotland" is composed be found therein. Suppose the words used had been "North Britain," or "Great Britain," would not these expressions have been equivalent to an express mention of Scotland? Now I say that when we find a term in this 37th section which, in common parlance, in the language of law and of the Courts, and above all, which in parliamentary language and according to parliamentary interpretation comprehends Scotland, we are not entitled to give that term a more limited interpretation. This term is "realm," or "kingdom," which comprehends the whole United Kingdom of Great Britain and Ireland. Thus, in the common parliamentary expression, "Kings and Queens of this realm," is not Scotland comprehended here? And where an enactment is intended to apply to a portion of the realm, the expression invariably used is, "that part of the," &c. Looking to 6 Geo. IV., where the vesting clause, with the exception of a few words, is the same, we find an explanation given of the word "realm," and that it comprehends Scotland. This Statute does the same thing. It provides for the registering the orders in Scotland, although it does not specify in what particular register, and the termination of this clause (§ 46,) to my mind settles the question by the use of the words "Great Britain." This would be an absurdity if no estate had been vested. Now, looking to the effect of the construction which we are called upon to make, viz., to exclude Scotland which is *nominatim* comprehended, to hold the 46th section as unnecessary and of no meaning, it appears to me to be opposing all the sound rules of interpretation; and indeed to be stultifying the Statute itself. Therefore, I am clear of opinion, that under the word "realm," Scotland is comprehended.

The Court being divided, appointed the case to be laid before the other Judges, who returned the following opinions:

Lord President (Boyle), Lords Gillies, Machenzie, Fullerton, Cockburn, Cuninghame, and Murray:

"This is a case of novelty, regarding the interpretation of a recent Statute for the relief of insolvent debtors in England, but it does not appear to be attended with much difficulty, particularly when we keep in view the late alterations that have been adopted by the Legislature with regard both to the English and Scottish bankrupt law.

"Considerable progress was made by the decisions of the Courts of the two countries in bringing the personal estates of bankrupts, wherever situated, under the law of the domicile of the bankrupt, and thereby facilitating their distribution among the creditors; and as far as was consistent with the state of the law as to real property, a similar melioration was manifested both in Scotland and England.

"The important enactment in the English Bankrupt Act of 6th Geo. IV. c. 16, however, put the real estate of the bankrupt equally under the control of the commissioners as the personal estate, and empowered them to convey the same to the assignees for the benefit of the creditors, as effectually as the personal estate.

"The clause in that Statute is quoted at page 5 of the respondent's case, and after declaring in the 12th section that the effect of the commission of bankrupt should be to convey to the commissioners 'all the bankrupt's lands, tenements, and hereditaments, both within this realm and abroad,' it unequivocally proceeds, in the 64th section, to provide for the transference of

all the bankrupt's lands, tenements, and hereditaments in England, Scotland, and Ireland, and in any of the dominions, colonies, and plantations of his Majesty.

"Both the real and personal estates of bankrupts were thus for the first time put on the same footing by the operation of law, and without the necessity of any circuitous or expensive forms.

"Such being the salutary provision made as to bankrupts in England, it is not surprising that a provision of a similar nature should have been subsequently introduced into the late Bankrupt Act for Scotland, and this has accordingly been done, as is shown by the enactment at page 10 of the case for the pursuer.

"The transference of *real property* is thus completed by its actual vesting in the assignees in England, and trustee in Scotland, by virtue of the act and declaration of the law.

"When the Legislature then thought fit to establish a new law for the relief of insolvent debtors from the imprisonment under which they laboured in England, the 1st and 2d of her Majesty, c. 110, under which this question arises, was passed.

"The sections referred to are at pages 6, 7, and 8 of defender's case.

"Now, one cannot think it at all surprising that as to the real estates, as well as the personal estates, of such insolvents as were to be relieved, similar enactments to these in the Bankrupt Act should be introduced; and accordingly it is seen that they are described in both Statutes in the precise same words as to their *situation*, viz., 'both within this realm and abroad'—these words in the Bankrupt Act being preceded by all the bankrupt's 'lands, tenements, and hereditaments,' and in the Insolvent Act by the words—'all the real and personal estate and effects of such prisoner.'

"Now, as the Bankrupt Act, in the 64th section, provides that the commissioners shall, by deed indented and enrolled in any of his Majesty's Courts of record, convey to the assignees for the benefit of the creditors (as had previously been vested in them), 'all lands, tenements, hereditaments, except customary or copyhold, in England, Scotland, Ireland, or in any of the dominions, plantations,' &c., we have here the express declaration of the Legislature itself, that by the use of the words '*this realm*,' it held Scotland and Ireland to be included as well as England. Why, then, should a more limited interpretation be put on the words '*within this realm*,' when used in the Insolvent Act, as to the real and personal estate of the prisoner vesting in his provisional assignee?

"The term *realm* is in the one Statute clearly used as applicable to the whole of the United Kingdom, and we can see no ground for holding that it is to be read in the other Statute as of a more limited import. The pursuer seems to contend that it includes neither Scotland nor Ireland in its use in the Insolvent Act; and, to be consistent, he must hold that Scotland is equally excluded by the words '*and abroad*.'

"But it really appears that the 46th section of the Act, not to dwell on any more of it, is sufficient to show that Scotland was clearly held as included in the provisions contained in the 37th section, by the words '*within this realm*,' as it is there expressly provided, that where, by any law now in force, any conveyance or assignment of any real or personal property of any insolvent debtor would be required to be registered, enrolled or recorded 'in any registry in England, Wales or Ireland, or in any registry-office, court, or other place in Scotland,' the certified copy or order under the Act 'shall be registered in the registry-office, court, or place wherein such conveyance or assignment, as last aforesaid, would require to be registered, enrolled or recorded.' It is no sufficient answer as to the effect of this clause to say, that registration in Scotland is inapplicable to a mere conveyance of real property. Registration is requisite in regard to sasines and other instruments connected with real estate in Scotland, and there is here an express recognition of the necessity of following out the system of registration applicable to an order as to real as well as personal property under the Act.

"Now, after this, to hold that this Statute did not at all comprehend or provide for the vesting in the assignees authorised by this Act of the real estate of an insolvent in Scotland, seems to be a proposition altogether untenable.

"Without dwelling more upon the matter, it appears to us that we have the declaration of the Statute itself, that it did mean to extend its operation in the above respect to Scotland,—as the provision as to the registration in the 46th section never otherwise could have been introduced,—and therefore the proviso in the 121st section, as to the Act not applying to Scotland, unless where 'it is expressly mentioned,' is in this particular quite inapplicable,—the term, *this realm*, being used as including the whole United Kingdom, of which Scotland is a part. It has already been seen that such is the clear meaning of the words 'this realm,' as occurring in the late English Bankrupt Act; and yet in that very Statute it is likewise provided in the 135th section, 'that it shall not extend to either Scotland or Ireland, except where the same are expressly mentioned.' But as in reference to the provision in the 12th section, that the persons appointed by the commission shall take order and direction of all the bankrupt's lands, tenements and hereditaments, 'both within this realm and abroad,' the 64th section afterwards expressly provides that these commissioners shall 'convey to the assignees, for the benefit of the creditors aforesaid, all lands, tenements and hereditaments (except copy or customary hold), in England, Scotland and Ireland,' &c., there cannot be a doubt that the clause as to the Act not extending either to Scotland or Ireland, except where the same are expressly mentioned, is quite inapplicable to the present question."

Lord Ivory:

"I have arrived at the same conclusion. It seems to me impossible to dispute (maintain?) that an enactment conceived in such broad terms as to include 'all the real and personal estate of the prisoner, both within this realm and abroad,' except such trifling articles as his wearing apparel, working tools, &c.,—and even these only to an extent 'not exceeding in whole the value of £20,'—should yet not reach the real estate of such prisoner situate in Scotland. It is no answer that the Statute is declared 'not to extend either to Scotland or Ireland, except where expressly mentioned.' It is conceded (pursuer's additional case, p. 10), that without expressly mentioning Scotland, Scotland would necessarily have been intended to be included under such general words as 'Great Britain,' or 'the United Kingdom.' But if so, the same necessity of construction must be equally operative to include Scotland, under the general words 'within this realm or abroad.' I am very clearly of opinion, that, as applied to both Ireland and Scotland, 'this realm' must here be interpreted as of identical meaning with 'the United Kingdom,' or 'the United Kingdom of Great Britain and Ireland.' And I can in no view adopt a reading of the Statute which would, contrary to its whole policy, and in the face, as it seems to me, of all common sense, allow even the insolvent himself (supposing the question were with him), on the one hand, to demand the privileges of the Statute, and on the other, to withhold from his creditors, it might be, the most valuable portion of his estate, merely because it happened to be situate in Scotland."

(Lord Jeffrey absent from indisposition.)

At finally disposing of the cause, Lord Medwyn and Lord Moncreiff expressed their adherence to their former opinions.

The Lord Justice-Clerk said he concurred with the opinion of the Lord Justice-General.

Lord Meadowbank returned the following written opinion:

"In this case I had the misfortune to differ from my two brethren, Lord Medwyn and Lord Moncreiff, when the case was advised by this Division, and had an opportunity then of stating fully the views which I entertained with regard to the Acts of Parliament in question. It is, therefore, unnecessary for me to say more at present than that I retain my former opinion, and concur entirely with the views of the consulted Judges."

The Court pronounced an interlocutor in terms of the opinions of the consulted Judges.

Defenders' Authorities.—Royal Bank v. Stein, 20th Janu-

ary 1813; 1 Rose, 462. Selkirk v. Davies and Salt, 2 Dow 245. 6 Geo. IV. c. 16, § 12, 64. 2 and 3 Vict. c. 41, § 79. 7 Bacon, 452. 2 Dwarria on Statutes, 703. Cooke's Law and Practice of the Court for the Relief of Insolvent Debtors, 2d edit. p. 64.

Lord Ordinary, Cockburn.—Act. Russell; William Mason, S.S.C., Agent.—Alt. More; W. and J. B. Douglas, W.S., Agents.—T. Clerk.—[J.W.]

8th March 1842.

SECOND DIVISION.—(J. W.)

No. 158.—MRS FRANCES RENNIE and HUSBAND, Pursuers, v. JAMES RITCHIE, Defender.

Process—Accounting.

Special case, in which the interlocutor of the Lord Ordinary was adhered to, with additional expenses—*Vide ante*, Vol. XIII. p. 73.

9th March 1842.

SECOND DIVISION.—(J. W.)

No. 159.—GEORGE BRECHIN, Advocate, v. WILLIAM TAYLOR, Respondent.

Cessio—Aliment—Act of Grace 1696—A party having petitioned for cessio, to which he was found entitled, on condition of assigning £5 of his wages for behoof of his creditors; and he having refused, was in consequence incarcerated on the warrant under which he petitioned. An application for aliment under the Act of Grace, or alternatively for liberation, refused.

The advocate is due to the respondent the sum of £20. 12. 7., besides expenses of process and dues of extract, as constituted by a decree of the Sheriff-substitute of Aberdeenshire, of date 8th July 1840. He raised in consequence a process of *cessio bonorum*, and when under examination, deponed, that he was a single man, and in the receipt of from £25 to £30 per annum, and board and lodging from his employer. In these circumstances, the Sheriff found him entitled to the benefit of *cessio*, on condition of his assigning £5 out of his wages for the benefit of his creditors. When this assignation was prepared and presented to him, he refused to sign it. In consequence, the respondent caused the warrant he had obtained, and which was that founded on by the advocate in his petition for *cessio*, to be put in force. The advocate was accordingly apprehended, and lodged in the jail of Aberdeen. Two days thereafter, he presented a petition for modification of aliment under the Act of Grace 1696, after considering which the Magistrates pronounced the following interlocutor:

"15th December 1841.—In respect it appears from the prisoner's deposition, that his imprisonment arises from his refusal to do an act ordained by a competent court, and which is within his power, refuses to modify an aliment to him *in hoc statu*."

(Signed) "JAMES FORBES, B."

The prisoner advocated, and pleaded—That in the circumstances stated, and the advocate not having been incarcerated for the non-performance of any obligation in the nature of *factum prestandum*, but simply for non-payment of a civil debt, there were no *termini habiles* in law, and no grounds in point of fact, on which an aliment ought to have been withheld from the advocate, and the cause ought instantly to be remitted to the Magistrates of Aberdeen, with instruc-

tions to modify such aliment as your Lordships shall deem reasonable, or otherwise to liberate the advocator from jail:—*Smith v. Christie*, 18th January 1776, Mor. Dict. of Dec., Vols. XXVII. and XXVIII., p. 11,816. *Aitkin v. Gray*, 27th May 1790, Mor. Dict. of Dec., Vols. XXVII. and XXVIII., p. 11,819. The Act of Grace. *Geikie v. his Creditors*, 9th February 1833, S. and D., Vol. XI., p. 372.

Pleaded for respondent.—As the incarceration of the advocator does truly proceed from his refusal to obtemper the order of a competent court, pronounced in a process founded upon the warrant of his present imprisonment; and as it is still in his power to operate his release by complying with the said order, he is not entitled to the benefit or the provisions of the Act of Grace, nor has he any claim in law for aliment as against the respondent, nor failing such aliment, to be liberated from jail:—*Turner v. Ross*, 2d December 1709, Mor. Dict. of Dec., p. 11,802. Act of Grace. *Glasswell v. Durham*, 28th December 1710, Mor. Dict. of Dec. p. 7460.

The Lord Ordinary pronounced the following interlocutor:

“*3d March 1842*.—The Lord Ordinary having heard counsel for the parties, and thereafter made avizandum, and considered the cause, appoints the parties to print the note of advocacy, along with the reasons and answers; and when printed, appoints the same to be boxed to the Lords of the Second Division, in order that the same may be reported to the Court.

“*Note*.—The advocator Brechin, prisoner in the jail of Aberdeen, before he was imprisoned, raised a process of *cessio bonorum* before the Sheriff of Aberdeenshire. The Sheriff, on the 5th of August, found him entitled to the benefit of the *cessio*, on condition of his assigning £5 annually out of his wages to a trustee for the benefit of his creditors. When the assignation was presented to him he refused to sign it, and no further steps were taken by him in the process of *cessio*. The respondent then incarcerated Brechin, who presented a petition to the Magistrates of Aberdeen for aliment, under the Act of Grace 1696. The Magistrates of Aberdeen refused the aliment, on the ground that the advocator had refused to obey the order of a competent court, which was within his power. The advocator pleads that he is here incarcerated for a debt, and that, whether he is entitled to a *cessio* or not—and even supposing that he is denied the benefit of the *cessio* from misconduct—he is on the footing of a debtor not able to aliment himself; so that his misconduct in the *cessio* cannot operate against him in the proceedings under the Act of Grace, where he appears as a civil debtor. In support of that view, he has referred to the case of *Geikie v. his Creditors*, 9th February 1833, 11 S. and D. 372,—where the Court gave an addition to aliment under the Act of Grace to a party whose *cessio* was refused, on the ground that he was believed to be concealing his funds. There may be room, however, for a distinction between that case and the present, when there appears nothing to prevent the pursuer signing the assignation which had been ordered, whatever the effect of it may be.”

At advising, the Court pronounced the following interlocutor:

“In respect that the incarcerating creditor states that he will liberate the advocator as soon as he signs the assignation prepared, and previously presented to him under the order of the Sheriff in the process of *cessio*, and that the debtor may obtain liberation from prison whenever he chooses, by complying with the said order of the Sheriff, Refuse the note of advocacy, remit the cause *simpliciter* to the Magistrates of Aberdeen, and decern.”

Lord Ordinary, Murray.—*Act*. A. McNeill; J. Stuart, *Agent*.—*Alt*. W. E. Ayton; Campbell and Trail, *Agents*.—F. Clerk.—[J. W.]

9th March 1842.

SECOND DIVISION.—(J. W.)

No. 160.—*MRS M. WEDDERBURN or HAWKINS and HUSBAND, and MANDATORY, Pursuers, v. SIR DAVID WEDDERBURN and OTHERS, Defenders.*

Process.—*Lis Pendens*.—*Foreign*.—*Diligence*.—*A party having instituted a suit in the Court of Chancery, which seemed the proper forum for the consideration of his claims, thereafter brought an action on the same claims, and against the same defendants, in the Court of Session, for the purpose of suing out diligence on the dependence against their property situated in Scotland*.—*The Court repelled a preliminary defence founded on lis pendens, but appointed the pursuer to lodge a minute stating the progress made before the Master in Chancery, and what orders had been issued.*

In the year 1796 the late Mr David Webster, Mr John Wedderburn, and the defender Sir David Wedderburn (then Mr David Wedderburn), entered into partnership in terms of a contract of copartnery. During the subsistence of the partnership, Mr Andrew Colville, one of the defenders (then Andrew Wedderburn), was conditionally, and to the effect of enabling him to sign the company firm, assumed a partner, but he was not to share in the profits or losses of the company.

David Webster died on 21st March 1801, leaving a will, appointing his wife and his two partners, Mr John Wedderburn and Sir David Wedderburn, his executors in trust.

In terms of the contract of copartnery, the representatives of Mr Webster were entitled to a share of the profits from the time of his death till May 1801. Thereafter the business was carried on by a variety of partners, under successive firms. These parties or their executors are the defenders in this action, and the pursuers are the children of Mr Webster, calling for a share of the profits of the business from their father's death down to the 1st May 1837.

On 21st February 1831, a suit in Chancery, as set forth in the summons, was instituted by the pursuers. The bill having been filed, an order was pronounced by the Master of the Rolls, and affirmed by the Lord Chancellor, directing the Master in Chancery to ascertain,—1. What was the value of Mr Webster's interest in the firm of Wedderburn, Webster and Company, on the 1st of May 1801, and, as incidental to that inquiry, to take an account of the previous transactions of that firm. 2. The amount of the profits made by the new and subsequent firms. 3. The sums paid or invested on account of David Webster's estate. 4. The capital employed by the partners in the new and subsequent firms. 5. The Master has certain powers given him, and amongst others the power of stating special circumstances relating to the matters aforesaid, and of making just allowances to the parties,—the latter involving many nice and important questions as to what the partners are entitled to for labour, and otherwise, affecting the amount of what (if any thing) is to be recovered by the plaintiffs.

Pending these proceedings each of the four children of Mr Webster raised an action in the Court of Session against the defenders, who are resident in Scotland, or are possessed of heritable estates there.

The summons sets forth, that the share of the profits effeiring to David Webster and his estate, from 1st May

1801 to 1st May 1837, amounted to about £462,076. 7s. 2d., and that the proportion of that sum belonging to the present pursuers, amounted to £97,279, or thereabouts, exclusive of periodical interest. And accordingly the pursuers concluded for payment "of the foresaid sum of £97,279. 4. 7., or such other sum, more or less, as shall, in the course of the process to follow hereon," be ascertained to be the amount of their share "and proportion of the gains and profits of the said business," (deducting £13,055. 7. 3. admitted to have been received by the pursuers), with interest of the balance since April 1837. The summons also concluded for payment "of the sum of £217,818. 7. 8.," or such "farther and additional sum, less or more, as shall be ascertained, in the course of the process to follow hereon, to be the pursuers' share and proportion of the accumulated interest on the said profits," from 1st May 1801 to 1st May 1837.

When these actions, at the instance of the children of David Webster, were instituted in this Court against the present defenders, who were also defendants in the suit in Chancery, the latter presented an application in the Rolls Court to restrain the plaintiffs from suing such actions in the Courts in Scotland for the same claims. On hearing counsel on that application, the Master of the Rolls pronounced a judgment on 23d January 1840, whereby his Lordship granted the injunction required. The plaintiffs thereupon brought the matter before the Lord Chancellor, and gave notice of an alternative motion, viz., either that the injunction so granted by the Master of the Rolls should be discharged, or that the plaintiffs should be at liberty to carry on the suits in Scotland, for the purpose of compelling the defendants to give security for so much of the profits of the business as might be found due. The Lord Chancellor having heard the counsel for the parties on these motions, on the 4th of March 1840 pronounced a judgment, bearing that his Lordship

"doth not think fit to make any order as to that part of the notice of motion which seeks to discharge the order made by the Right Honourable the Master of the Rolls; but upon the rest of the motion, now made as an original motion to his Lordship, his Lordship doth order that the plaintiffs be at liberty to proceed in the suits or actions commenced by them in the Court of Session in Scotland, or take such other proceedings as they may be advised, so far only as may be necessary for the purpose of obtaining security, according to the practice of the Court of Session, for the forthcoming of the property of the defendants in Scotland, to answer the demand of what may be found due from the defendants under the decree in these causes."

In this state of matters, the defenders proposed in this suit the following preliminary defences:—1. As the present random claim of the pursuers is comprehended in the suit before the Court of Chancery in England, and is thus *lis alibi pendens*; and as there has been no decree pronounced in that Court for the sums sued for, and it has not been ascertained in any way, in that suit, or otherways, that all or any part of the sums sued for are owing to the pursuers, the present action ought to be dismissed. 2. That from the statement in the summons, it is apparent that the sole object of the action is to obtain letters of inhibition and arrestment against the defenders upon the dependence; and as this, in fact, would be to obtain these diligences upon an illiquid and random claim now depending before the Court of

Chancery in England, which must be decided by the law of England, and over which action in England the Court of Session has not, and cannot have any control, the present action should be dismissed. 3. The present claim is barred by the accounting which took place between the pursuers and Mr Webster's executors,—by the discharge which the pursuers granted,—and by the lapse of time in bringing forward the present action.

The Lord Ordinary appointed revised cases, and thereafter pronounced the following interlocutor:

"20th March 1841.—The Lord Ordinary having heard counsel on the preliminary defences, and thereafter considered the revised cases for the parties, and whole process.—In respect it is judicially stated for the pursuers that they only intend to insist in the present action for the purpose of suing out such diligence against the property of the defenders situated in Scotland, as is competent, by our law and practice, against the property of defenders in ordinary depending suits of admitted competency in our courts; and in respect that the pursuers have farther stated that they do not propose that the defenders shall be subjected to the discussion of the merits of the claims against them in this Court, as well as in the Court of Chancery at the same time, but are willing that the present case shall be sisted till the amount of the pursuers' claims is ascertained by the Court of Chancery, before which they were first brought, and which seems the proper *forum* for the consideration of the said claims on their merits.—Repels the first and second preliminary defences stated against the competency of the action founded on the *lis pendens* in the Court of Chancery; and sustains the competency of the action as urged, *in hoc statu*, to the limited effect, and for the special purpose before set forth; and reserves the other preliminary defences, as involved in the merits, and requiring probation, to be discussed along with the merits, if these shall be afterwards competently investigated in this Court;—but, *quoad ultra*, sists process for six months, in order to afford time to the parties to bring the proceedings relative to the claims libelled on to an issue in the Court of Chancery; and farther, reserves to the defenders, in case of any diligence being used on the dependence of this action to an excessive and unreasonable extent, to apply to the Lord Ordinary or the Court for a recall or restriction of the same in terms of law, and to the pursuers their answer to such application if made, as accords of law; and in respect the defenders do not intend to acquiesce in this interlocutor, finds them liable in the expense of discussing the preliminary defences, in terms of the Statute, as the same may be taxed by the auditor, and decerns.

"*Note*.—This is a question of great importance both to the parties and to the law. But it is thought that the authorities, both earlier and later, predominate greatly in favour of the competency of the action, when raised under the circumstances and to the effect to which the pursuers at present propose to limit their proceedings in this Court.

"From the numerous transactions which commerce gives rise to among the members of different states, it is a question which has long been the subject of consideration, whether the dependence of a suit in one country ought to prevent a creditor from taking such steps in another, as are necessary to secure the property of the alleged debtor for the ultimate payment of the debt. The decided tendency of the decisions in our law, from the earliest period, has been to admit of such actions, to enable the creditor to attach the debtor's property within our jurisdiction.

"In the first place, the jurisdiction of the Supreme Court over foreigners, when they possess such property within Scotland, has been long admitted in cases which, but for that property, there would have been no *forum competens* in this country to support the jurisdiction of the Scotch Court.—See the case of Galbraith in 1626 (p. 4813, Dict.), and of Haldane against the York Buildings Company in 1724 (Dict., p. 4818).

"The only question then is, if this undeniable right of a creditor to attach his debtor's property when situated in this country, is affected by the consideration that the claim is already the subject of litigation in the *forum* of the debtor's resi-

dence, or of the place where the debt was contracted. Here also the weight of the authorities in our law appears long to have sanctioned actions, the avowed object of which is to attach the property of debtors, notwithstanding the dependence of suits in other countries.—See the cases of *Vanlovan* in 1651, and of *Coleman Cunningham* in 1705, reported in the Dictionary under '*Lis alibi*,' p. 525-56. Indeed all the cases reported under this title are adverse to the objection of *lis alibi*, with the exception of the case *Gordon v. Elliot* in 1715, where the whole sum in dispute was actually consigned in the court abroad; and the case of *Blackstock*, reported in Mr Brown's Supplement (5 Supp., 519), where the defender, before being cited in Scotland, had found caution in the court abroad, which of course was the only legitimate object of a second suit in this country. It is thought that, on principle, both of these precedents rather aid than oppose the plea of the pursuers in the particular circumstances of this case, as it is manifest that the Court, if they had not dismissed the actions, would have recalled any diligence used on the dependence as nimious and oppressive. Hence there was no purpose or use in entertaining the action as a ground for new attachment, which the Court would have abrogated the moment they were laid on.

"The later cases, however, of *M'Master* in 1834 (12 Shaw, 731), and *Munro v. Graham* in 1839 (1 Dunlop and Bell, p. 1192), seem to fix the competency of actions brought for the purpose avowed in the present instance, in a manner hardly admitting of question in any subsequent case. In *Graham's* case, Lord Moncreiff expressly found, 'that it is not incompetent for the pursuer to raise and insist in this action, to the effect of obtaining security over property situated in this country;' and that finding was adhered to by the Court. No doubt the defenders refer to certain expressions in the Lord Ordinary's note, to show that he laid some stress on the circumstance that the defender *Graham* had not appeared in the Court of Chancery, and therefore, as he had not submitted to the jurisdiction of any other court, that he might be amenable in Scotland, where he had property. It is supposed, however, that his Lordship's meaning in that passage of his opinion was, that the defender, not having pleaded to the merits in the Court of Chancery, might be compelled to state such pleas here, if he meant to resist decree. But that is not proposed in the present case. Here the defenders are not required to plead to the merits; but this case is to wait the issue of the pending suit in Chancery; and the case of *Graham* is of importance to show that a suit brought for the sole purpose of commencing an attachment of property in Scotland, was found relevant by the Court in the recent case now referred to.

"Farther, the proceedings of the Court in the case of *M'Master* in 1834 are equally decisive in this question. There a party began by bringing an action in this Court on a claim which ought to have been previously constituted in England as the proper forum for trying the claim, and the Court here sisted proceedings till the pursuer filed his bill in Chancery, and obtained a judgment there. In that instance the suits in both countries were entertained at the same time under the direction of this Court itself, though proceedings in Scotland were superseded till the issue of the English suit. How then can the Court be now asked to dismiss the pursuers' action, merely because they have taken the very course recommended in that late and well-considered precedent, and begun their proceedings by a suit in the English Court?

"It is obvious to remark, that from the course followed both in *M'Master's* case and in *Munro's*, the main objection is removed on which the plea of *lis alibi pendens* is founded. This rests chiefly on the hardship of compelling defenders to incur the expense of entering appearance, and meeting their adversaries in two courts at the same time. When an action, brought, however, solely to attach property situated in any other country than the proper forum of the parties, is sisted till the case is discussed in the primary jurisdiction to which the parties are subject, the defender suffers no hardship beyond that to which every party is exposed who is subjected to prohibitory diligence for a depending claim. The defenders, however, plead, that from the limited effect to which the pursuers are allowed by the Court of Chancery to insist in the present action, from the terms of the summons, they would be ex-

posed to diligence of a very severe and oppressive nature, if any were allowed to issue upon it as a depending suit, because the Court is prevented from entering into the merits of the case, so as to enable them to determine, as they do in other cases of diligence and on depending claims, how far there is ground for recalling or restricting the diligence. But the Lord Ordinary certainly does not understand that there is any such limitation in the power of the Court as that which the defenders allege. Holding this as an action brought to enable the pursuers to get the security of the defenders' property in Scotland for their ultimate claims, there is nothing in the orders or opinions of the Court of Chancery, as communicated by the parties, to show that the Court here is to be restrained from looking into the proceedings and grounds of the pursuers' claims, to enable them to judge to what extent the defenders shall find security to enable them to get that attachment *ad interim* relaxed, according to the uniform law and practice of Scotland. Nay, it is thought that cases might even occur where this Court might render it imperative on a pursuer to show, by the report of a Master, or of the proper officer in Chancery, to what extent the claims of the pursuer had been as yet ascertained or rejected. In this view, both Courts co-operate with each other in securing the just rights of litigants in a reasonable manner, which is manifestly an object of high concern in the administration of justice in both countries. It is plain from the report given of what passed in the Court of Chancery, that the noble and learned Judges in that Court saw no incompatibility in the proceeding which the pursuer is now adopting in Scotland, if competent under our laws; and the Lord Ordinary is humbly of opinion that it is maintainable on legal grounds which have long received effect in Scotland.

"With reference to the separate pleadings lodged in the name of Sir David Wedderburn, and of the executors of John Wedderburn, it is only necessary to observe, that they appear to have been made parties to the action in Scotland because their constituent's estate is interested in the issue. They are defendants in the English suit; and if they had not been called in this action, a dilatory plea might have been urged, that all having interest were not cited. It does not appear, however, that any diligence is proposed to be used against them; and if any attachment should be used against the individual estates of executors for what is due by them solely in their official capacity, it would be competent to the Court to recall it. But it is obvious that the pursuers' claim, both under the bill in Chancery and in the present action, is laid against Messrs Colville and Seton, as partners of the late concerns of Wedderburn and Company, and Wedderburn, Colville and Company; and so individually responsible to the pursuers in a large part of the balance claimed, if it shall ever be substantiated. It is probably for that branch of the pursuers' claims only that any diligence has been, or will be raised against the property of these gentlemen in this country, on the dependence of the present action. That, however, is an ulterior inquiry which cannot affect the preliminary question now under consideration."

The defenders reclaimed. At advising on 20th July 1841, the Court were equally divided in opinion,—Lord Moncreiff and Lord Meadowbank were for adhering to the Lord Ordinary's interlocutor, while the Lord Justice-Clerk (Boyle) and Lord Medwyn were of a contrary opinion. In consequence of this result, the case was disposed of by the following interlocutor:

"The Lords appoint the papers to be laid before the Lords of the First Division and the permanent Lords Ordinary for their opinions, whether the interlocutor of the Lord Ordinary reclaimed against should be adhered to or not."

The following opinions were returned:

Lord President (Boyle) and Lord Gillies:

"We consider the question that is raised in this case, and decided by the judgment of the Lord Ordinary, to be one of very considerable importance in this department of the law; and as our views do not coincide with those of the Lord Ordinary, we shall state shortly the opinion we have formed upon the case.

"It appears from the narrative of the summons in this case, that the pursuers, along with certain others, the near relatives of Mrs Hawkins, in February 1831 commenced proceedings in the Court of Chancery in England against the present defenders, and also John Wedderburn, and James Wedderburn, now deceased, for whom the defenders now act as executors, by bill of complaint, concluding that the pursuers, as children of the deceased David Webster, were entitled to participate in the profits made by carrying on partnership business since his death, and that an account should be taken of all that was due to them in consequence thereof, in any manner of way; and that if necessary an account should also be taken of the personal estate of John Wedderburn (the first), that had come into the possession of J. Wedderburn, Andrew Colville, and Alexander Seton, as his executors. James Wedderburn having afterwards died, bills of revivor were afterwards filed in the said Court against Andrew Colville and Alexander Seton as his administrators. Appearance having been made in Chancery for the defenders, in answer to the several bills filed against them, as alleged principal debtors, and also as executors of their respective constituents, an order was made in 1836, by the Master of the Rolls, directing one of the Masters in Chancery to take an account, as required by the said bills, in the manner that is set forth in the summons. This order having been appealed from, the Lord Chancellor, on the 9th of November 1838, dismissed the appeal, thereby determining, as the summons bears, or at least strongly indicating, that the children of the said David Webster are entitled to participate, under the circumstances set forth, in the gains and profits made by carrying on the forssaid partnership business since the death of the said David Webster, according to his share, and the proportions falling to his children by virtue of his will.

"Before, however, any step was taken before the Master in Chancery, under the order made for an account by the Master of the Rolls, the pursuers instituted their action under the present summons, the terms of which are before the Court; while three similar actions were raised by others interested in the succession of David Webster, against the several defenders,—some as directly liable, both as principals and as executors, and others in their capacity as executors alone for others who are now deceased,—concluding for the enormous sums that are set forth as due, less or more, and with interest to the extent of no less than £217,818. 7. 8.

"These conclusions are preceded by the statement, that the defenders have lands, heritages, and other property, heritable and moveable, within Scotland, and reside therein, at least are subject to the jurisdiction of the Scottish Courts and to the executorial of the law within Scotland: And therefore 'necessary it is for the pursuers, and the pursuers are entitled to have them convened before the Lords of our Council and Session in Scotland, in order to have decree against them, to the effect, and in the terms underwritten, so that the pursuers may operate payment of the said sum against the said defenders and their said estates within Scotland.' But it is particularly to be observed, that the conclusion, in consequence of an amendment of the summons, is not made to depend on any decree to be pronounced in the Court of Chancery, but is for the direct payment of the sums to be found due here.

"Upon this, and the other actions being instituted in this Court, the defenders applied for an injunction to restrain the pursuers from proceeding with them, and thus carrying on litigation both here and in England for the same alleged debt; upon which application it appears that the Master of the Rolls, on the 23d January 1840, ordered that the pursuers 'be restrained by the order of this Court from prosecuting or carrying on the four several suits or actions commenced by them respectively in the Court of Session in Scotland' against the defendants, Andrew Colville, &c., to recover the respective shares claimed by the said petitioners respectively, in the profits of the trade or business carried on by the successive partnership firms of Wedderburn and Company, Wedderburn, Colville, and Company, Colville, Wedderburn and Company, and Colville and Company, mentioned in the decree in this cause, bearing date the 5th day of November 1836, and by the partners constituting those firms respectively; and it is ordered that the said petitioners, and each of them, be also restrained by the order of this

Court from commencing or prosecuting any other suit or proceeding in the said Court of Session, or other Court in Scotland, to recover the said shares of profits so claimed by them respectively, or otherwise touching or concerning the matters in question in this cause, until the further orders of this Court,' &c. This order was followed by an award of costs to the defenders.

"This order for injunction by the Master of the Rolls was submitted to the review of the Lord Chancellor, as appears from his order of 4th March 1840; and accompanied at the same time by an application for liberty to insist in Scotland in the suits there depending, to the effect of obtaining security for the sums sued for, according to what it appears had been alleged to be the practice of the Scottish Courts. The order pronounced on that motion bears, that 'his Lordship doth not think fit to make any order as to that part of the notice of motion which seeks to discharge the order (injunction) made by the Right Honourable the Master of the Rolls; but upon the rest of the motion now made, as an original motion to his Lordship, his Lordship doth order that the petitioners be at liberty to proceed in the suits or actions commenced by them in the Court of Session in Scotland, or take such other proceedings as they may be advised, so far only as may be necessary for the purpose of obtaining security, according to the practice of the Court of Session, for the forthcoming of the property of the defendants in Scotland, to answer the demand of what may be found due from the defendants under the decree in these causes.'

"So standing matters in England, and the Master in Chancery being left to proceed in taking the account that had been ordered in the suit there depending, for the purpose of ascertaining what may be truly due, with the view of adopting certain measures in security of their debt, by inhibition and arrestment against the defenders, the pursuers moved in the present action, when the Lord Ordinary pronounced the interlocutor now under review.

"Before advertting to the preliminary defences that have been so far repelled by the Lord Ordinary, it is necessary to observe, that there is an objection, altogether different, which applies to a considerable part of the present summons; viz., in so far as it concludes against all or any of the defenders, as executors of deceased individuals, to whose estates letters of administration were taken out in England, or in the courts of which country these executors were necessarily bound to account. It has been ruled by the decisions in the cases of Pulmer and others, that executors under similar circumstances must be called to account in the courts of law in England, and that Scotland is not the proper *forum* in which English executors can be sued; and, if this is settled law, it surely is not to be understood that persons so situated can be made amenable to the jurisdiction of a Scottish court to any effect whatever, in connection with supposed claims against them as executors, when they are already defending themselves against the very same claims in the proper court in England. But this objection, in so far as applicable to the present action, does not seem to have been at all attended to in the interlocutor of the Lord Ordinary, though it appears certainly to be deserving of special attention.

"Keeping however in view the terms of the present summons, which concludes directly against the defenders as liable to account for and pay the large sums of money therein set forth, and which does not make their liability at all to depend upon what sum may ultimately be found due by them in the present depending suit in Chancery, it seems quite impossible to deny that there here exists a manifest appearance at least of *lis alibi pendens*. The hardship, therefore, that would be imposed upon the defenders, in being obliged to oppose the pursuers both here and in Chancery at one and the same time, is too manifest to require any discussion. It was at once, accordingly, acknowledged by the Master of the Rolls, who did not hesitate to grant his injunction against the pursuers proceeding with their litigation in this Court at the same time that they were insisting in Chancery, and where regular appearance had been made for all the defenders. The present is not, therefore, the case of a party refusing to submit himself to the jurisdiction of the proper Court in England, or withdrawing himself from the operation of its decrees, and not leaving sufficient funds within its territory to answer for the debt claimed against him;

in which circumstances it has been found, by the recent decision of *Munro v. Graham*, 4th July 1839, that action might be instituted against him in Scotland, where he held a landed estate. All that occurs in the present case is, that the defenders in this Court, who are resisting as defendants the pursuers' suit in Chancery, are proprietors of landed estates and funds, and have their residence in Scotland; but this surely of itself cannot be viewed as sufficient to deprive them of the benefit of the ordinary defence that is available to all litigants whatever. But in addition to that plea, of the hardship of being involved in a double litigation, the defenders also found upon the special terms of an existing injunction in Chancery, restraining the pursuers from prosecuting or carrying on the several suits commenced by them against the defenders, or commencing or prosecuting any other suit or proceeding in the Court of Session, or any other Court in Scotland, to recover the said share of profits. It seems impossible, therefore, that they can obtain any effectual decree in those suits under the existing summonses, which conclude directly for recovery of the sums sued for. The merits of the claims under them cannot be ascertained, nor can any investigation in regard to the extent of their claims be carried on.

"It is no doubt true, that on application to the Lord Chancellor he was pleased to grant leave in the terms which have already been referred to. But although he certainly did thereby authorise the plaintiffs before him to avail themselves of those actions which they had already instituted in this Court, or of such other proceedings as they might be advised, as far only as may be necessary for the purpose of obtaining security, according to the practice of the Court of Session, for the forthcoming of the property of the defendants in Scotland, to answer the demand of what may be found due from the defendants under the decree in these causes,"—yet his Lordship clearly meant that the leave so granted should be exercised only according to the practice of this Court. He must have been informed that it was conformable to our practice under the dependence of regular actions, for the pursuers to take measures for the security of such sums as might ultimately be decreed for; and under this impression alone, it is to be presumed that he granted the liberty in question. He never meant by his order, however, to give authority for the adoption of any measures for the purpose of obtaining any security that the practice of the Court of Session did not recognise as competent,—neither did the Lord Chancellor in the least degree mean to deprive the defenders of any plea competent to them, or as arising out of the frame and structure of the summonses that had been instituted in this Court.

"The competency, therefore, of the proceedings of the pursuers, and which have so far been sanctioned by the judgment of the Lord Ordinary in sisting procedure for six months, but permitting thereby in the meantime the use of the diligence of inhibition and arrestment against the defenders, stands altogether unaffected by the liberty granted under the order of the Lord Chancellor.

"While the defenders are made regular parties to the proceedings in Chancery, which must be admitted to be the proper Court for investigating such a case as the present, and are there actually defending themselves, and remain amenable to its jurisdiction, and while it cannot be denied that litigation on the merits of the action cannot proceed here, nor any proceedings in fact adopted towards investigating what is truly due, it does appear not a little extraordinary that the pursuers should be entitled to adopt the same measures, in security of their alleged claims, that are competent to the pursuers of actions liable to no such objection as can prevent their obtaining a direct decree. No statement has been made that any measure of a similar nature would be competent in England, with regard to security over either the real or personal estate of the defender in a depending action in Scotland, against whom a suit of a similar nature was attempted to be carried on in the former country. No case in this country has been pointed out at all similar to the present, as neither the case of *M'Master*, nor the recent one of *Munro* can be viewed as truly of the same nature. In the case of *M'Master v. Stewarts*, the action was for implement of an English will, under which the defenders in this country had administered in England, and as the will permitted others

who had declined to act to file a bill in Chancery, and both parties had bills depending there, the proceeding here for accounting for intromissions was instituted and allowed. The nature of the case of *Munro v. Graham* has already been noticed. If the present pursuers, however, are allowed to inhibit and arrest on the dependence of the actions that they have raised in this Court, but in which they cannot obtain decree, for the very same enormous sums they are now demanding in their depending suit in Chancery, and where the defenders at this moment are litigating with them, we apprehend that the same sort of proceedings to obtain security, may be resorted to by every party that has instituted in a foreign country an action to any amount against any one possessed of landed property in Scotland. The consequences of establishing such a rule of practice are certainly deserving of serious attention, as it will be sanctioning the doing indirectly, what cannot be obtained directly, namely, to procure security for a claim depending in another country.

"We are aware that the defence of *lis pendens* in any of the Courts in England has, in several instances, not been sustained. But still, it is a defence which appears to be founded on strong principles of equity and expediency; and accordingly it would appear, that in this cause effect was given to it, first by the Master of the Rolls, and then, to a certain extent, by the Lord Chancellor, who ordered 'that the petitioners be at liberty to proceed in the suits or actions commenced by them in the Court of Session in Scotland, or take such other proceedings as they may be advised, so far only as may be necessary for the purpose of obtaining security according to the practice of the Court of Session, for the forthcoming of the property of the defendants in Scotland, to answer the demand of what may be found due by the defendants under the decree in these causes.'

"All possible respect is due to the opinion of the Lord Chancellor; but a question is raised, whether the qualified permission here given by his Lordship is, in the peculiar circumstances of this case, according to the practice of the Court of Session, or consistent with the principles of the law of Scotland, by which diligence of this sort is regulated or allowed.

"By the law of Scotland a person is entitled, merely by raising and executing a summons, to use inhibition and arrestment against his alleged debtor. This is a great privilege, and one, so far as we are aware, peculiar to the law of Scotland. In the general case, a pursuer's object in bringing his action is to constitute and obtain a decree for payment of his alleged debt against his debtor; and to make that decree effectual, he is allowed, on the dependence, to use his diligence. His *primary* as well as his principal object, is to obtain decree; and while he is seeking that, the use of diligence is allowed him. But matters are here in a manner reversed. His diligence is the *primary* object, and he raises the action, not with the view of getting or of seeking a decree, but solely, in the meantime, to create a dependence, which may be the foundation of diligence. We believe that no instance of such a case is to be found in our law books, and that no precedent or practice can be pointed out of such a proceeding.

"The use of this diligence is a Scottish privilege, and allowed only to suitors in Scottish Courts,—to one who undertakes to establish his claim in a Scottish Court. But here the pursuer does not at present undertake, or offer to establish his claim here. It is to be established in an English Court, and there only. In effect, this is bestowing on an English suitor the privilege of a Scotch suitor.

"The only object on which he can at present insist, is to obtain a decree of a foreign court, and in Scotland, his only object at present is to create a *dependence*. We should say that this was not a legitimate object. What is the evil to be obviated, or what is the benefit meant to be bestowed on the creditor, by allowing him the use of diligence on a dependence? It is to afford him immediate security while he is proceeding to establish his claim in a Scotch Court, but not while he is proceeding to establish it in a foreign court. This may lengthen and increase greatly the hardship of the debtor in such a case.

"In this case the pursuer, so far from insisting in his claim and offering to establish it in the Scotch Courts, asks, on the contrary, that process shall be *sisted*. He virtually admits that he is not now in a situation to establish his claim in this Court, where he desires that proceedings may be stopped. But observe,

that during the stoppage of proceedings, the unfortunate debtor is subjected to that diligence which the law authorised only on the supposition that its commencement and termination were to be regulated by a litigation in Scotland. If the process is sisted, there is substantially and in truth no litigation, or, we may say, no proper dependence in Scotland—at least, none such as the law contemplated when it authorised diligence of this sort.

"The long endurance of the diligence, which a depending action authorises against him, may be a grievous hardship on the debtor. Against this our law affords him some protection. After a summons has been executed, the pursuer may use his diligence; but the defender by protestation can compel him to go on with his action. Again, when the action comes into Court, the defender, as well as the pursuer, is entitled to enrol it, and to insist that the pursuer shall proceed with the action with all due dispatch. Of all those remedies or means of protection the debtor may be deprived, if the endurance of this diligence is to be regulated, not by a Scotch Court, but by the Court of a foreign country. This foreign country may be England, as in this case. But the same would hold if suit was raised in any other foreign state. A pursuer may bring an action concluding for £200,000 in Madrid or Vienna—founded on transactions which took place in Spain or Austria, and then he may bring his action for this sum in Scotland; in which he cannot and does not attempt to establish his claim, but brings it merely to create a dependance which entitles him to use diligence. He acknowledges that it is only by establishing his claim abroad that he can establish it here, and the extent and endurance of the Scots diligence must therefore be regulated by a foreign court.

"That such proceedings as the present may lead to the greatest oppression in many cases, is perfectly obvious. For although it is no doubt competent for the Court, in regard to the diligence of inhibition and arrestment, to recal or limit their extent when used oppressively on actions regularly depending before it, the nature and probable amount of their conclusions being easily brought under notice, and even ascertained with tolerable exactness, yet no such satisfaction can be obtained in such a case as the present, or in one that may relate to a suit depending in a more distant foreign country against a native of Scotland. To obviate the injurious consequences of the use of inhibition and arrestment in such cases, it would at least be advisable to adopt universally the rule that was followed in the Bargany case, and also in the late case with regard to the sale of the estate of Barra, by requiring the user of the diligence to find full security to answer for all the damages that might arise from their use of the diligence. To whatever extent the pursuers in the present case may think proper to push the use of their diligence in security, there seems no mode in which the Court, in the event of an application by the defenders for its restriction, can obtain anything like satisfactory information as to the real nature or amount of the pursuers' demand; no investigation whatever as to the extent of the alleged profits of the various London companies can take place here, as all the requisite documents must be before the Master in Chancery; and this Court can receive no information even as to the progress that the Master is making in framing the account he has been ordered to prepare.

"In whatever aspect, therefore, we view this case, it appears, that by sisting the action even for a limited time, while the pursuers are permitted to resort to the use of diligence in security of their alleged claim, that is going far beyond what has ever been sanctioned by the Court in any former case, and, therefore, we cannot accede to the interlocutor submitted to review."

Lord Mackenzie, concurred in by *Lords Fullerton, Cockburn, Cunningham, Murray and Ivory*:

"The ordinary and strict rule requiring the dismissal of an action on the ground of *lis alibi pendens*, which is stated by Lord Stair, appears to us to be limited to cases where the same action is pendent in another Court within the same country. It rests on the reasons, not only that a double litigation on the same claim is vexatious, but that it would be wrong to allow double decrees to be obtained, each constituting *res judicata*, and which must be either two decrees to do the same thing only once, and

so one of them utterly useless, or must be cumulative, to do it twice over, or contradictory and discordant, which would be oppressive, or leading to confusion. But these cases are not applicable in the case of a previous action depending in a foreign court, where the decree obtained is not *res judicata* in this country, and may not at all, or not satisfactorily answer the purpose of a decision in this country,—the foreign decree extending over the foreign country, the home decree over the home country only, and the legal means and actual facilities of enforcing decrees being different in different countries. Accordingly, there seems no authority for holding that the ordinary rule of *lis alibi pendens* applies strictly to cases where the previous *lis* is pendent in a foreign court.

"But though the original and strict rule of *lis alibi pendens* may not so apply, nevertheless, there seems to be no doubt that in cases of *lis alibi pendens*, even in a foreign court, it is competent for the court in this country to consider the effect of that circumstance, and if it be such as in reason and equity to require the dismissal, or the sisting, or modification of the action raised here to give it such effect. This again appears to be not only consistent with legal principle, but to be clearly established by the cases referred to by the pursuers as well as the defenders, and by various other cases.

"In this case, then, the existence of *lis pendens* in the Court of Chancery in England is not denied. And *per contra*, the existence of jurisdiction generally over the defenders in the courts of this country is not denied.

"Under these circumstances, the present summons is raised in this Court, containing conclusions against the defenders of two distinct kinds—1. Personally: 2. As executors.

"1. Now in regard to the action, in so far as it is an action in this Court against the defenders personally, there seems *prima facie* no room for doubt, that if, in favour of the defenders, proceedings be sisted until the issue of the suit in the English Court, that is the utmost the defenders can ask. For by that the defenders are entirely relieved from the hardship of double discussion, or discussion in the Court least qualified to investigate the facts and law of the case; and the only effect of sustaining process with such a sist is, that after decree shall be pronounced in England, the action here will then be more speedy than if it had to be raised *de novo*, and legal, and just diligence in this country for due execution of judgment in the case will be better had. Abstracting, therefore, from the specialities of this case, alleged to have arisen in the course of the proceedings in Chancery, there seems no room to doubt that the interlocutor of the Lord Ordinary sustaining the action, but sisting proceedings, is right, in reference to the claim against the defenders personally. Supposing nothing appeared here, but that there was a previous suit in the English Chancery on the same personal claim, there seems no room for doubt, that the action here must be sustained, though the process might be sisted, as has been done in various cases.

"But it is said there is a specialty here, which requires immediate dismissal of the action in this Court. The specialty is alleged to be, that the pursuers stand prohibited by the Court of Chancery from legal proceedings in Scotland, under a limited exception, 'that the plaintiffs be at liberty to proceed in the suits or actions commenced by them in the Court of Session in Scotland, or take such other proceedings as they may be advised, so far only as may be necessary for the purpose of obtaining security, according to the practice of the Court of Session, for the forthcoming of the property of the defendants in Scotland, to answer the demand of what may be found due from the defendants under the decree in these causes.' The effect of this is said to be, that the Scotch proceedings are converted into a mere form for attaching to an English suit in Chancery the diligence of the Scotch law by arrestment and inhibition on depending actions. And this, it is said, would be dangerous, because the Scotch Courts have no power over foreign actions, and cannot force them on, or dismiss them, or limit them, whatever may be the conduct of the pursuers; so that this kind of diligence might be kept up to an extent and duration that would be oppressive. And, it is added, that as England is in this respect a foreign country, the same rule must apply to all foreign suits, and expose the lieges of Scotland to arrestment and inhibition without limit, at the instance of all

who choose to raise action in a foreign court. Now, I do not see the force of this objection. It seems to me that the effect of the Lord Chancellor's order is not to create any limitation that would not have existed without it, provided we thought, in the circumstances of the case, that the process in this Court ought to be sisted in favour of the defenders until the issue of the suit in Chancery. The effect of such a sist, obtained by the defenders, is precisely to allow such proceedings by the pursuer as may be necessary for the purpose of obtaining security, according to the practice of the Court of Session, for the forthcoming of the property of the defendants in Scotland, to answer the demand of what may be found due from the defendants under the decree in these causes. The obtaining a sist until the decree in Chancery shall be pronounced, and so keeping up the Scotch action for the purpose of arrestment, inhibition on the dependence, and of decree in Scotland, agreeably to the Chancery decree after it shall be pronounced, is the very thing the Lord Chancellor has allowed to the pursuers. Why, therefore, shall proceedings become incompetent or objectionable here, because they are excepted from a prohibition, which would have been competent if never prohibited?

"But it is said, that under this Chancery injunction, the Court here have no power over the action before themselves. But that is a mistake. The Chancery prohibition is in favour of the defenders only, and binds only the pursuers. The defenders are not barred from craving a recal of the injunction in Chancery granted on their motion, nor barred from craving a recal of the sist which stands in their favour, if they can show any good grounds for the process in this Court going on. It may be difficult for them to do this last; but the difficulty does not arise from the injunction of the Court of Chancery on the pursuers. It arises simply from the fact, that there exists a suit on the same matter between the same parties in another court, much better able to investigate the law and facts of the case. That may entitle the pursuers, as well as the defenders, to maintain the sist. But the mere injunction on the pursuers in favour of the defenders, cannot give the pursuers such right to any extent they would not have possessed without it.

"As to the danger of oppression from the Scotch diligence of arrestment and inhibition proceeding on foreign actions, because these actions are not under the control of our Courts, if that be a good argument, it must warrant the absolute dismissal of all actions in Scotland where there is a *lis alibi pendens* in a foreign Court, which cannot be disregarded altogether in our Scotch proceedings. For in no case is the foreign action under the control of Scotch Courts; and in all cases arrestment and inhibition may be used in Scotch depending actions. So it would follow, that wherever there was a *lis alibi pendens* in foreign countries, including England and Ireland, Scotch action on the matter must be absolutely dismissed, unless the foreign action can be disregarded altogether as if not existing. But that seems too much to be maintained. The answer is—(1.) That though there is not in the Scotch Court any control over the foreign action, there is control over the Scotch action, which may be continued under sist, or dismissed, or proceeded in, or modified according to what appears to be the circumstances of the case, either in relation to the state of the foreign action, or any other circumstance appearing. (2.) The Court has power over the diligence of arrestment and inhibition, and may recal or limit these according to equity, on any circumstances appearing to require it; and that, not upon exact evidence, but upon such probable evidence as the state of the case affords. And in estimating that, it is easy to make allowance for the circumstance, that the primary suit is in a foreign Court, and to lighten so far the *onus* on the party showing grounds for recal, or modification of arrestment, or inhibition. This equitable and discretionary power of the Court alone makes such diligence on the dependence tolerable, in cases of simple Scotch actions. For it is generally impossible to get rid of, or limit this diligence, though excessive, by any thing that can be done in the action. Relief is sought from excessive diligence by a distinct application, directly applicable to the arrestment or inhibition itself, without interfering with the action, and supported by nothing more than the exhibition of probable grounds for thinking that more is claimed in the depending action than is likely to be decerned for. And surely

the equitable powers of this Court to restrain excessive arrestment and inhibition on depending actions, may be better exercised by inquiring into the circumstances of each case, whether there be a *lis pendens* in a foreign court or not, than by attempting a sweeping rule, that wherever there is a *lis pendens* in a foreign court, which cannot be entirely disregarded, the Scotch action must be wholly dismissed in order to prevent the abuse of arrestment and inhibition. Accordingly, there is no one instance referred to of dismissal of an action in Scotland on such ground, though there have not wanted cases in which foreign *lis alibi pendens* could not be, and was not disregarded, producing, on the contrary, a sist of the Scotch proceedings. I therefore think, that in regard to the personal conclusions of the action, the interlocutor is right. I may perhaps remark, that in form, I should rather omit the limitation of the sist to six months, and leave it indefinite as to time, standing good till recalled, and only till recalled. But that is not of much moment.

"II. In so far as the defenders are concluded against as executors, if we are to follow the precedents of the cases of *Brown's Trustees v. Palmer*, 17th December 1830; and *Dickson v. M'Master*, 7th June 1833, the action here ought to be dismissed immediately. But, on the other hand, in the case of *M'Master*, 17th June 1834, the plan of sisting the action was adopted on the *ratio* stated by Lord Corehouse, the Ordinary, that it was 'imperative that this process should be sisted until the accounting in Chancery is brought to a close. It is possible that the aid of this Court may be afterwards required to enforce the execution of the decree.' Considering that in this case the Court of Chancery in England have given leave to the pursuers to sue in the Courts of Scotland, for the purpose of securing execution of the judgment, when it shall be obtained, without making any exception of the action in so far as it is brought against executors, I think Lord Corehouse's conjecture is one that we cannot venture to reject; and I am therefore, in reference to this part of the action also, for adhering to the interlocutor of the Lord Ordinary sisting procedure. But in regard to this part of the action, if arrestment or inhibition be used, the recal or limitation of them may probably not be very difficult, unless there be something unusual in the situation of the executors."

(Lord Jeffrey absent from indisposition.)

At advising of this date,

Lord Meadowbank.—"When this case was formerly before the Court, I concurred in opinion with the Lord Ordinary. It is therefore sufficient for me to state at present, that I remain of the same opinion, and coincide in the views taken by Lord Mackenzie and the majority of the consulted Judges."

The Lord Justice-Clerk (Hope) stated, that he concurred with the majority of the Judges.

Lord Moncreiff likewise concurred with the consulted Judges.

The Court pronounced the following interlocutor:

"In respect of the opinions of the whole Court, Adhere to the interlocutor submitted to review, and refuse the desire of the reclaiming note, and remit to the Lord Ordinary to call on the pursuers to state in a minute, to be lodged within such time as his Lordship shall appoint, what progress has been made before the Master in Chancery, and what orders, if any, have been issued by him: Find the defenders liable in additional expenses, and remit to the Lord Ordinary to decern for the same."

Lord Ordinary, Cuninghame.—Act. , Monro; Gordon and Barron, W.S., Agents.—Alt. Solicitor-General (McNeill), Marshall; W. and J. Cook, W.S., Agents.—F. Clerk.—[J.W.]

10th March 1842.

FIRST DIVISION.—(H. B.)

No. 161.—MAJOR-GENERAL JOHN M'INNES (*Macalister's Trustee*), *Raiser, v. MACALISTERS, Claimants.*

Testament—Succession—Destination—Entail—*A father bequeathed to his two natural daughters two separate sums, to be accumulated for their behoof till they were twenty years of age. Failing either of them without lawful male heirs, the other was to take her fortune; and failing both without lawful male heirs, the whole was to go to one, and failing him to another brother of the testator's, and his lawful male heirs, and failing them to a nephew. On the marriage of the daughters, provided it was after twenty years of age, and with the consent of the trustees under the settlement, they were "to have the whole of the sums heretofore bequeathed to them," which sums, however, were to be invested in land, and entailed on the male heirs of the two daughters. A multipoleinding having been raised for the purpose of determining the rights of the parties, and one of the daughters having died leaving a daughter, an interlocutor was pronounced, finding that the lands to be purchased with the sums bequeathed to the daughters were to be settled on the surviving daughter and her heirs-male, under the fetters of a strict entail, but that it was "unnecessary, hoc statu, to give any direction as to the extent of the destination to be inserted in the said deed"—Held that the collateral heirs-male of the testator ought not to be included in the entail which he had directed to be made, and that the trustees under the marriage-contract of the daughter surviving at the date of the above interlocutor, to the exclusion of those of the daughter who had died, were entitled to have the lands and estate purchased with the accumulated amount of the bequests transferred to them in fee-simple, for the behoof of the parties interested in said marriage-contract.*

Norman Macalister, governor of Prince of Wales Island, a Scotsman, was lost at sea on his return to this country in 1810. He was the youngest of four brothers, and died unmarried, survived by two brothers and a son of the third. He had two natural daughters, Frances Macalister and Flora Macalister. His settlement, which was holograph, contains, *inter alia*, the following provisions:

"I give and bequeath to my daughter, Frances, the sum of £15,000 Sterling.

"I give and bequeath to my daughter, Flora Macalister, the sum of £10,000 Sterling.

"The fortune I have thus bequeathed to each of the above-mentioned children, the said Frances Macalister and Flora Macalister, is to be left bearing interest in India, and placed in the hands deemed the most safe by the trustees, who will take care that collateral security be taken for the whole property invested in this way, which is to be left to accumulate for the benefit and behoof of the said children until they are twenty years of age. At the same time, as much of the interest of their fortune is to be remitted to England annually as shall defray the expenses of their education, provided that the sum required shall not exceed £200 Sterling for education and maintenance together, until they are fourteen years of age; and after they have attained that age (fourteen), should their guardians, who shall be hereafter mentioned, deem it necessary, they are then to receive each £300 Sterling annually, until they are twenty years of age, when more may be allowed them should their guardians deem it necessary.

"In the event of the death of the said Frances Macalister without lawful male heirs, her sister, Flora Macalister, is to inherit and receive the whole and every part of the said Frances Macalister's fortune; and in the event of the death of Flora Macalister without lawful male heirs, the above-mentioned Frances Macalister is to inherit and receive the whole and every part of the said Flora Macalister's fortune; and in the event of the death of both of these, Frances Macalister and Flora Macalister her sister, and failing of them both, and their lawful male heirs, I bequeath the whole and every part of the fortune

of Frances Macalister and Flora Macalister to my brother, Keith Macalister, and his lawful male heirs; and failing the said Keith Macalister, and his lawful male heirs, I bequeath the fortune of the said Frances Macalister and Flora Macalister to my brother, Mathew Macalister, and his lawful male heirs; and failing of the said Mathew Macalister, and his lawful male heirs, I bequeath the fortune of the above said Frances Macalister and Flora Macalister to my nephew, John Macalister (the claimant's father), and his lawful male heirs.

"I appoint my brother Keith Macalister, my brother Mathew Macalister, and John Macalister, also Donald Macalister my nephew, Lieutenant-Colonel John Macdonald, John Macalister of Cour, and William Burnie, Esq., trustees and guardians to my children in England; and I appoint John Ferguson, Donald Macnab, John Macalister, and Captain John M'Innes, trustees to my children in this country.

"Should Frances Macalister, or her sister Flora Macalister, marry before they are twenty years of age, they will forfeit the whole and every part of their fortune bequeathed to them by me; and after the said Frances Macalister and Flora Macalister are twenty years of age, they may then marry; but whomsoever they marry must have the full consent and approbation of two of the trustees and guardians above named, otherwise they forfeit every shilling of the fortune bequeathed to them by me.

"And whomsoever the said Frances Macalister and Flora Macalister marries after they are twenty years of age, with the full consent and approbation of two of their trustees and guardians, shall and will take, and shall continue hereafter lawfully, him and his lawful heirs, both male and female, to take the name of Macalister, otherwise the above-named Frances Macalister and Flora Macalister, and their husbands, and their male and female heirs for ever, shall forfeit the whole and every part of the fortune bequeathed to them by me in this or other will or wills; provided, however, that the above-named Frances Macalister, and her sister Flora Macalister, has the full consent and approbation of the majority present of their trustees, not less than two, to marry at the time above specified, they will; and in that case, have the whole sums heretofore mentioned and bequeathed to them by me; which sums, however, are to be invested by the trustees and guardians in purchasing lands in Argyleshire, if possible to be procured in that county, which lands are to be entailed on the male heirs of the two sisters, the above-named Frances Macalister and Flora Macalister.

"I leave and bequeath to my brother Keith, £10,000 Sterling during his life, which sum is afterwards to revert to Frances Macalister and male heirs. I bequeath to my brother, Mathew Macalister, the sum of £5000 Sterling during his life, which is afterwards to revert to Flora Macalister and male heirs; failing them, to Frances Macalister."

"I give and bequeath the whole and every part of my landed property and estates of Kernhill, with any other lands that I may have, to my daughter, Frances Macalister, and her lawful male heirs; and failing of the said Frances Macalister, and her lawful male heirs, I bequeath the above-named estates and lands of Kernhill to my daughter, Flora Macalister, and her lawful male heirs; and failing of them, I bequeath the above-named estate and lands of Kernhill, together with every other part of their property, to my brother, Keith Macalister, and his lawful male heirs; and failing of them, I bequeath the above-named estate and lands of Kernhill to my brother, Mathew Macalister, and his lawful male heirs; and failing of them, I bequeath the estate and lands of Kernhill to my nephew, John Macalister, and his lawful male heirs; which, however, I have now burdened with £100 Sterling a-year for life to my sister Peggy."

After attaining the age of twenty, Frances Macalister was married in 1820 to Angus Macalister, and Flora, in 1822, to Keith Macdonald Macalister. Both marriages were approved by the trustees. By antenuptial contracts, the whole interests of Frances and Flora Macalister under their father's settlement were conveyed to marriage trustees.

Owing to the want of dispositive words, the estate of Kernhill was not validly conveyed by the settlement,

and was taken up by Mathew Macalister, the testator's immediate elder brother, as his heir of conquest. A declarator was afterwards brought, to have it found that, by thus taking up the estate, Mathew Macalister had forfeited his claims under the settlement, and decree to that effect was pronounced. An attempt was made to reduce this decree, but it was found to be final as *res judicata*.

In 1820, the testator's trustees instituted a process of multiplepounding for the purpose of ascertaining the rights of all parties interested in the succession.

In this process Flora Macalister and her marriage trustees claimed,—“*1st*, The principal sum of the provision to her of £10,000 Sterling, in order that it may be invested in the purchase of lands in Argyleshire, to be laid under entail for the benefit of her and her heirs-male, as this Court may direct, and at the sight of the trustees and guardians nominated by the testator, or of such of them as may accept. *2dly*, The accumulated interest upon that provision and legacy of £10,000 until she attained the age of twenty, in order that the same may be invested in such manner as this Court may direct, according to the sound and legal interpretation of the true meaning and import of the will. And, *3dly*, The accumulations since the claimant, Mrs Macalister, attained the age of twenty.”

The claim of Frances was *mutatis mutandis* in the same terms.

Frances Macalister died in 1825, leaving an only child, a daughter; and on 30th June 1827, the Court pronounced an interlocutor, in which, *inter alia*, they “find that Frances Macalister, who married with the consent required in the will of the testator, having died without heirs-male, and Flora Macalister being also married with consent as aforesaid, the said two sums of £15,000 and £10,000, with the said respective accumulations thereon, under the deductions aforesaid, must be invested by the executors of the testator in the purchase of lands in Argyleshire, if possible to be procured in that county, to be settled upon the said Flora Macalister and her heirs-male, under the fetters of a strict entail, as understood in the law of Scotland—the deed to be prepared at the sight of this Court; and find it unnecessary, *in hoc statu*, to give any directions as to the extent of the destination to be inserted in the said deed, or as to any other particulars thereof.”

In 1831, the testator's trustees purchased the estate of Hayfield or Innistrynich, in Argyleshire, for £30,000, and on application to the Lord Ordinary, his Lordship approved of the purchase, and authorised Governor Macalister's surviving executor, General M'Innes, to uplift £30,000 of the fund *in medio*, which had been consigned in bank, to be applied by him

“in payment of the purchase-money of the lands and estate of Hayfield before mentioned, to be afterwards entailed in terms of the testator's will, under the authority and direction of the Court; and authorises and directs the conveyance to the said estate to be taken in the mean time to Colonel M'Innes, the executor, and failing him (in order to prevent the trust from lapsing,) to his agents, Messrs James Mackenzie and William Innes, and the survivor of them, to be held by them in trust for behoof of the parties interested, until the precise sum falling to be laid out in the purchase of land shall be ascertained, and the terms and conditions of the entail finally adjusted and determined.”

The only son of Flora Macalister has died recently, and questions having arisen as to the destination of the purchased lands, General M'Innes, the testator's only surviving trustee, lodged a minute craving the Court to give directions

“with regard to the extent of the destination to be inserted in the deed of entail of the said purchased lands, and as to the conditions of entail, and other particulars thereof, and thereafter to direct and allow the executor and his agents to prepare a draft of the deed of entail, and put it into process.”

Cases were ordered; and the cause having been advised, the following opinions were delivered:

Lord President.—Your Lordships who sat here at the time, will recollect that the questions between the parties in this case were made the subject of cases which were reported to your Lordships by Lord Murray. The cause was afterwards stated in argument before your Lordships, and stood for judgment; but in consequence of the unfortunate event that occurred,—the death of Mrs Flora, who had married Mr Keith Macdonald Macalister, and had left no male issue of her body, in the same way as her elder sister Frances had also done,—your Lordships, when the case came to be advised, allowed parties to withdraw the former cases, and to put in those which are now before us. We have here cases both for the trustees of the marriage-contract of Mrs Flora Macalister and her two daughters, and for the trustees of the marriage-contract of Frances and her only daughter; and we have also cases on the part of the Messrs Macalister, the representatives of the two brothers of the maker of the deed, the deceased Norman Macalister, for some time governor of Prince of Wales Island.

The first question discussed in these papers is, whether or not, in regard to the will of Colonel Macalister, and the proceedings that have already taken place in this Court, particularly your Lordships' judgment in 1827, you are now to proceed further in regard to the execution of an entail of certain lands directed to be purchased, if possible, in Argyleshire? These two gentlemen respectively maintain that they are entitled to demand that that entail, notwithstanding of the intervening death, shall be still framed, and ordered to be extended, so as to include them as heirs of entail of the estate purchased under your Lordships' interlocutor. On that question I have no difficulty whatever. Looking to the whole deed of Colonel Macalister, giving all the effect to it which we are entitled to give in such a question as this, and looking to what you have determined by your judgment in 1827, I am humbly of opinion that we are not entitled to order an entail to be executed, so as to include any one of these two gentlemen or their descendants. Your Lordships are quite familiar with the only passage in the will of this gentleman that has reference to an entail; namely, that where two sums, one of £15,000, the fortune of Frances, and another of £10,000, the fortune of Flora, the natural daughters of the testator, are directed to be laid out in the purchase of lands, if possible to be acquired within Argyleshire, and entailed in favour of these two ladies and their issue-male; but there is not one word farther of direction, or instruction, or exposition of intention, that that entail should go one iota beyond what I have stated. There is also in this will a declared intention that certain other sums, pending on certain events, shall, along with those sums of £15,000 and £10,000, be taken up and destined to his brothers in their order; but there is not a syllable as to the necessity of laying out that money in purchasing lands for the purpose of being entailed on those brothers and their descendants. The question, therefore, is, can we in any way, by conjecturing or guessing at the meaning of the testator, and looking at his predilection for the Messrs Macalister, construe it to have been his intention to include them in the entail, and can we carry out that intention by ordering such an entail to be made? Were we to do so, we would be doing nothing else than making a will for a party who had given no indications of making it for himself. On this part of the case, then, I have not the slightest difficulty in arriving at the conclusion, that we have no right to order any entail to be executed which shall include any of the descendants of the brothers of Colonel Macalister.

But there remains behind a question of great importance, and of sufficient difficulty, apart from the other, namely, What is now to be done, under the present circumstances, with the fortune which had been destined to go to those ladies? The Court had formerly occasion to consider the matter, and by an interlocutor of 30th June 1827, found, “that Frances Macalister,

who married with the consent required in the will of the testator, having died without heirs-male, and Flora Macalister, being also married with consent as aforesaid, the said two sums of £15,000 and £10,000, with the said respective accumulations thereon, under the deductions aforesaid, must be invested by the executors of the testator in the purchase of lands in Argyleshire, if possible to be procured in that county, to be settled upon the said Flora Macalister and her heirs-male, under the fetters of a strict entail, as understood in the law of Scotland, the deed to be prepared at the sight of this Court; and find it unnecessary, *in hoc statu*, to give any directions as to the extent of the destination to be inserted in the said deed, or as to any other particulars thereof."

This is the judgment which your Lordships pronounced in 1827 in regard to the provisions in Colonel Macalister's will, and the particular directions therein contained as to entailing those lands in the county of Argyle. Your Lordships thought it unnecessary to go farther than to settle the lands on Flora and her heirs-male, without inserting any further destination. Now, it does not appear that that entail was then executed; but lands having occurred which appeared to the executors to be suitable for the fulfilment of this part of the will, a purchase was made. The titles to that property have very properly been made up in the names of the executors in trust, and have so remained ever since. In this situation of matters the case has come before us on report by Lord Murray, and the question we have to decide at present is this,—it having happened that the family of Flora Macalister is exactly in the same situation with that of Frances when the interlocutor was pronounced—she having now deceased, leaving two daughters but no son—What are the rights that have arisen under the circumstances in which the case now comes before us for our determination? It is maintained on the part of those who are discharging their duty as trustees in the marriage-contract of Frances, and as such attending to the interests of her daughter, that it is impossible to carry forward the entail of those lands beyond what is expressly declared in your Lordships' judgment of 1827—that, in conformity with the will (there being no heirs-male, and there being in the marriage-contract a sufficient conveyance to them by that lady), they are now entitled to insist that her daughter ought to receive the £15,000, with the accumulations, as the amount of her mother's fortune. On the other hand, it is maintained on the part of those who are trustees under the marriage-contract of Flora, that the Court have no choice, but that, in consequence of the judgment of 1827, the daughters of Flora are the only persons to whose interest we are now to look;—that as no other entail can be made, and she executed a deed conveying all her property to trustees, her daughters are the only persons who are entitled to the estate, which is just a surrogatum for the price with which it was purchased, and that the claim of the young lady, the daughter of Frances, cannot now be regarded by us.

I must confess that this appears to me to be a very difficult question indeed; and on this point I set out by stating, that if it was not for the impediment in the way, which, if I could, I have a wish to get over, I would hold that the right of the daughter of Frances to her mother's fortune of £15,000 is just as clear as the right of Flora's daughters to their mother's fortune of £10,000. In principle, I can see no difference between them. If the thing were open—if there were no impediment in the way—if we were now, for the first time in this discussion, considering that neither of these ladies had left heirs-male, I would have no difficulty in the matter at all. But it is in consequence of what has passed—it is in consequence of the judgment to which I have referred—that an impediment exists and stands in our way. I cannot relieve my mind of this difficulty, or see how we can get rid of it. I know it is said in these papers that this is the first time that the question has been brought properly before your Lordships; but, on the other hand, it is averred with equal confidence, that in 1827 this matter was fully and amply discussed; and although your attention was directed chiefly as to how the entail was to be framed, yet the interest of that lady, and the interest of her daughter, were fairly brought under your cognisance. In regard to the contradictory averments, I have no assistance from your Lordships, or from the report of the case, which is very

short. One party says that your Lordships did decide the point, and the other says you did not decide it. In point of fact you dealt with the two sums, and found that they must be laid out on land to be settled on Flora Macalister and her issue-male. The case of Campbell appears to be in point, and to show that you could not go beyond the destination actually expressed. Under these circumstances, I have, unfortunately I may say, come to the conclusion, that by the judgment of 1827 the money was made one complete *sors*, and that the daughters of Flora are entitled to the whole of it. If we had the question for the first time before us, without any impediment in our way, I am quite sure that there would be no difference of opinion among us. I am satisfied that we would hold that the daughter of Frances was just as fairly entitled to her mother's fortune as the daughters of Flora to their mother's fortune. But in consequence of the judgment pronounced in 1827, I am compelled to say that there is an obstacle which prevents us from going farther. That judgment must be binding on your Lordships. I do regret it. If it could be shown to me that I could, with safety and propriety, disregard what must be deduced from that judgment as it now stands, I should entertain a very different view as to the interests of those parties. But I have not been able to get over the difficulty; and I am under the painful necessity of stating, that, under the circumstances in which the case is before us, I cannot resist the conclusion, that the whole must go to the daughters of Flora Macalister.

Lord Gillies.—I concur so entirely with your Lordship, that it is wholly unnecessary for me to go into any detail. I most fervently wish I could give your Lordship any information as to the opinions expressed in the judgment alluded to, but my memory is not sufficiently retentive to enable me, at this distance of time, to do so. I am in the same situation with your Lordship. I have the same inclination to get rid of the difficulty that presents itself to us; but I am sorry to add, that I am of the very same opinion with your Lordship as to the merits.

Lord Mackenzie.—I concur in the opinion which your Lordships have stated. The first question is in reference to the two gentlemen who claim under the deed of Colonel Macalister, which claim is made on the ground that they are entitled to be included in the entail directed to be made of the lands that have been purchased. I do not think that claim well founded. The money was directed to be laid out in the purchase of lands to be entailed "on the male-heirs of the two sisters, the above-named Frances Macalister and Flora Macalister." There is no doubt that that will warrant the constitution of an entail with fetters imposed on the heirs-male. But I see no solid ground for holding that there was an intention to carry the fetters beyond these heirs. There is not a word in the deed which expresses that the fetters are to be carried farther. There was room here for great doubt, whether there could be any fetters upon the sisters themselves,—whether they were only to be enforced on the heirs-male. But as the heirs-male were after the sisters, there was an implication of intention that the fetters should apply to them, to which the Court gave effect. Supposing, then, that the intentions of the testator had been fully carried out, there would have been two entails—one in favour of Frances; whom failing, of her heirs-male; whom failing, of Flora; whom failing, of her heirs-male,—the other in favour of Flora; whom failing, of her heirs-male; whom failing, of Frances; whom failing, of her heirs-male. But the execution of two entails was superseded by the death of Frances before the question was tried. Your Lordships then found that one entail should be executed in favour of Flora and her heirs-male. The point was thus fixed, that the fetters were to be imposed upon Flora herself, as well as her heirs-male. But as to going or not going farther, nothing was said. And now I think the claim that they should go farther has not been supported. We must hold that the fetters should end with the heirs-male of Flora. This I have held all along to be the law of the case, and it excludes the claim of these gentlemen, the collateral heirs-male.

Then arises the claim of the daughters of Flora to the whole subject,—not only to what would have been their mother's share, but also to the other part originally destined to Frances.

I am sorry to say, that upon this point I agree with your Lordships, though the case is a hard one. In determining questions under trusts, the rule has always been that we are to suppose the trust executed. We cannot hold the claim of any party to be excluded by delay in doing so. We must suppose the entail executed. We are not to hold that parties are to be excluded from their just rights by any accidental delay in executing the trust. Once getting this principle, we must suppose that this entail has been executed. It must stand as if fully executed, and as if it had been so from the very first. If that were the case, what would result? By failure of Frances without heirs-male, the whole subject fell under entail on Flora Macalister; whom failing, her heirs-male under the fetters; whom failing, upon other destinations, without any fetters—the fetters in both ending with the heirs-male. Flora then executed a marriage-contract, by which she altered the destination, and settled the estates on her own children, whether male or female. They then came to be her heirs, and have right to the succession, if she had power to dispose of it. It does not signify who were beyond heirs-male in the destination; for they were all put aside by this alteration in the destination, if she had power to alter it. The two gentlemen claiming might have been parties if she had not interposed; but by her marriage-contract they were all put out, and the destination is made to go to her own daughters. Now, I think Flora had power to alter the destination. No doubt, she had a son; and as long as he lived the fetters were good and valid. But when he died she became the last heir of entail, entitled to dispose of the estate as she chose, and she did dispose of it under that settlement in favour of her own daughters.

But then it is said that Frances also made a marriage-settlement during her life, and that she altered the destination. No doubt she also executed a marriage-settlement; but she had no power to alter the destination. I have already said, that though the entail was not made then, we must hold it as made. If it had been made then, it would have been an entail on Frances Macalister; whom failing, her heirs-male; whom failing, Flora; whom failing, her heirs-male. And then, during the whole life of Flora, it was a good and binding entail; and Frances, being an heir of entail, with parties substituted to her still alive, had no power of disposal. The daughter of Frances is barred by the fetters which were operative against her mother during her lifetime; whereas the daughters of Flora are not debarred by the fetters. Flora got the whole of this estate, and held it as last heir of entail, with a power of disposal. No doubt a deed was made by Frances to defeat the right of Flora, but that deed was void, for want of power in the maker of it. Flora would have had no power to alter the destination had she not been the last heir of entail. Being the last heir of entail under this deed, or *quasi* last heir, I think her alteration of the destination was effective. The case is certainly a hard one, but for that the testator is to blame. He has made an injudicious settlement; and I dare say if he were alive, and the thing explained to him, he himself would think so. Hard as the case is, under the circumstances, we can do nothing in regard to the claim of the daughter of Frances.

Lord Fullerton.—Considering the terms of this will, and the interlocutors already pronounced by the Court, I have not been able to come to any other conclusion than that which has been just expressed. In regard to the first point, viz., the claim of the Messrs Macalister to be included in the destination of the lands, I do not think there is much difficulty. The testator leaves two sums of money to his two daughters and their heirs-male; and in the event of their both failing, and leaving no lawful male heirs, he bequeaths the fortunes of both to his brothers in their order. There is also a forfeiture in the event of the daughters marrying before they are twenty years of age, and if they should then marry without the consent of two of the trustees and guardians. There is here a conditional bequest to, and institution of, these gentlemen, on the failure or forfeiture of the daughters. But there is also an express provision fixing a particular event on which the bequests are to vest in the daughters,—“Provided, however, that the above-named Frances Macalister, and her sister, Flora Macalister, has the full consent and approbation of the majority present of their trustees; not less than two, to marry at the time above specified;

they will in that case have the whole sums heretofore mentioned and bequeathed to them, which sums, however, are to be invested by the trustees and guardians in purchasing lands in Argyleshire, if possible to be procured in that county, which lands are to be entailed on the male heirs of the two sisters, the above-named Frances Macalister and Flora Macalister.”

I take these directions of the testator to be quite sufficient to exclude the claims of these two gentlemen, Keith Macalister and Alexander Macalister, to be inserted in the entail of the lands to be purchased. Their rights were extinguished by the events which took place, viz., the marriages of those two ladies with consent of the trustees; it being declared that, in that case, the two sums should belong to the daughters, and be vested in the purchase of lands for their benefit, and that of their heirs-male, without any farther destination. I apprehend that if a party bequeath a sum to A, with this provision, that failing A it shall go to B, and failing B to C, but in a subsequent part of the deed puts in a clause, stating that the money so bequeathed shall, on a certain event, be vested in the purchase of lands for the sole benefit of A, the conditional institutes are excluded in virtue of the arrangement made by the testator himself. In fact, they are no longer institutes—their institution being completely extinguished. I agree, therefore, with your Lordships, that it is impossible, in regard to those gentlemen, that we can, consistently with the will of the testator, carry the destination of the lands beyond the terms of the direction of the testator himself. According to his express directions, though conditional institutes in the moveable bequests, they are not substitutes in the lands to be purchased, on those bequests vesting in the prior institutes.

Then comes the other and more difficult question, in regard to the rights of the female children of the daughters, who both died after marriage, but before the lands were purchased and the entail executed. The direction is, that if the parties married with consent of their trustees, “*they should have those sums respectively bequeathed*” to them, in order to be invested in the purchase of lands to be entailed on “*the male heirs of the two sisters.*” Here the first question that arises is this,—supposing the two ladies had been alive, there must have been two entails; but what must have been the nature of those entails? This admits of two constructions. It might be supposed that the two entails to be made were, *first*, an entail of Frances’s property in favour of herself and her heirs-male; and, *secondly*, an entail of Flora’s property in favour of herself and her heirs-male, in which case the heirs-male of Frances would not have taken any part of Flora’s estate, and *vice versa*. Flora having died leaving only daughters, would, in that case, have been the last party entitled to take under the entail so constituted, there being nobody to plead the fetters against her. And in the same way, on the supposition of there being two such entails, Frances’s estate would have been carried by the conveyance in her marriage-contract.

But this was not held to be the proper construction of the deed. In the *first* place, it is contrary to the opinion of English counsel. The entails which they considered proper to be executed were separate entails, but, at the same time, entails which included in each the heirs-male of the other sister. But, *secondly*, and what is conclusive, that construction was finally excluded by the interlocutor of the Court in 1827. At that time, Frances having died without heirs-male, the Court considered that all they had to look to then was one entail; and that one, an entail including Flora and her heirs-male. This interlocutor could not have been pronounced, unless on the ground that Flora and her heirs-male were to take Frances’s share, failing herself and her heirs-male, and that, in consequence of that failure, the whole sums provided were to be applied in favour of Flora. The judgment finds that the said Mrs Frances Macalister being now dead, without leaving male heirs, &c., “*the said two sums of £15,000 and £10,000, with the said respective accumulations thereon, under the deduction foresaid, must be invested by the executors of the testator in the purchase of lands in Argyleshire, if possible to be procured in that county, to be settled on the said Flora Macalister and her heirs-male, under the fetters of a strict entail, as understood in the law of Scotland, the deed to be prepared at the sight of this Court; and find it unnecessary, in *hoc statu*, to give any directions as to the extent*

of the destination to be inserted in the said deed, or as to any other particulars thereof." Then the lands were purchased, and I see by the interlocutor of the Lord Ordinary in 1831, that there is a direction given as to how they shall be held;—he authorises the lands to be purchased, and authorises and directs the conveyance of the estate "to be taken to General MacInnes, whom failing, to Messrs Mackenzie and Innes, his agents, in trust, until the terms and conditions of the entail to be executed should be finally adjusted." Thus, at present, those lands are held in trust for behoof of the parties interested.

Now, if there were any persons entitled to be added to the destination, of course they would become parties, for whom, to a certain extent, this trust was executed. But the question here is, are there any such parties? For the reason already assigned, I think there is no room for holding that the two gentlemen here claiming, are parties who have an interest in the trust. Then I am not sure that I understand the ground on which the trustees of Frances Macalister claim. They seem to claim by virtue of the marriage-contract, but I cannot see that it gives to them any right whatever. For how could that, or any deed of Frances, carry directly any interest in the bequest or in the lands purchased, when the interlocutor expressly found that the £15,000 as well as the £10,000, was to be invested by the executors in the purchase of lands, to be settled on Flora and her heirs-male? I cannot see how any other construction can be given to the interlocutor. The only ground, then, for conceiving that the trustees under the marriage-contract are entitled to get at the £15,000 or the lands, in so far as they are a *surrogatum* for that sum, is to suppose that, some how or other, they are entitled to insist that the heirs-male of Frances Macalister shall be inserted in the destination. But I cannot see how they are entitled to be thus put into the destination. Whether they could have maintained this before the interlocutor of 1827 was pronounced, is a different question. But as the matter now stands, I see no reason for holding that the marriage-contract of Frances could either carry that sum of £15,000 to the trustees directly, or could carry it indirectly, by enabling them to get her daughter inserted in the destination. There is authority for entailing the land to heirs-male, but no authority whatever for carrying it beyond them to any heirs-female.

There is a sum of money, or rather a landed estate purchased with that money, held in trust for the behoof of the parties entitled to take under an entail, and the only question is, what is to be the destination in that entail? The destination cannot go farther than the heirs-male of Flora Macalister. This is confirmed by the case of Campbell, which has been referred to. There being thus an entail limited to the heirs-male of Flora Macalister, and there being no heirs-male now in existence, the estate is just held in trust for Flora Macalister, and is consequently perfectly well carried by the conveyance in her marriage-contract. Therefore, looking at the whole circumstances of the case, I am bound to hold, *first*, that we are not entitled to carry the destination beyond the heirs-male of Flora; and, *secondly*, that there are no grounds for holding that any part of the sum in question was carried by the marriage-contract of Frances. I therefore concur in the opinion which has been expressed by your Lordships.

The Court pronounced the following interlocutor:

"Find that, according to the sound construction of Governor Macalister's will, the collateral heirs-male of the Macalister family ought not to be included in the entail directed by him to be executed, and repel the claims of Alexander Macalister of Loup, and Keith Macalister of Glenbar, accordingly: Find that the trustees under the marriage-contract of Mrs Flora Macalister, and Keith Macdonald Macalister, her husband, are entitled to have the lands and estate of Hayfield or Innistrinch transferred to them in fee-simple for behoof of the parties interested under the said marriage-contract, and appoint the proper deed to be prepared for vesting the said lands and estate in their persons, as trustees, accordingly; and the said deed, when duly revised and settled, to be executed and delivered to them; and to this extent sustain the claim of Donald M'Crummen and Mathew Norman Macdonald, the surviving and accepting trustees under the said marriage-contract, and of Ann Amelia Burnie and Margaret Frances Byng Macdonald Macalister, only

children of the said marriage: and repel the claim of the trustees under the contract of marriage of the late Mrs Frances Byng Macalister and Angus Macalister of Balinakill; and remit to the Lord Ordinary to proceed accordingly."

Lord Ordinary, Murray.—*For Trustees of Mrs Frances Macalister*, Rutherford, E. D. Sandford; J. W. Mackenzie, W.S., *Agent.*—*For Trustees of Mrs Flora Macalister*, Solicitor-General (M'Neill); M. N. Macdonald, W.S., *Agent.*—*For Mr Macalister of Loup*, Whigham; James Bridges, W.S., *Agent.*—*For Mr Macalister of Glenbar*, G. Graham Bell; Andrew Clason, W.S., *Agent.*—B. Clerk.—[H.B.]

11th March 1842.

FIRST DIVISION.—(H. B.)

No. 162.—THE REV. WILLIAM MIDDLETON and OTHERS, *Suspenders*, v. ALEXANDER ANDERSON and OTHERS, *Respondents*.

Church—Patronage—Jurisdiction—Process—Certain parishioners having complained that a majority of the presbytery of the bounds had inducted a minister into the parish in violation of the Act on Calls, in disregard of a tender of special objections, and pending appeals to the higher church courts, the Commission of the General Assembly interdicted the presentee from officiating, and authorised the members of Presbytery not complained of, to provide for the ministration of the word and sacraments in the parish—A note of suspension of this sentence passed, and interdict against the execution of it granted.

The Reverend William Middleton, after officiating for several years in the parish of Culsamond as ordained assistant to the incumbent, the Rev. Ferdinand Ellis, received a presentation to be his assistant and successor. This presentation, granted by Sir John Forbes of Craigievar, the patron, and accompanied with the usual documents, was laid on the table of the Presbytery of Garioch on 22d September 1841, and sustained. At the same time, two motions were submitted to the Presbytery,—the first, "That the Presbytery do appoint one of their number to meet with the elders of Culsamond for the purpose of making up a roll of male heads of families in communion with the church in said parish, conformably to the Act of Assembly 1835 on the calling of ministers;" and the second, "That the Presbytery proceed according to the law and practice of the Church previous to the interim Act of Assembly 1834." After discussion, the second motion was allowed to be withdrawn, and the first was agreed to without a vote—six members of Presbytery, being one-half of the whole sederunt, exclusive of the moderator, entering their dissent, and both the patron and presentee protesting, that by the adoption of the motion their rights should not be compromised.

The Presbytery having again met on the 6th October, called for the roll of the male heads of families. It was accordingly laid on the table, and being purged and completed, "was countersigned in name, presence, and by appointment of the presbytery, by the moderator." Thursday the 28th of October was fixed as the day for moderating in the call, and the Presbytery having accordingly met, a call was produced and read to the congregation, and thereafter subscribed by the whole elders, three of the heritors, and a number of male heads of families and communicants—the whole amounting to forty-one. Mr J. D. Milne appeared as agent for the presentee, and Mr David Mitchell for certain of the parishioners. After some preliminary

procedure, Mr Mitchell craved "that dissents be received according to the Act of Assembly on Calls;" to which Mr Milne objected, and craved that his objections be recorded. It was then moved "that dissents be received." This motion was agreed to without a vote; but seven of the members, forming a majority of the whole sederunt, entered their dissent, and protested that the adoption of the motion should not compromise their sentiments "as to the Veto Act, nor the rights of the patron and presentee accruing to them respectively from the presentation, and relative documents formerly sustained by the Presbytery." Mr Milne also protested. Dissents were then tendered, and the Presbytery found that they had been lodged "by an apparent majority of male heads of families on the roll." Mr Mitchell craved "that the Presbytery would now proceed, according to the Act on Calls, and the instructions to presbyteries thereanent, with a view to the ultimate rejection of the Rev. William Middleton, the presentee to Culsamond." Mr Milne craved, that in respect "that the said Act anent calls had been found to be *ultra vires* of the ecclesiastical courts, and that the dissents tendered were illegal and incompetent, the Presbytery proceed to sustain the call, and thereafter, on a future day, to induct the presentee." The following motion was then made:

"The Presbytery having duly considered the call now given to the Rev. William Middleton to be minister of this parish, find it subscribed by three out of five heritors,—that a fourth, necessarily absent, had intimated his concurrence,—and that the remaining heritor had intimated no opposition or dissent; find it subscribed by all the elders, and by a large number of respectable male heads and other communicants in the parish; therefore the Presbytery did, and hereby do, sustain said call, concur with the same, and appoint Mr Middleton, who is already an ordained minister of the Church, to be received and admitted into the pastoral charge of this parish on Thursday the 11th day of November first ensuing,—the Rev George Peter, minister of Kemnay, to preach and preside on the occasion: They also appoint one of their number to preach at Culsamond on Sunday first, the 31st day of October current, and to serve an edict to the above effect."

Another motion was made, "That at present, in this case, the Presbytery do sist procedure, and report to the General Assembly." The first motion having been carried, five of the members dissented, and protested for leave to complain to the Synod. Mr Mitchell protested, and appealed. It does not appear from the minutes of Presbytery that he did more; but, according to the statement of the dissentients, "when these two motions were about to be put to the vote, and before the roll was called, the law-agent for the dissentients, perceiving that a majority of the Presbytery was determined to proceed, disregarding the dissents, craved to be heard, and intimated verbally that he was ready to offer special objections against the said presentee; and notwithstanding of his having been interrupted by the members constituting the majority of the Court, on the ground that he was out of order, did make the Presbytery aware of his offer of special objections before the said motions were put to the vote; but the vote was taken notwithstanding, and the motion to proceed with the settlement was carried by a majority of seven to five." "Immediately after said motion was carried, the said law-agent for the dissentients caused to be served by a notary-public a schedule, setting forth, that as an apparent majority of dissents had been lodged and

declared, the said Presbytery were bound, in terms of the laws of the Church, to take steps for the ultimate rejection of said presentee: But that, since they had resolved to take steps to the contrary, it farther represented the willingness of the said agent, without prejudice to the effect of the said dissents, but in corroboration thereof, to tender special objections, and did thereby, then and there, tender the same; the said objections having been seen by the said notary-public, and afterwards marked by him as notary in the premises." It was then moved,

"That as the dissent and complaint of the minority, and the protest and appeal by the agent for the dissentients, against proceeding to receive and admit Mr William Middleton, the presentee, are founded on the Veto Act, which has been declared *ultra vires* of the Church, and illegal, the said dissent and complaint, and the appeal, are inept and incompetent, and ought not to bar the execution of the Presbytery's finding,—the Presbytery accordingly proceed to the induction on Thursday the 11th day of November, and that the record be now closed."

This motion having been seconded, Mr Mitchell

"now tendered special objections to the fitness of the presentee; and it was moved, 'That the said objections be received and discussed;' which being seconded, it was agreed that this motion be put as an amendment on the former, and that the state of the vote be, first or second motion; and the roll being called, and votes marked (first motion, second motion), it was carried first motion by seven votes to five; and the Presbytery found and appointed in terms thereof. Against which sentence Mr Garioch declared that he protested for redress in the hands of Mr John Anderson, notary-public in Aberdeen; and Mr David Mitchell aforesaid, declared that he protested in like manner in the hands of said notary-public."

The Presbytery then appointed the usual steps to be taken for Mr Middleton's admission on the 11th November. The Presbytery having accordingly met, the clerk stated "that he had in due time received a paper containing reasons of dissent and complaint by the minority of the Presbytery against the finding of the Presbytery sustaining the call and appointing the settlement of Mr Middleton." The reasons of dissent are as follows:

"1. Because the said settlement is in violation of the solemn principle recognised by the standards of the Church,—'That no man be intruded into a congregation contrary to the will of the people.'

"2. Because the resolution of the majority to proceed to the settlement, did not stand directly against any provision of the Veto Act, the regulations of which Act were followed out down to this stage of the proceedings, though it was characterized by them as illegal; but against a proposal simply to sist procedure, and report the whole case to the General Assembly."

"3. Because, under the circumstances, the settlement is a wilful and deliberate defiance of the Church itself, as well as a subversion of the rights of her people, and is in reality, on the part of the majority of the Presbytery, a breach of those solemn ordination vows which they came under to submit to the authority of the judicatories of the Church."

"4. Because it is a submission of the privileges which the Lord Jesus Christ has conferred upon the Church, as her exalted head, to the powers of this world, which effectually degrades and prostrates the spiritual independence which belongs to the Church, as a church of the Redeemer."

"5. Because it must inevitably lead to a schism and separation on the part of the majority of the Presbytery, and on that account is another breach of their ordination vows, whereby they are solemnly bound to 'maintain the unity and peace of this Church against error and schism, notwithstanding of whatever trouble or persecution may arise, and to follow no divisive

courses from the present established doctrine, worship, discipline, and government of this Church."

The clerk also stated

"that he had received, at the same time, reasons of dissent and complaint by the same minority, against a sentence of the Presbytery refusing to receive special objections from communicants and parishioners of Culsamond, against the settlement of the Reverend William Middleton; which paper being produced and read, the Presbytery find, that these reasons offered are *ex facie* based on an erroneous assumption, and moreover, that the record having been closed, reasons of dissent and complaint from that finding cannot be competently received, and refuse to record these reasons accordingly."

The clerk then produced the papers containing reasons of protests and appeals by the agent for the male heads of families, dissentients, namely,

"1st, Reasons against receiving *ex gratia* the memorial of certain communicants not parishioners; 2d, Reasons against the finding of the Presbytery sustaining the call, and appointing the settlement, without regard to dissents given in; 3d, Reasons against the finding of the Presbytery refusing to receive special objections to the presentee;—all which being read, the Presbytery allow the first two papers of reasons of protests and appeals to be recorded, and extracts thereof granted;" but "with respect to the third paper of reasons of protest and appeal lodged, inasmuch as the said reasons are *ex facie* equally ill based with those of the minority, which have been already refused, the Presbytery also refuse to record these reasons, and intimated this accordingly."

The Presbytery afterwards proceeded to the church, but the moderator

"having repeatedly attempted, but in vain, to ascend the pulpit stair, and there being in the church a constant noise and booting, with yelling, besides throwing of stones, and other signs of violence, which were continued for about an hour, in presence of Mr Sheriff Murray of this county,—Mr Sheriff Lumsdaine, of the county of Sutherland, and Justice of the Peace for this county,—Mr William Simpson, procurator-fiscal,—Captain Elphinstone Dalrymple, Justice of the Peace; and the said Captain Dalrymple having declared that the Presbytery were deforced and violently interrupted in the execution of their purposed solemn duties, and Mr Sheriff Lumsdaine having farther intimated to the Presbytery 'that Mr Sheriff Murray considered it unsafe and inexpedient to proceed to public worship within the church;' and both said Sheriffs having made ineffectual attempts to address the people, the Presbytery, after waiting for some time after said intimations, and the violent and indecent interruptions continuing unabated, resolved to adjourn to the manse for the purposes of worship, and of receiving and admitting the Rev. Mr William Middleton to be minister of the church and parish of Culsamond, as aforesaid."

The Presbytery adjourned accordingly, and completed the settlement.

The Commission of the General Assembly having met on the 17th November 1841, the dissentient parishioners gave in a petition and complaint, in which, after narrating the proceedings in the settlement of the parish of Culsamond, they submit "that said proceedings and said settlement are in contravention not only of the recognised laws of the Church prior to the Act of Assembly anent calls, in consequence of the refusal of the said Presbytery to receive special objections against the said presentee, and of their determining to proceed in the face of the due and regular dissents and complaints of the minority of said Presbytery, and of the protests and appeals of the agent for the dissentients against their findings, but more especially of the said Act of Assembly anent calls, and of an apparent majority of dissents received and judicially found under the same; and this while there was no reason at all

for their precipitancy—no order or pretended order from any civil court, as in certain other cases—and nothing but their own deliberate resolution so to do.

"That said pretended settlement is therefore irregular, inept, void and null; and that, by the proceedings whereby it has been pretended to be effected, your petitioners are sorely aggrieved, and their spiritual interests deeply injured.

"That your petitioners would farther, in the strongest terms, represent, that as they cannot now, without injury to their own feelings, and dishonour to the Church, avail themselves of the religious services of the said presentee, and as there is no convenient place of worship situated near their parish, they will be totally left without the means of grace; and this while there are, for instance, already some requiring the ordinance of baptism to be dispensed.

"That, in these circumstances, your petitioners have been advised to petition and complain to the Commission of the General Assembly, at their meeting on Wednesday the 17th day of November current, praying the Commission to adopt measures for vindicating the laws and dignity of the Church, and for the protecting the spiritual interests of your petitioners, their families, and the other parishioners of Culsamond, who conscientiously feel dissatisfied with the ministry of the said Rev. William Middleton." They therefore prayed the Commission

"to serve this petition and complaint upon the individual members constituting the majority of the said Presbytery who voted on the motion sustaining the call, and concurring in the same, and appointing the said Reverend William Middleton to be admitted into the said parish, notwithstanding the said apparent majority of dissents, and in disregarding the same; as also upon the motion disregarding the dissents and complaints of the minority, and the protests and appeals of the agent for the dissentients, upon the pretence that they were founded on the Veto Act, which had been declared *ultra vires* of the Church, and whereby they declared the record closed, with a view to prevent special objections from being received, though tendered, and by whom, in its subsequent stages, the said pretended settlement has been perpetrated;" "as also the said Reverend William Middleton the presentee, who has closed with the said settlement, and accepted of the same, notwithstanding the dissents above-mentioned, and that it is perpetrated against the laws of the Church; and to appoint the said parties respectively to appear before the Commission of Assembly, or before the General Assembly itself, at its next meeting, to have such censure pronounced upon them as to the said Commission or the General Assembly shall seem meet; or to give such other order upon the said individuals, respectively, as to the said Reverend Court may seem meet in the hall circumstances, for the vindication of the laws and discipline of the Church, the protection of the spiritual interests of the said parishioners and petitioners; for dealing with the said individuals for their said disorderly conduct as it may appear to deserve; and further, to annul and rescind the pretended settlement, and whole proceedings above set forth and complained of; and also to take into immediate consideration the spiritual necessities of the petitioners, and the said parish, and to take such steps for the immediate supply of public worship and ordinances, as to the said Reverend Court may seem meet, to prevent the lamentable consequences which must otherwise ensue from the want of them."

The Commission, after hearing counsel for the petitioners,

"did and hereby do grant warrant to all presbytery and kirk-session officers to serve the said petition and complaint upon the several parties therein complained of, as craved, to cite them to appear personally to answer thereto before the Commission at its meeting in March next, or failing such meeting,

before the General Assembly at its meeting to be holden at Edinburgh on the 19th day of May next, and also appoint the said parties to give in answers to the said petition and complaint in writing to the said meeting of the Commission, or failing said meeting, to the next General Assembly, all with certification. Farther, the Commission in the meantime, and until a final deliverance shall have been pronounced in regard to the proceedings complained of, did and hereby do interdict and prohibit the Reverend William Middleton from officiating and administering ordinances in the said parish, and authorise and enjoin the remanent members of the Presbytery of Garioch, not complained of, to meet forthwith to provide for the ministration of the word and sacraments in the parish of Culsamond, in the manner which shall appear to them competent in the existing circumstances of said parish, the senior of the said remanent members being convener, and to report in their name to the meeting of the Commission in March, and to the next General Assembly."

A note of suspension and interdict was presented by Mr Middleton and the majority of the Presbytery, praying the Court

"to suspend the proceedings complained of, and particularly the sentence or deliverance of the Commission, or pretended Commission, of the General Assembly against the complainers, of the date of 17th November 1841; and to interdict, prohibit, and discharge all execution or intimation of the said sentence or deliverance, or of any of the proceedings complained of; as also all proceedings in furtherance or pursuance of the same, and every attempt, in any way whatever, to carry the same into effect: And in particular, to interdict, prohibit, and discharge Alexander Anderson" and others, "designing themselves male heads of families and communicants in the said parish of Culsamond, or residents and communicants in the said parish, from prosecuting or following forth a pretended petition and complaint, bearing to be presented in their names to the Commission of the General Assembly of the Church of Scotland, which met at Edinburgh on Wednesday the 17th November 1841, against the complainers, to the effect of molesting and disturbing the complainers, or any of them, in the performance of their duties as ministers of their respective parishes, or as members of the Presbytery of Garioch: And further, to interdict, prohibit, and discharge the Reverend Henry Simpson" and others (minority of Presbytery), "from usurping and exercising any of the functions of the said Presbytery, by taking upon themselves the superintendence of the parish of Culsamond, and from providing, or meeting to provide, for the ministration of the word and sacraments in the said parish, in any manner of way whatever, to the exclusion of the other members of said Presbytery, complainers, and from interfering with, or molesting the Reverend William Middleton, complainer, minister of the said parish, in the enjoyment, exercise, and discharge of his rights, functions, and duties as such, or as a member of the Presbytery of Garioch, and from preaching or administering any of the ordinances of religion in the church and parish of Culsamond, and from using the church bell of the said parish, without the consent of the complainer, the Reverend William Middleton, minister thereof, and from instructing and authorising others to usurp and exercise any of the functions of the said Reverend William Middleton, complainer, as minister of the church and parish of Culsamond."

In support of their note the suspenders *pleaded*—

1. The rejection of a presentee by a presbytery, on the sole ground that a majority of the male heads of families, communicants in the parish, have dissented, without any reason assigned, from his admission as minister, and the refusal or delay of such presbytery to induct a qualified presentee on this ground being illegal, and a violation of the duty of presbyteries as imposed by Statute, the Presbytery of Garioch were not entitled to give any effect to the dissents tendered, without reasons assigned, at their meeting on the 28th October 1841, but were bound and astricted by Statute to proceed with the settlement of Mr Middleton

notwithstanding these dissents. 2. The complainer, Mr Middleton, being a qualified presentee presented by an undoubted patron, and his presentation having been sustained by the Presbytery of Garioch, he was entitled to insist, as he did, that the Presbytery should proceed to admit and receive him as minister of the church and parish to which he had been presented, according to law, notwithstanding the dissents, without reasons assigned, of a majority of the male heads of families, communicants in the parish. 3. The rights of the presentee, and the duties of the Presbytery, being thus clearly defined and settled, no dissent and complaint, or protest and appeal taken to any Superior Church Court, on the ground that the Presbytery had refused to commit the unlawful act of entertaining and giving effect to the said dissents without reason, could have the effect of sisting farther procedure, or of entitling the Presbytery to refuse or delay, when required by the presentee, to proceed with his settlement—the said dissents and complaints, and protests and appeals, being in themselves inept and illegal. 4. The complainer, Mr Middleton, an ordained minister of the Church of Scotland, having been regularly admitted and received as minister of the said church and parish of Culsamond, upon the presentation in his favour according to law, is entitled to be protected in the enjoyment and exercise of the rights and duties of his office, thus legally vested in him; and the pretended Act of the General Assembly anent calls having been found by this Court, and by the judgment of the House of Lords, to be illegal, he is further entitled to an interdict against all proceedings founded on the authority of the said pretended Act, and against any undue interference with him in the discharge of his duties or enjoyment of his rights as minister aforesaid. 5. The Commission of the General Assembly have no jurisdiction to entertain or dispose of the matters contained in the said petition and complaint, in respect the same formed no lawful ground of complaint against any of the parties called who were acting legally in the settlement of Mr Middleton as minister in the foresaid parish, and it was *ultra vires* of the Commission to interfere or pronounce the sentence complained of. 6. The sentence of the said Commission, which was pronounced in absence, and without calling the parties there complained of, is farther illegal: (1.) In respect it is, *quoad* the complainer, Mr Middleton, an unwarrantable interference with his rights, and the performance of his duties as minister of the parish of Culsamond, and with the right of the parishioners of the said parish to receive his ministrations as their parish minister. (2.) In respect it involves an illegal and unprecedented interference with the functions of a presbytery, and authorises and instructs certain individual members of the Presbytery to usurp the functions of the collective body.

The dissentient parishioners entered appearance, and *pleaded*—1. That as the interdict now craved does not relate to any civil right, but to matters purely spiritual, it does not fall within the jurisdiction of this Court, and therefore this application is incompetent. 2. That as the judgment complained of was strictly and legally within the competency of the Court which pronounced it, this Court has no jurisdiction to interfere with its due execution. 3. The interdict now craved cannot

be granted without an interference with the rights of the Church, as confirmed and recognised by the law and the constitution of this country. 4. That even if this Court had jurisdiction, under any circumstances, to entertain such an application as the present, which is expressly denied, the procedure of the complainers, members of Presbytery, in the premises, was altogether inept and illegal, and contrary to the laws of the Church, and, in particular, to the Act of Assembly 1732, c. 5.

The Lord Ordinary pronounced the following interlocutor:

"13th January 1842.—The Lord Ordinary having resumed consideration of this note of suspension and interdict, with the answers thereto, and productions, and having heard parties fully thereon, refuses the note: Finds the complainers liable in expenses, of which appoints an account to be given in, and remits the same, when lodged, to the auditor to tax and report; and decerns.

"Note.—The Lord Ordinary has given the most anxious consideration to this case, and has not presumed to dispose of it without a careful and laborious examination of all those former judgments of the Court which were argued on before him by the complainers, as ruling the question.

"The more he has studied the matter, the more has he become satisfied that the present case does not fall within the scope of these precedents. There is no question now brought before the Court as to the *legality of the Veto Act*; and the *civil rights*, whether of the *patron* or *presentee*, will stand perfectly unscathed, notwithstanding all that has yet been done by the Commission of the General Assembly. The only question here is, shall this Court interfere with the proceedings of a *proper church court*, where that Court, *acting within its own province*, is dealing with a *proper ecclesiastical cause*; and this too, while that cause is still *actually depending* before them?

"It cannot be doubted—for the very judgments of this Court which are most unfavourable to the extreme pretensions of the Church tribunals, expressly assume—that there is an ecclesiastical jurisdiction *altogether independent of the civil courts*. This, indeed, as an abstract proposition, even the complainers hesitated not to concede. But what is more important, the doctrine was again and again distinctly laid down by both of the noble Lords, who, in the Court of last resort, supported the judgment of affirmance in the case of *Auchterarder*. Lord Brougham, taking his illustration from the question of *qualification*, said:—'Prove to me that this is a matter of *ecclesiastical cognizance*: Prove to me that this is a question of *qualification* like the question of *sufficiens* or *minus sufficiens in literatura*, and then I say that the *Court of Session* will be excluded.' And so also said the Lord Chancellor:—'It is not disputed that, as to matter of *qualification*, which is submitted to the decision of the Church, the *judgment of the Assembly upon appeal* is *final*.' In truth, no man who knows anything of the constitution either of the civil or ecclesiastical courts, could ever be misled on this point. The powers of both are to be found in the Statute-book. By 1537 (1532), c. 36, the Court of Session is authorised 'to sit and decide upon all actions *civil*.' By 1579, c. 69, 1592, c. 116, &c., the Presbyteries and other Church Courts, upwards to the General Assembly, are empowered 'to put order to *all matters and causes ecclesiastical* within their bounds, according to the discipline of the Kirk.'

"The only difficulty is, where to draw the line of demarcation between the '*action civil*,' and the '*matter and cause ecclesiastical*,' with the corresponding puzzle, *by what authority shall the line be fixed?*

"Fortunately, it is not necessary, in the present case, at all to deal with this *questio vexata*. At least, so it has appeared to the Lord Ordinary in pronouncing the above judgment; and the grounds upon which he has arrived at this conclusion are as follow:—

"1. To put the case *hypothetically*: Suppose that the Veto Act had never been passed, and that without any attempt to encroach upon, or evade the civil rights of either patron or presentee, and without at all departing from the old and established,

and therefore unquestionably competent and legal form of proceedings in the induction of a minister, a question had arisen in the church courts as to the presentee's *qualification in literature, life, or manners*. This, it will be observed, is the very case which was put in the House of Lords as an admitted example of the independent jurisdiction of the ecclesiastical courts. Now, suppose farther, that in the course of adjudicating upon this question, there came to be tendered, at a particular stage of the process, certain dissents for *cause*, or '*special objections to the presentee's fitness*,' and that these were rejected by the Presbytery, and an appeal taken to the superior church judicatory; and, finally, suppose that the Presbytery, disregarding this appeal, determined, notwithstanding, to proceed in the settlement, and *appeal was again taken* against this irregularity, and that, in the face of all this, the Presbytery still went on to complete the settlement,—in such a case, it cannot surely be questioned, that this Court would have been utterly incompetent to interfere with the proceedings of the higher church court in disposing of the appeal. 1. The church court was here in no respect stepping beyond or out of its own province: 2. The cause in which the question had occurred was purely a '*cause ecclesiastical*;' and 3. The question itself, even in so far as it might depend upon the regularity or competency of the appeals, as having been taken in any peculiar form, or at any particular stage, being a question affecting the form of process in the church courts, was still one upon which these courts, and these courts alone, were entitled to adjudicate.

"II. The case which has actually occurred, and which is now before the Court, is not substantially different from the hypothetical one that has just been put; for, after laying aside (which the Lord Ordinary unqualifiedly does) all that was either said or done in the Court of Presbytery as to matter connected with the Veto Act, there still remain the two important points (and which only became the more important after the Presbytery had resolved, as they ultimately did, *not to proceed upon the Veto Act*.)—viz., 1. That *special dissents*, or '*objections to the fitness of the presentee*,' were tendered and rejected; and, 2. That various appeals having been taken against the proceedings, the Presbytery yet went on to the final question of settlement, and *admitted the presentee* in the face of these appeals.

"The complainers say, that the dissents were not tendered at the proper stage. But, I. That is an answer which it is conceived *they must plead in the church court*, in justification and support of their own judgment; which, at least as regards the *jurisdiction* of that tribunal, has been *competently* carried up for review; for this Court cannot review, and of course cannot inquire into the regularity or irregularity of what must, on all hands, be admitted to be matter of proper church procedure. 2. Even were the church court of review itself to decide erroneously upon the matter thus brought up to them, the case must there '*take end*,' as having been adjudicated on by the only competent tribunal. 3. The complainers stand out in an awkward predicament, as regards the objection on its merits. For though it were the fact (and the Lord Ordinary has formed no opinion either way) that the dissents for *cause* were not lodged in due time, this would seem to have been very much attributable to the conduct of this Presbytery itself, in having not only commenced their proceedings upon the *footing of the Veto Act*, (for though dissents were entered by certain of the individual members, no appeal was taken, and the proceeding was thus left, in substance as well as form, the authoritative proceeding of the *body*); but having so continued them through several diets of the cause, and having only determined at last to *change their course* after they came to find that the majority of the dissentients, *without cause*, were against them, the complainers seem, in this respect, to have been very much playing the game which the Church at large has been said to have done, in first pleading to the *veto* in the civil courts, and afterwards resisting the decision. But be this as it may, at least the proceeding was calculated to mislead the parishioners, who *might* otherwise, at that stage which the complainers say was the proper one, have dissented *for cause*. Therefore, even though it were to be assumed that there was some irregularity in point of time or otherwise (which, however, the respondents deny), it may reasonably be doubted how far the complainers, at least, would not be barred from taking advantage of it, and

whether, accordingly, if they made the attempt, the supreme judicatory of the Church would not, in a general review of the cause, be warranted, without any imputation on the correctness or propriety of their proceedings, to reponne the dissentients as a step *tota re perspecta* necessary for doing substantial justice between the parties.

"In like manner, the complainers justify their having refused to receive and record the dissent and complaint tendered by the minority of their own body, as well as the corresponding protest and appeal of the communicants and parishioners against the sentence '*refusing to receive special objections*,' on the ground 'that the record having been closed, reasons of dissent and complaint, &c., from that finding cannot be competently received.' But, while this argument is open to the same observations generally which have just been made upon the preceding, it appears from those very minutes of Presbytery, which the complainers have here produced, that the record was *not* closed until *AFTER* the *special objections had been tendered*. The minutes bear that a motion was made, and laid on the table, to the effect, *inter alia*, 'that the record be *now* closed.' But the minutes go on, 'which motion being seconded, Mr David Mitchell *now* tendered *SPECIAL OBJECTIONS TO THE FITNESS OF THE PRESENTEE*; and *it was moved THAT THE SAID OBJECTIONS BE RECEIVED AND DISCUSSED*.' Now, these two motions were put against each other as *motion and amendment*. Therefore, though the first motion no doubt carried, it is clear there was *no closed record* until the result of the vote. But the judgment, as determined by that vote, is the very judgment which was the subject, as well of the dissent and complaint, by the minority of the Presbytery, as of the protest and appeal by the parishioners.

"The complainers have still another plea,—viz., that by the rules and practice of the Church, *frivolous appeals* may be *disregarded*. The Lord Ordinary does not know how the case may be as to this: or whether, as is most probable, the true substance and meaning of the rule (if such there be) be not rather confined to this—that though frivolous appeals may be disregarded in the first instance, to the effect of enabling the *inferior* church court to go on and complete their proceedings without those vexatious stops and interruptions which such appeals might occasion, it is still open to the appellant, *in the end*, to insist for judgment on his appeals *before the Superior Court*, and not less competent for that Court to give effect to these appeals, should they happen to differ in opinion, as to their importance, from the Court below.

"Be this, however, as it may, the alleged practice cannot avail the complainers; because, whatever may be the case as to the *earlier* stages of their proceeding, they were not entitled, in the face of an appeal, however frivolous, to proceed to *admit and settle* the presentee. The Lord Ordinary finds it laid down in Dr Hill's book on the Practice of Church Judicatories, (p. 36, citing Act 5, Assembly 1732. Form of Process, c. 6, 10,) that, '*in regard to the settlement of a parish*, that it may not be unnecessarily delayed, it is especially provided that, notwithstanding an appeal, a presbytery may proceed to all the *previous* steps to take the presentee upon trial, and to serve the edict, *LEAVING only the ordination or ADMISSION TILL THE APPEAL BE DISCUSSED*.'

"But, finally, the question here raised is like all the rest, just precisely such a question as the Supreme Church Court, in dealing with the practice of its own inferior judicatories, is exclusively competent to decide upon; for surely, least of all, in a matter of mere *practice or form of proceeding*, is there the shadow of pretext for maintaining that the Supreme Civil Court is entitled to review, or in any respect to interfere with, the Church tribunals.

"III. Did the matter stop here, the Lord Ordinary would be decidedly of opinion, that having regard to the *nature and character of the questions raised*, it is not competent to this Court even to read, for the purpose of *reviewing*, the sentence of the Commission of Assembly which is here complained of. That Court may or may not have adjudicated correctly the cause which was brought before it; or it may have proceeded rashly—let it be irregularly—in so adjudicating. The complainers, for example, say they ought not, until the complaint was finally discussed upon its merits, to have pronounced deliverance of *interdict* against the presentee, &c., strangely enough

forgetting that nothing is more familiar in the Bill-Chamber itself, than to issue interim interdicts before hearing the party complained against; and that this, indeed, was actually prayed for by themselves in the present case, and is in fact the very course which has been followed by this Court in almost every one of the questions of suspension and interdict which have unfortunately arisen upon the Veto Act. Be the blunders and irregularities of the deliverance, however, as numerous and as great as the complainers would wish to represent them, they can, in the *circumstances of the present case*, no more be redressed by this Court, than the blunders that may occasionally creep into the judgments of this Court could be redressed in the General Assembly. The cause being an ecclesiastical cause,—the question a question of church practice, and the subject, with which the church court have been dealing, being the rendering of '*special objections to the fitness of the presentee*,'—that very matter in which the House of Lords have declared the church courts to be exclusively competent,—the civil tribunals, whatever opinions they may hold as to the propriety or regularity of the deliverance, are utterly powerless to touch what a competent court has already, within its own proper province and jurisdiction, adjudicated.

"IV. But if it *were* competent to look at the deliverance thus pronounced by the church court, it would not avail the complainers; for, on the face of that deliverance, the church court appear to have done nothing but what, as a church court, they were entitled to do. All that is there presented, is the fact that a certain petition and complaint having been submitted, they, 1. appoint service on the parties complained against; and, 2. in the meantime, and until a final deliverance, interdict the presentee '*from officiating and administering ordinances in the said parish*;' and 3. authorise and enjoin the members of Presbytery, not complained of, '*to provide for the ministration of the word and sacraments in the parish, in the manner which shall appear to them competent in the existing circumstances of said parish*.'

"Now, really, if such a deliverance is to be regarded as involving any matter but what is purely and strictly *ecclesiastical*, and quite within the reach of the powers of discipline belonging to the church courts, the Lord Ordinary is at a loss to conceive what shall ever be so held. No civil interest, either of the patron or presentee, is thereby affected. And so far, more especially as regards the operation of the Veto Act, it might perfectly well have been that precisely the same deliverance should, in all points, have been pronounced, and precisely the same question that is now before the Court have been raised thereon, although the Veto Act had never existed, or although it had (as it unquestionably ought) been repealed by the General Assembly the moment it was declared to be contrary to the law of the land. Indeed, if the case be what the respondents contend, it is a case of gross departure, in the various particulars already noticed, from some of the most important and fundamental rules of the Church, in regard to the practice of presbyteries in questions of settlement, and the deliverance may, after all, be possibly not merely a competent deliverance for the church court to pronounce, but one actually not more severe, in point of discipline, than such a Court, in the circumstances, was warranted, and might, without any stretch, deem it necessary to pronounce.

"But the complainers say, that however cautious the deliverance may be in expression, it is in reality the Veto Act, and the feelings that actuate the church courts in regard to it that lie at the bottom. The Lord Ordinary can only look at what is competently before him. He is not judicially entitled to inquire into or guess at the motives of a judgment which has been pronounced by a competent tribunal of *co-ordinate* authority, and which bears the mark of *no excess of power* to the prejudice of civil right upon the face of it. He acknowledges, in this respect, the soundness of the principle which was given effect to by the Court of Queen's Bench in the late famous case of the *Sheriffs of Middlesex* (11 A. and E., 273). Nor does he deem it would be either seemly, or looking to the hazard of provoking unnecessary collision, expedient, to presume unworthy motives in the judicial proceedings of such a tribunal as the Assembly or its Commission. To borrow the words of the Lord Chief-Justice Denman in the case referred to,—'*if they ever did so act,*

he is persuaded that, on farther consideration, they would repudiate such a course of proceeding.' And he is satisfied, at all events, that the matter is most safely left upon this footing, instead of straining the law in order to get the better—a little more early—of the inconvenience and excitement of a collision, which after all can be but temporary.

"V. Supposing it were open to look *beyond* the deliverance, and to construe it with reference to the petition and complaint on which it proceeds; and even farther, to glance from that petition and complaint to the previous dissents and appeals which were taken in the course of the Presbytery's proceedings, it would still make no substantial difference in the case. It would only thence appear that the complainers, *in addition to the two grounds* of complaint, which, alone, the Lord Ordinary has found it necessary to consider, founded also—but separately and independently—on a third, which, no doubt, might have brought the veto question more directly into the discussion. The Lord Ordinary may have his own impressions as to the unhappy influence which the introduction of this exciting matter may, and perhaps must have had upon the minds and conduct of one and all of the parties who are concerned in this cause. But he deems himself bound to cast all this aside,—neither the deliverance of the Commission, nor the complaint on which it proceeds, is *nullified* as to those matters contained in it, which are of unquestionable competency, by the mere *taint* of their being brought into juxtaposition with another matter which may possibly be regarded as *incompetent*. On the contrary, if that deliverance and that complaint would have been unassailable in this Court, if specifically rested on two out of the three grounds upon which the complaint is rested,—the third not having been stated, or not having so much as existed,—there is quite enough to support the exclusive jurisdiction of the church court,—and the mere introduction of the third ground could not take away this jurisdiction. And then, there being nothing in the deliverance itself to connect it *necessarily* and *exclusively* with the third ground, the Lord Ordinary is surely not to presume (more especially if that third ground would vitiate the proceeding by its incompetency,) that the deliverance was founded upon it at all, but must deal with the case precisely as he would have done if that third ground had not been embraced in the complaint,—the terms of the deliverance being perfectly applicable to the other two,—and its whole force being sufficiently exhausted by what might competently have been pronounced with reference to them, and to them alone.

"More particularly would this seem to be the only proper course in the *present stage* of the proceedings before the church court, in the process of review. The complaint is *still in dependence* before that Court; and until it be finally disposed of, there can neither be any *absolute right* to the office of minister recognised in the presentee, nor can it be anticipated how the Court of Review itself may ultimately deal with the various grounds of the complaint which is depending before them. If, rejecting the *two* grounds, in respect more immediately of which the Lord Ordinary has pronounced the present judgment, they shall rest their final sentence entirely upon the Veto Act, this Court may be again called upon, and it will then be time enough for it (if at all necessary) to interpose. But if, on the other hand, waiving or throwing aside all consideration of the Veto Act, they merely reverse the proceedings of the Presbytery, in respect of the irregularities *otherwise* committed by them, and so remit the cause back to be proceeded in by the Presbytery, consistently with the old and acknowledged practice in such matters, then there will in no view be any room whatever for interference on the part of this Court; and it will be made clear, on all hands, that to have interfered with them now, would really have been to be guilty of a very grievous encroachment on the independence of the Church and its courts, in regard to a matter exclusively within their own province."

The suspenders reclaimed. When the cause was advised, the following speeches were delivered:

Lord President.—We are now met to decide on the questions which have lately been so elaborately discussed under the reclaiming note against the interlocutor pronounced by the Lord Ordinary on the bills, on the 13th of January last. From the manner in which those questions have been treated, and the

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great variety of authorities referred to on both sides, it became necessary for the Court to take time for their consideration, and to deliberate on its judgment. Notwithstanding, however, the very wide field of argument which has been embraced by the counsel on both sides, and sensible as I am of the great importance of some of the questions that have been raised, I do not consider it will be necessary, from the view that I have taken of the case, to detain your Lordships at any length commensurate with the extent of the pleadings, which we have all listened to with so much satisfaction. Of one thing I am most fully assured, that, if we arrive at an erroneous conclusion, it will not be owing to any deficiency on the part of the learned counsel, who have maintained the interests of their clients with infinite ability, learning, and research.

I must begin with adverting to one question, to which the attention of counsel was directed by the Court itself, and which, though it had not been made the subject of discussion in the Bill-Chamber, appeared to be of essential importance,—namely, whether the Commission of the General Assembly of the Church of Scotland, from which that proceeding emanated which has been brought before us, is a tribunal or judicature of the Church established and recognised by the laws and constitution of the realm? Called upon, as the counsel on both sides suddenly were, to argue this question, they have discharged their duty unquestionably in a most able and satisfactory manner. But, although we have bestowed upon their arguments the greatest possible attention, yet, considering the shape of the present proceedings, and that we are now only in a discussion in the Bill-Chamber, it appears to me, and I believe also to all of your Lordships, that it would not be proper or decorous finally to dispose of such a question,—involving interests so extensive and important, both to the Church and to the whole people of Scotland,—without fuller and more deliberate consideration, and probably by availing ourselves of our brother Judges. I shall abstain, therefore, at present from giving any indication of opinion in regard to the above question, and, looking to the Commission as it now exists, proceed to state the grounds of my judgment upon the rest of the case,—the only difficulty as to which I have felt being that of comprising them within as narrow limits as possible.

The note of suspension and interdict, which has been refused by the Lord Ordinary on the bills, was presented on behalf of the Rev. William Middleton, minister of the church and parish of Culsamond, in the presbytery of Garioch and county of Aberdeen,—of that reverend Presbytery, and the Rev. George Peter, the moderator, and the other members therein named; and of Sir John Forbes of Craigievar, Baronet, patron of the said parish:—and it prayed for suspension of certain illegal proceedings adopted against them at the instance of Alexander Anderson, and various other persons designed parishioners of the parish of Culsamond, and enumerated in its prayer, by parties designing themselves and acting as a Commission of the General Assembly. The suspenders also prayed particularly for interdict against proceeding to carry into execution a sentence or deliverance of the Commission, pronounced on the 17th November last, upon a petition and complaint presented against the suspenders by the parties above named, the terms of which are fully set forth in the note. This note having been followed with answers, and the question of interdict having, by consent of parties, been in the meantime reserved, they were afterwards fully heard, when Lord Ivory, on the 13th January pronounced the following interlocutor:—"The Lord Ordinary having resumed consideration of this note of suspension and interdict, with the answers thereto, and productions, and having heard parties fully thereon, refuses the note; finds the complainers liable in expenses, of which appoints an account to be given in, and remits the same when lodged, to the auditor to tax and report, and decerns." To this interlocutor the Lord Ordinary added a note, explaining fully the grounds of his judgment.

Unable, my Lords, as I am to concur in many of the views expressed in this detailed exposition of the opinion of the Lord Ordinary, I do not feel myself as called upon, neither do I consider it in fact as a proper course of proceeding, sitting here merely to review the judgment he has pronounced, to reply in any degree to what he has there stated. I cannot, however,

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refrain from noticing what I consider as the fundamental proposition on which the whole of the Lord Ordinary's reasoning appears to rest,—namely, "That there is no question now brought before the Court as to the legality of the Veto Act; and the civil rights, whether of the patron or presentee, will stand perfectly unscathed, notwithstanding all that has yet been done by the Commission of the General Assembly. The only question here is, shall this Court interfere with the proceedings of a proper church court, where that court, acting within its own province, is dealing with a proper ecclesiastical cause, and this, too, while that cause is still actually depending before them?" With what is thus pointedly affirmed, I am, upon the most deliberate consideration, compelled totally to disagree, as it, on the contrary, appears manifest to me, that the Veto Act, and the civil rights both of the patron and presentee, are directly involved in, and are in reality the basis of, the whole petition and complaint which was presented to the Commission of the General Assembly; and that the departure from the enactment and regulations of that Act, in its proceedings, is the real charge made against the majority of the Presbytery of Garioch, and the conduct of Mr Middleton in availing himself thereof. If this can clearly be shown to be the case, it cannot surely be asserted, after what has been solemnly declared to be law, that the granting of the protection of this Court is an interference with the proceedings of a proper church court, acting within its own province, and dealing only with a proper ecclesiastical case. In order, however, to see how the case actually stands, it is necessary to attend to the circumstances under which the deliverance of the Commission complained of was applied for and obtained.

Something has been said as to the incompetency of our looking beyond the terms of the deliverance itself, in order to decide whether it is, in fact, competent for this Court to receive the note of suspension, or in any way to interfere in the case. I can, however, subscribe to no such doctrine, as I hold it to be perfectly legitimate to examine minutely the petition and complaint, which, as the sole foundation of the procedure, was presented to the Commission, and upon which its sentence or deliverance was pronounced. Although the parties have on both sides also referred largely to the minutes of the Presbytery in support of their different statements, I am not prepared to hold that it is equally necessary for this Court to follow them into that minute examination, as we are not here called upon to review those proceedings, in the proper sense of the term. They may, however, perhaps be referred to if necessary, in explanation of the statements in the complaint.

[After narrating the leading facts of the case, and quoting the complaint presented to the Commission, his Lordship proceeded.] If anything had been wanting to show that the real *gravamen* of this complaint,—(which bearing, as it expressly does, that it had "been craved by the agent for the said dissentients that the Presbytery should then take steps, in terms of the said Act anent calls, and of the instructions of the General Assembly thereanent, for the ultimate rejection of the said presentee,")—was the disregard by the Presbytery of those dissentients,—and having actually inducted Mr Middleton, notwithstanding of them, and that comparatively little weight is attached to the refusal of the tender of special objections,—it is demonstrated by the primary prayer of the complaint, which craves warrant for service upon the members constituting the majority of the said Presbytery who voted on the motion sustaining the call, and concurring in the same, and appointed the said Rev. William Middleton to be admitted into the said parish, notwithstanding the said apparent majority of dissentients, and in disregard of the same. This leading and fundamental part of the prayer is followed, no doubt, by a reference to "the motion disregarding the dissentients and complaints of the minority, and the protests and appeals of the agents of the dissentients, upon the pretence that they were founded upon the Veto Act, which had been declared *ultra vires* of the Church, and whereby they declared the record closed, with the view of preventing special objections from being received, though tendered." But, keeping what is above recited in view, and that the prayer is directed also against Mr Middleton, the presentee, who, it is said, "has closed with the said settlement, and accepted the same, notwithstanding of the dissentients above mentioned, and that it is perpetrated against

the laws of the Church,"—it is utterly impossible to deny that the disregard of the Veto Act, and the refusal of the majority of the Presbytery to give effect to it, so far as to sist proceeding till the next General Assembly, are truly and substantially what is brought under the notice of the Commission in this complaint; and that the allegation of a violation of the laws of the Church is brought forward merely as a secondary consideration to elicit out the complaint.

But was this complaint dealt with by the Commission in its deliverance now before us, and which I need not read at length, as in reality relative to matters totally apart from, and in no way connected with the supposed violation of the Veto Act? Or is there an individual member of that Commission who will venture to assert that the deliverance of the 17th November, against which interdict is craved in the note of suspension, had no reference to the alleged departure from the Veto Act and its regulations, but was pronounced solely in respect of the other proceedings of the majority of the Presbytery, which are noticed in the complaint? The preamble of that deliverance is of itself sufficient to demonstrate the direct contrary bearing, as it does, that the Commission "took up the petition and complaint of the dissentient male heads of families and others in the parish of Culsamond, praying the Commission to grant warrant to serve this petition on the individual members constituting the majority of the Presbytery of Garioch." The description of the complainers here given, applied undeniably to those only who are designated under the Veto Act as entitled to dissent; as, prior to that Act, no such denomination of persons was ever known throughout the country. The deliverance likewise bears:—"Farther, the Commission in the meantime, and until a final deliverance shall have been pronounced in regard to the proceedings complained of, did, and hereby do, interdict and prohibit the Rev. William Middleton from officiating and administering ordinances in the said parish, and authorise and enjoin the remanent members of the Presbytery of Garioch, not complained of, to meet forthwith to provide for the ministrations of the word and sacraments in the parish of Culsamond, in the manner in which it shall appear to them competent, in the existing circumstances of said parish," &c. Now, under these words, "in regard to the proceedings complained of," it is impossible to dispute that every thing that is set forth in the complaint, as to a disregard of the dissentients under the Veto Act, is included. It is therefore out of all sight to hold for one moment that this deliverance can be viewed as solely applicable to supposed violations of the other known laws of the Church. We see the disregard of the Veto Act,—the Presbytery retracing its steps,—their refusal at last to give effect to it, as being *ultra vires* of the Church,—and their proceeding to the admission of Mr Middleton, notwithstanding an apparent majority of dissentients given against him, under the provisions of that Act, prominently brought forward as the grounds for calling for the extraordinary interference of the Commission; and, though other allegations are stated as to the violations of the Church, there is no pretence for maintaining that it was in reference to them alone that the Commission pronounced its deliverance. The suspenders are here opposed to the respondents, who demanded the interference of the Commission; and seeing what they have set forth as the special grounds for its interposition in their behalf, they cannot be tolerated in pretending that it was not at all because the Presbytery refused to give effect to the majority of dissentients without reasons, or in consequence thereof to take the necessary steps for the ultimate rejection of Mr Middleton, they had complained.

Had the deliverance pronounced by the Commission, which is the subject of complaint in the note of suspension, been truly meant to be confined to deviations merely on the part of the Presbytery from the laws of the Church, altogether apart from their disregard of the Veto Act, and the majority of dissentients without reasons under its operation, it ought to have been conceived in terms very different from those in which it is actually couched. Had it borne that the Commission, considering that, independently altogether of what had been set forth in the complaint as to the disregard and violation of the Veto Act and its regulations (which, having been found by the highest authority to be *ultra vires* of the Church, are now no longer operative,) the Presbytery of Garioch had apparently been guilty

of a violation of the laws of the Church in their proceedings, and particularly in refusing to receive special objections with regard to the admission of the Rev. Mr Middleton, as assistant and successor in the parish of Culsamond, it therefore pronounced the deliverance as it now bears,—there might have been some foundation for holding that no question was now raised as to the legality or effects of the Veto Act; and that, as the deliverance related solely to an ecclesiastical matter, and was within the province of a church judicatory, the note of suspension was incompetent. But when the deliverance actually pronounced is compared with the petition and complaint, and the terms of its prayer, it is utterly impossible to view it in any such light.

The general terms in which the deliverance of the Commission is framed, whether purposely or not, can never warrant its being withdrawn from its direct connection with the matter set forth in the complaint, so as to entitle the respondents to convert their sweeping and prominent charges as to a violation of the well-known legislative act, under which the proceedings in regard to Mr Middleton were commenced and carried on from the moment his presentation was sustained, into a mere deviation from the laws of the Church in regard to the settlement of ministers. The well-known maxim, *Dolus latet in generalibus*, directly applies to such a construction being put on the deliverance in question. But I am fully persuaded that there was no real intention of so disposing of, or acting upon the complaint, as has been attempted to be maintained on the part of the respondents; but that the Commission had resolved to interfere in the manner expressed in their deliverance; and that, in fact, it was pronounced in reference to the whole subject matter, and most especially the avowed disregard of the Veto Act and its regulations, that had marked the conduct of the majority of the Presbytery in their later determination to proceed in the admission of Mr Middleton. It is impossible, therefore, for the respondents to be now permitted to shelter themselves under the generality of the terms in which the deliverance is framed, or that they can be entitled to maintain that it was pronounced altogether irrespectively of the veto law.

Keeping in view, then, the real nature of the petition and complaint which was presented by the dissentient male heads of families, and others, in the parish of Culsamond, and the sentence or deliverance pronounced thereon by the Commission of the General Assembly, it remains to be considered, whether the civil rights of the suspenders, now before this Court, are thereby affected or trespassed upon. The presentation in favour of Mr Middleton, it is admitted, was granted by the undoubted patron, and was regularly sustained by the Presbytery. The patron and presentee were unquestionably, therefore, entitled to rely that their respective civil rights would be disposed of by the Presbytery in strict conformity with the statutory law in regard to the admission of ministers, and that neither the veto law, nor any other illegal proceeding, would be adopted, so as to interfere with Mr Middleton's admission as assistant and successor to the minister of Culsamond. The duty incumbent on the Presbytery and its component members is pointed out by the statute law of the land; and if they ultimately have conducted themselves in conformity therewith, they are unquestionably likewise entitled to its full protection. It cannot, however, be disguised, that, in their proceedings, after sustaining the presentation, the Presbytery commenced with acting contrary to law; and, in so far as it is necessary for us to give any opinion, I must unequivocally state, that I totally disapprove of the steps that were sanctioned by them, in giving effect to an act which the Church had taken upon itself to enact without lawful authority, and which has been solemnly determined, after the fullest and most deliberate consideration, to have been *ultra vires*, and utterly beyond the competency of the whole legislative power of the Church. Had those early proceedings of the Presbytery, which were resisted and protested against by the patron and presentee, been made the grounds of application to this Court for our interference, as amounting to a direct invasion of their civil rights, we must immediately have taken the necessary steps for affording them redress. But after having gone so far wrong,—probably from their being misled by the expectation that those persons who had, in fact, petitioned for Mr Middleton's appointment, and with whom they had been so

long familiar,—would not afterwards have had the effrontery, and, I must add, dishonesty, to negative it by their dissents without reasons, there was still *locus penitentiae* for the majority of the Presbytery; and having accordingly stopped short, and resolved to proceed no farther under the Veto Act, but to discharge their legal duty to the presentee, by completing his admission according to law, the persons complained against are now entitled to the full protection of this Court, and to insist that they shall neither be removed from the exercise of their legal functions, nor degraded by having those functions conferred on the minority of their body for having acted merely in obedience to the law.

That Mr Middleton's civil rights, as well as those of the patron, are encroached upon and compromised by the deliverance of the Commission, appears to be clear beyond all doubt. He states that his admission was completed, notwithstanding the illegal attempt of his opponents, backed by the minority of the Presbytery, to defeat it by the application of the veto law,—to the effect, at least, of sisting all further proceedings till the next meeting of the General Assembly. Had this proposal been sanctioned by the majority, after it had been publicly announced that there was an apparent majority of dissents, without reasons, against him, and steps had been craved to be taken for his ultimate rejection in consequence, Mr Middleton was well aware of the fate that, in all probability, awaited him, as occurred in the sequel of that of the unfortunate presentee to the parish of Daviot, whose case was decided by the very last General Assembly, notwithstanding that their line of duty had been so plainly pointed out to them by the judgment of the House of Lords; for I find in the printed Acts of that venerable body, which have been referred to in this case, the following entry of the 28th May 1841:—"Parties having been heard, were removed: After reasoning, it was moved and seconded that the General Assembly sustain the reference: Find that there is a majority of male heads of families dissenting; and therefore instruct the Presbytery of Inverness to reject the presentee to Daviot, and intimate this sentence to the patron. The General Assembly, without a vote, agreed to this motion; when Mr Crawford, for the dissenting heads of families, communicants, took instruments, and craved extracts." The presentee who was thus disposed of, no less than three years after the judgment of the House of Lords in the case of Auchterarder, admitted in this case to be authoritative law, is the same individual who formerly obtained from the Second Division an interdict against those same heads of families who were about to enter their dissents against him, without reasons, but which he had unhappily been induced to fall from and commit himself to their tender mercies, and those of the Presbytery, and was thus finally rewarded for his conduct. If the ordinary vehicles of public intelligence are to be relied on, the male heads of families in this parish have again exercised their power of dissenting, without reasons, against another presentee to the church of Daviot. That Mr Middleton had, therefore, the clearest right and interest to object to any such illegal sisting of his admission, is most manifest.

But nothing can be more evident than that his civil rights are directly violated by his being now interdicted and prohibited by the Commission, without even being heard, "from officiating and administering ordinances in the same parish;" while the members of the Presbytery, not complained of, are enjoined to meet forthwith to provide for the ministration of the word and sacraments in the parish of Culsamond." A gross stigma is thus fixed upon him and his sacred character as a minister of the gospel, which resting (as I hold it to be) altogether on illegal grounds, he is justly entitled to complain of, and to be protected against. Notwithstanding what has been said as to its still being competent for him to perform certain acts, for which I see no authority, I am satisfied that the deliverance was intended to prevent his doing anything, in the meantime, within the competency of his office, as the admitted assistant and successor in that parish. The head and front of his offending, therefore, which has led to his being so dealt with, consists in his having merely offered himself to the Presbytery for admission, in terms of his presentation, under his legal rights, and his refusal to submit himself to the operation of the Veto Act. As to the other reverend members of the Presbytery, it is not of

their being merely cited, or ordained, to give in answers to the petition and complaint that they complain in the note of suspension, but of the manner in which they are dealt with in the deliverance, in having the minority of their own body appointed to meet and perform that duty, in regard to the parish of Cul-samond, as has already been pointed out. That this is not, in direct terms, a suspension of them from their official situation as regular members of this Presbytery, may no doubt be said; but it still clearly amounts to a degradation from their *status* and functions as established ministers, pronounced before they were heard for their interests, and which is continued against them, and thereby affects their general usefulness and respectability, and, as they maintain, for merely giving obedience to the declared law of the land. Such sentences, affecting, as they do, the respectability of the parochial clergy of Scotland, are productive of incalculable evil, as they must inevitably lead to a spirit of discontent and insubordination among the people under their charge. Their right to protection is, therefore, equally clear with that of their reverend brother, and no solid distinction can be made between their respective cases.

The whole proceedings of the Commission, in regard to so singular an application as this complaint of dissentient male heads of families, of which no similar example has been produced from the whole annals of the Church, seems, in reality, to have been intended to strike terror into the minds of the majority of this Presbytery, who, it was seen, had returned to a due sense of their duty, and probably, also, to prevent the contagion of their example from spreading in other quarters. If the unusual measure thus resorted to by the Commission, in stepping in between the appeals and complaints, which, they must presume, would be disposed of according to the laws of the Church, is to be defended on account of the supposed exigency of the case, the extraordinary nature of their deliverance entitles those aggrieved by it to call equally for the prompt interference of this Court. Pending appeals, which, according to what we have been told, must clearly be successful, and insure the overthrow of the whole proceedings of the Presbytery in the admission of Mr Middleton, the Commission strikes in by its despotic act, interdicting an admitted minister from the exercise of his clerical functions, and putting the majority of the Presbytery under the ban of the Commission; and all this at the very time that the majority of the Presbytery is accused of disregarding an appeal that had been taken. Everything done by the Commission is reconcilable only with its impression, that here was the case of another Presbytery resolved to shake off all connection with the Veto Act, and to abide solely by the established laws of the Church. It was deemed necessary, therefore, that the Commission should act decisively, and not wait for the decision either of the Synod or of the General Assembly itself. I cannot, therefore, view the proceeding that it adopted as necessary merely to secure adherence to the ordinary laws of the Church; but, on the contrary, I consider it, though carefully framed and covered up to keep the Veto Act and its machinery as much as possible in the back-ground, as intended to preserve their full operation against the settlement of Mr Middleton.

From the manner in which the leading counsel for the respondents, in his able argument, spoke of the Veto Act, and the effect of the decision in the case of Auchterarder, one would have been led to suppose that the Church had, in reality, abandoned it, and no longer meant to enforce its operation in regard to any presentation to a benefice in Scotland. That, however, is very far from appearing to be the case, from the course adopted, not only in the very recent case of Daviot, as already noticed, but in this very one of Culsamond, as is demonstrated on the face of the complaint to the Commission; which shows that the Veto Act, even in that part of it admitted to have been found to be illegal, was applied and endeavoured to be enforced against the rights of Mr Middleton. It would have been well, indeed, for the Church itself, the peace of the country at large, and the best interests of true religion, had it acted on the views so properly indicated by its learned counsel, and conformed itself to the expectation expressed in these concluding words of the Lord Chancellor, in moving the affirmance of the judgment in the case of Auchterarder:—"If your Lordships shall concur in the opinions I have expressed, and by your decision inform the clergy of Scotland what the law really is, I cannot doubt but

that they will, by their conduct and example, inculcate the sacred principle of obedience to the law,—of respect for the rights and interests of others,—and of the sacrifice of private feelings to the performance of a public duty." Instead, however, after this solemn affirmance, of betaking itself to the wholesome laws of the Church, expounded as they so clearly are, for its guidance, in the admirable compendium of its constitution, by the venerable Sir Henry Moncreiff, or acknowledging, in the words of an eminent leader himself,—“We have failed certainly and conclusively in obtaining a ratification of the veto law, and we have no hesitation in saying, that the first step of an outgoing from this position is the repeal of the veto law;” and adding, “this is the path of consistency and of honour, and we must not be deterred from it by the ill cry of course-minded impatience, or the ridicule of those opposed to us,”—it has since been resolved by the General Assembly not to repeal that veto law; it has been re-affirmed, with the regulations regarding it, as the Acts of last Assembly before us clearly prove; and wherever the presentee is opposed, he has either been rejected, or the case is sisted, and the parishes throughout the land left vacant, while ecclesiastical censures of the heaviest description have been poured out against all those who have merely performed their legal duty, and will not join in systematic opposition to the law of the land.

In this infatuated determination, then, we see the true source of all those proceedings that have taken place, and are continuing to agitate the country, and of which those with regard to Culsamond make a part; and because parties do not slavishly submit to have themselves and their rights trampled upon, under a law attempted to be enacted by the Church, directly interfering with acknowledged civil rights, and which has solemnly been adjudicated to be *ultra vires* of it, and contrary to the law of the land, but merely apply to this Court for protection, we are to be told that we are going beyond our jurisdiction, and usurping the powers of the Church, whose jurisdiction, forsooth, is supreme in all matters ecclesiastical, and which, of course, has the power of declaring what is ecclesiastical at its pleasure. But what is this but again bringing forward what was so fully discussed, and finally disposed of, in the case of Auchterarder? Is it really expected that this Court, after what has already passed, is to give any countenance, direct or indirect, to the operation of the veto law, or any part or portion of it? If the Church, or any of its members, entertain any such absurd conception, the sooner they get rid of it the better; for I am confident that this Court will continue, as it has done, as Judges sworn duly to administer the law, to disregard and check every attempt to enforce that Act, or any of its provisions, and to protect, in the full enjoyment of their legal rights, all persons whatsoever against whom the censures or punishments of the Church may be attempted to be hurled for giving obedience to the law.

The Presbyterian form of the Church government of Scotland having unquestionably been established by the authority of the Legislature,—its Confession of Faith having been sanctioned by express Statute,—the endowments of the ministers of its parishes having generally been provided for under the same authority, and various Statutes having been passed recognising in the clearest terms the rights of patrons to present qualified ministers to such parishes, and containing special injunctions as to how presbyteries shall proceed in the discharge of their duty with regard to their admission,—it may fairly be asked, whether those Statutes are or are not to have effect? Can it for one moment be maintained, that the Statutes above alluded to, expressed as they are in terms equally clear and explicit as any others in the Statute-book, are to be held *pro non scriptis*, or as wholly nugatory and inoperative? or is there the slightest pretence for asserting that, in acting upon them in the discharge of their sacred duty, the Judges of the land are transgressing the bounds of their proper jurisdiction, or usurping a right to interfere with spiritual matters that belong solely to the ecclesiastical courts? According to every principle of law, justice and sound reason, the answers to such questions must be given in the negative,—it being plainly the bounden duty of the civil court to interpret and give effect to the Statutes in question, in the same manner as they are bound to do with regard to any other legislative enactment whatever that involves the civil rights of the subjects of the realm. As to the idea that the statutory

enactments relative to the rights of patrons, or the duties of presbyteries, as to the admission of qualified presentees, are to be viewed as in their nature encroachments on the spiritual rights and independence of the Church, it can afford no ground of objection in a court of law, when called upon to support the civil rights of patrons or presentees, as the Church ought to have opposed the passing of the law when enacted, instead of having, for so long a period, partaken and enjoyed the benefit and protection that were secured to it as the Established, and certainly not as a Voluntary or Independent Church.

It is the most unfounded, therefore, of all assumptions, to hold that, in merely giving effect to the Statutes in question, this Court is, in the slightest degree, trespassing on the proper spiritual rights or functions of the Church as by law established. If the Church only walks according to the express terms of the Statutes by which it is, both collectively and individually, as effectually bound as any other incorporated body of the State, there can be no occasion for ever calling for the interference of civil authority; but when these Statutes are directly violated, or set openly at defiance, then it becomes necessary that those who are guilty of such breaches of the law, shall be taught that they cannot so act with safety, let their cry of the spiritual functions of the Church being thereby invaded be ever so loud and clamorous.

Before adverting more particularly to the clear exposition of the law, afforded by the judgment of the House of Lords, affirming the decision of this Court in the case of Auchterarder, it is necessary to attend to the position on which some stress has been laid in the argument for the respondents, as to the alleged deviation from the established laws of the Church in regard to the refusal to receive special objections at the time they were alleged to have been tendered to the Presbytery of Garioch; and as to what has also been stated as to the departure from the standing law established by the Act of the Assembly 1732, having warranted the interference of the Commission.

It will be seen from the printed Acts of the last General Assembly, that they contain an "Overture and Interim Act, with regulations for carrying into effect the Act of Assembly, May 29, 1835, anent the calling of ministers;" and though those regulations have undergone some modification since the veto law was first passed, yet others, nearly similar in their terms, were sanctioned and enacted by the same authority, for carrying that Act into effect from its first commencement. These regulations are, therefore, part and parcel of the veto law itself; and it will be seen from the speech of the Lord Chancellor, in the case of Auchterarder, that he so considered and dealt with them throughout as part of that legislative enactment which the Church had attempted to pass. The House of Lords, however, having unequivocally decided that the veto law, in regard to the admission of ministers, was altogether *ultra vires* of the Church, and consequently wholly inoperative, it necessarily follows, that no presentee can legitimately be made to suffer by the application of any provision of that law, or its concomitant regulations, as a bar to his admission by a presbytery under a legal presentation. It is utterly in vain, therefore, to tell your Lordships that these regulations for carrying into effect the Veto Act are, in fact, transcripts of resolutions that were proposed to the General Assembly in 1834, by Dr Cook, before it was enacted. Whether these regulations were or were not consonant to the law and practice of the Church, is, in fact, of very little importance in the present question; because, instead of their being adopted as a code of procedure for the future admission of ministers, they were negatived by the Assembly, and in lieu of them, that Act, with the regulations for carrying it into effect, which has been found to be altogether *ultra vires* of the Church, was substituted.

But even if those regulations, which clearly make part of the veto law, could be appealed to by the respondents, it appears, from what is stated in their complaint, that they could not avail them in maintaining that the majority of the Presbytery have been guilty of the wrong that is asserted, in not receiving and acting upon the tender of their special objections. For it is thus provided, in the 6th and 7th regulations, enacted on the 31st of May 1841,—“That if the Presbytery shall find that there is not a majority of persons on the roll dissenting, and if no special objections be stated, they shall sustain the call, and

proceed to the trials and settlement according to the rules of the Church: But, if the Presbytery shall find that there is a major part of the persons on the roll dissenting, they shall reject the person presented, so far as regards the particular presentation, and the occasion of that vacancy in the parish, and shall, within two days thereafter, intimate this their determination to the patron, the presentee, and elders of the parish.

“7. That if, at the meeting for moderating in the call, dissents by a majority on the roll shall not be stated; and if any special objections to the settlement of the person presented, of whatever nature such objections may be, shall then be stated to the Presbytery by any person entitled to object by the general laws of the Church, and if such objections appear to be deserving of deliberate consideration or investigation, the Presbytery shall delay the further proceedings in the settlement till another meeting, to be then appointed, not later than eight days thereafter, and give notice *apud acta* to all parties concerned then to attend, and that they may be heard.”

Recollecting, then, that the respondents themselves expressly state that, prior to the slightest hint being given of their even having had it in contemplation to give in special objections, their dissents, without reasons, against Mr Middleton had been received and entered on the record, and a public annunciation made that there was an apparent majority of such dissents against him, and that their agent accordingly craved the Presbytery to adopt the necessary steps for his ultimate rejection,—it is plain, upon the face of the regulations themselves, that the then tendering of special objections is an entire departure from their express terms. Even, therefore, if those regulations were to be held as ever so binding, the Presbytery, at the time when it is said the objections were tendered, were not bound to receive them; but resolved, as the majority had become, to act no longer under the veto law, but to proceed in the discharge of their statutory duties in the admission of the presentee,—they are entitled to maintain that they were guilty of no violation of the laws of the Church, in doing, as they did, in strict obedience to the laws of the land; for their constitutional duty as to the proper time of receiving special objections, and which the Presbytery duly performed, is clearly defined in Principal Hill's Institutes of the Church, p. 207, where, after stating that at any time during the trials of a presentee, the inhabitants of a parish may present a libel against him, charging him with immorality or unsoundness of doctrine, and that the Presbytery is not to proceed to the settlement till it is discussed (nothing of the sort having been dreamt of in the present case), he adds:—“After the trials of the presentee are finished, all who have any objections to his life or doctrine are summoned by a paper read from the pulpit, which we call an edict, to appear on the day appointed for his ordination, which is at the distance of not less than ten days from the reading of the edict, and may then, without the formality of a libel, state their objections as matters of charge. The charge will be disregarded by the Presbytery if it is frivolous; and as proof must be instantly adduced, the edict does not afford any occasion of vexatious delay, but it gives persons, the most unacquainted with the forms of business, an opportunity of stating their personal knowledge of any circumstance, in the character and conduct of the presentee, which renders him unworthy of being a minister of the gospel; and, by exhibiting the jealousy with which the constitution of our Church watches over the qualifications of entrants, it furnishes a lesson of circumspection to all who direct their views to the Church.”

In regard, again, to the supposed violation of the injunctions of the Act of Assembly 1732, in requiring, that after appeals are taken, the actual admission of a minister is to stop short till they are disposed of, the true meaning of that regulation is well explained in the passage from Lord Bankton, which has been laid before us. The evil to which that learned author alludes, seems no longer, however, to influence those who take a lead in questions of this nature, or who give countenance to the new-fashioned doctrine as to the supposed distinction between *officium* and *beneficium*, in regard to ministers of the Established Church of Scotland,—a doctrine which will probably not soon receive the deliberate sanction of your Lordships. But, not to dwell on this point at present, the Act of Assembly 1732 must be held to have contemplated appeals only that are founded upon grounds consistent, not only with

the laws of the Church, but the laws of the realm. If the Veto Act, then, as to a departure from which the appeals were taken against the proceedings of the majority of this Presbytery, is in itself utterly illegal and inoperative, those appeals against the disregard of it cannot fairly be held to fall within the injunction of the Act of Assembly in question. It is, at any rate, obvious, that its violation is not specially set forth as a ground of the complaint; and as to the assertion of any other departure from the general laws of the Church, it has already been sufficiently adverted to.

As to the weight due to the legitimate effect of the judgment in the case of Auchterarder,—in the decision which, in my opinion, ought to be pronounced in this case,—I feel it to be unnecessary to enlarge at any great length. I shall not, therefore, refer minutely to the particulars of that important case, which are generally so well known, further than to direct attention to the words in which, in the authoritative reports prepared under the eye of the House of Lords, and regularly transmitted by its direction for the guidance of this Court, the argument maintained by the appellants, the Presbytery of Auchterarder, backed by the Church itself, is introduced:—“Two questions had to be considered: (1.) Whether the General Assembly were competent to pass *cum effectu* the interim Act of 2d June 1834? And, (2.) Whether, supposing that such interim Act was alleged to be *ultra vires* of the General Assembly, the Court of Session had power to entertain the question of its legality?”

In the disposal of the questions thus raised for the determination of the House of Lords, and more particularly set forth in the appellants' pleas in law, reference was made by the counsel for the respondents in this case to certain isolated passages to be found in the opinions of the Lord Chancellor and Lord Brougham in delivering judgment, as favourable to part of their argument; but, upon a careful perusal of the whole of what these learned Lords have stated in so luminous a manner, it appears to me that they afford the most decisive authority, in regard both to the illegality of the veto law itself and its enacted regulations, and to every thing that has been urged against the jurisdiction of this Court concerning it.—[After quoting to this effect from the speeches, his Lordship proceeded.]

Notwithstanding the above opinions, that were followed by the affirmance, on the 3d May 1839, of the judgment of this Court in the Auchterarder case, it has been said that that decision only determined the point which was raised by the summons. This, in one sense, may no doubt be judicially stated; but, nevertheless, it is manifest, from the way and manner in which the whole questions, both as to the jurisdiction of this Court, and the power of the Church, in its legislative capacity, to pass the Veto Act as a binding law with regard to the exercise of patronage, were raised and discussed in this Court, and finally decided in the House of Lords, it is utterly impossible to deny that the total illegality of the whole measure was conclusively determined. No reduction of that enactment, as seemed to be hinted at, was therefore necessary to be instituted. The idea, indeed, of the necessity of raising a reduction of that or any other enactment of the Church, which is directly contrary to the statute law of the land, appears to me to be utterly preposterous,—it being enough, that whenever any such enactment is founded upon as a justification of an encroachment on a civil right, it should be resisted in a court of law, which is imperatively called upon instantly to disregard it.

After so clear and authoritative an exposition of the whole law, truly applicable to the present case, as has been afforded by the above opinions in the Court of last resort, I feel altogether averse from entering upon any examination of the Statutes and authorities which are so well known, and which have been again commented upon at such length, in regard to the power of this Court to interfere under the present note of suspension and interdict. Your Lordships, in this Division, have had too much occasion to show what your opinions are, in the various proceedings which have followed, in regard both to the case of Auchterarder itself, and to those which have taken place as to the case of Marnoch, and the discussions relative to the Presbytery of Strathbogie. Holding that your Lordships' decisions have given due effect to what was determined by the

judgment of the House of Lords, and concurring, as I entirely do, in the propriety of the solemn assurance you thereby afforded that the law must be carried into full execution, I have only to observe that I had an opportunity, along with this Division, of expressing my opinion with regard to the breach of interdict that was committed in the case of Lethendy, and in which there again arose the fullest discussion in regard to the question of jurisdiction, and the competency of this Court in proceeding as it did in that case. To that opinion I still adhere in all respects; as I also do to the whole of the opinion which I had occasion to deliver in the case of Auchterarder, to a part of which the opening counsel for the respondents in this case thought proper to refer. I can find, however, no inconsistency whatsoever between that opinion and the views which now influence me in the present case; and I had another opportunity of acting upon the precise same grounds, when the Second Division unanimously granted interdict against certain of the male heads of families of the parish of Daviot, who had avowed their intention to dissent, without reasons, against the admission of a presentee, convinced, as we all were, that it was better to prevent a wrong from being done, than to apply a remedy after its completion.

I must here observe, before leaving the case of Lethendy, that the opinions of Lords Medwyn and Cuninghame, in that case, are most important in regard to the matter of jurisdiction. Their diligence and research have accumulated a host of authorities, applying most pointedly to the discussion which has again been raised on the present occasion in regard to that question; and I should have wished, indeed, to have seen the authorities, which are there referred to, fairly grappled with in argument, as they certainly appear to me to be of the most decisive importance. I have no intention, however, of again referring to them at any length, or of recalling to your Lordships' recollection the passages which have been already cited from the works of Mr Erskine and Lord Bankton, but shall content myself with here quoting one passage from Lord Bankton's Institute, as I am doubtful whether it has yet been prominently brought under our notice. In the 25th section of the 22d title of his fourth book, he thus expresses himself:—“It may therefore be questioned how, at present, we are safe against such abuses by our General Assembly, as perhaps they may usurp a jurisdiction that may not belong to them, against which there does not lie an appeal. The answer is, that no execution can follow on the decrees of the ecclesiastical courts, other than church censure for disobedience; and if they should presume to intermeddle in civil matters without their sphere (as it is not imagined they will), I do not see but redress will be competent, by suspension or reduction, before the Court of Session; or a prohibition might be granted, in way of advocacy, inhibiting them to proceed in such matters.” The application of this authority, in regard to the proceedings now under consideration, is most direct, as the attempt to apply the veto law of the Church, as a bar to the admission of a legal presentee, is not only an usurpation of jurisdiction, and a meddling with civil matters, but a direct violation of civil rights, which can properly only be redressed under the authority of this Court. In reference to the same point, I may here also refer to the words of Sir George Mackenzie, who thus expresses himself in his Observations, Vol. II. p. 439:—“The Lords are still allowed to suspend the decrees of the Admiral *in presentia*, or by three Lords in the vacance, which is hardly to be reconciled with its being a sovereign court; and yet, in some cases, the Lords suspend the decrees of the Justice Court, and of the Commission of the Kirk, which are certainly sovereign courts.” Such were the views of this author, written towards the close of the seventeenth century.

The above passages may be considered as affording a sufficient answer to what has been urged with regard to the alleged supreme and exclusive jurisdiction of the church courts in matters purely ecclesiastical. The pretence of that jurisdiction being founded on divine authority, has no longer been maintained in argument; and however indisputable it may be supposed to be, in regard to what is confessedly a matter purely spiritual or ecclesiastical, that can in no degree countenance the power arrogated by the Church, to declare, of its own authority, what is truly of that nature. Whenever a proceeding

can be shown to trench directly upon a civil right, whether it has emanated from the Church in its legislative or judicial capacity, and, especially, if it is stated to be in violation of the law of the land, by which the Church itself is alone established, it can, in the nature of things, only be in the Supreme Civil Court where the question as to the civil right can be adjudicated. To suppose that the Church itself has only to resolve what shall be held to be an ecclesiastical or spiritual matter, and that that is sufficient to withdraw it entirely from the cognizance of this Court, and compel parties, whose civil rights are thereby prejudiced, slavishly to submit to it, is a proposition utterly extravagant, and contrary to the plainest principles of national jurisprudence. To expect that those who are aggrieved, by an obstinate persistence in the exact same course of proceeding that has been declared to be utterly illegal by the only tribunal on earth that is entitled to decide, are pusillanimously to acquiesce, and refrain from applying to a court of law for protection,—and that our interference is to be proclaimed throughout the land by the members of that very Church which is established and maintained by the Statutes of the realm, as an undue usurpation of power, and encroachment on the supreme jurisdiction of the Church,—is so extravagant a proposition as hardly to be expected to be maintained by any man of rational understanding. The interpretation of all Statutes whatsoever, which embrace the civil rights of the subject, must necessarily proceed from the Supreme Civil Court; and it is contrary to all principle to hold that any ecclesiastical court can possess anything like co-ordinate jurisdiction in any such matter. Its province is confined to what is purely ecclesiastical or spiritual, as is evident from every word of its own Confession of Faith,—which stands sanctioned by the authority of the Legislature, and which as directly recognises the authority of the civil magistrate as it does that of the Church itself.

As to the childish idea that this Court is in collision with, or, by the judicial determinations it is called upon to pronounce, is entering into competition with the General Assembly as to jurisdiction, or is anxious to interfere in such questions as the present, and the many others which have been raised since 1834 (though, for the preceding century, few had ever arisen), I shall only say, and I believe I speak the unanimous sentiments of the Court, that nothing has been more contrary to its wishes than to have been called upon to adjudicate in any one of them. Let the Church only confine itself to matters that are truly of an ecclesiastical nature, avoiding all interference with civil rights, and in no respect fly in the face of statutory law, or attempt particularly to subvert the law of patronage by its own authority, and there will neither be applications made for the protection of the civil power, nor any interference whatever on the part of this Court, which can by possibility be construed into an attempt to encroach upon the privileges of the Church or any of its courts. But whenever we are called upon to support the civil rights of our fellow subjects—to enforce obedience to the Statutes of the realm—and to protect, from acts of manifest injustice and oppression, those who have merely given obedience to the law,—the Church may depend upon it that this Court will be prepared to perform its own duty, whether those who demand its interference are clergymen or laymen.

Relying on the clear and unalterable determination of the House of Lords as to the utter worthlessness of the veto law of 1834, in affording any bar whatever to the admission of a legally qualified presentee to any parish in Scotland, every patron and presentee, whenever met by an attempt in any presbytery to apply its enactments or regulations to their case, unless they are ready tamely to surrender their undoubted rights, are entitled instantly to apply for the protection of the law; and as the patron and presentee of the parish of Culsamond stand as much entitled to it as those in the case of Auchterarder were,—upon what ground are they to be precluded from calling upon this Court to afford it? In the latter case, the patron and presentee were under the necessity of asserting their legal rights by means of a formal action of declarator, accompanied also by other important conclusions. That course, however, is no longer necessary; and the present application for the suspension and interdict of this Court, to prevent the completion of an egregious wrong, and to preserve an admitted minister in the possession of his vested civil right and ecclesiastical status, and at same

time to avert the degradation of his co-presbyters for having merely given obedience to the law, is perfectly competent, as the proper judicial remedy under existing circumstances.

It has been already noticed, that after the apparent majority of dissents had been announced, and an actual demand made on behalf of the dissentients, that the necessary steps should, in consequence, be taken for the ultimate rejection of Mr Middleton, the motion to proceed, notwithstanding, to his admission, was met by a counter motion to sist further procedure till the next General Assembly,—which the supporters of it were fully aware, from what had taken place in the late case of Daviot, would, in all probability, have annihilated the rights of Mr Middleton. The majority of the Presbytery having become, at length, sensible of the illegality of giving any effect whatever to the Veto Act, were fully justified, therefore, in proceeding to the induction, having called repeatedly for any special objections after the reading of the edict, and none having been offered. The completion of that necessary step has conferred upon Mr Middleton the full status of regular assistant and successor to the minister of Culsamond, which can never be affected by the application of the veto law to his case, so long as the arm of the law can be exerted for his protection; and his claim, therefore, to prevent inversion of possession, attempted by the deliverance of the Commission, becomes the more clearly founded in substantial justice. As any attempt on the part of the Church, in the event of the death of Mr Ellis, the minister of the parish, to oust Mr Middleton, under pretended exercise of the *jus devolutum*, would be utterly nugatory and inept, his right to demand protection in the possession of all his functions, justly warrants him, therefore, in claiming the benefit of the interdict now craved.

The true question, then, presented for our decision in this case, divested of all extraneous matter, is one far narrower than what would appear from the extent of the discussion to which it has led: that most probably arose from the views of the Lord Ordinary, as developed in his note, having led to their being dissected and enlarged upon by the counsel for the suspenders, who were necessarily followed by those of the respondents. But holding, as I do, that the attempt by his opponents to arrest the settlement of Mr Middleton—persisted in, as it was, till the last act of his admission—was bottomed principally, if not solely, on the application of the veto law, and the concomitant regulations, which are manifestly a part of its machinery, and that that law, as a legislative act of the Church, has been declared wholly abortive,—the right of those aggrieved by the extraordinary and unprecedented interference of the Commission of the General Assembly, to apply for protection, flows directly from the solemn determination of the law, promulgated by the judgment of the House of Lords in the case of Auchterarder. Any attempt, therefore, to give the case a different aspect, and to represent what has been done by the Commission, in reference to the complaint of the dissentient heads of families of the parish of Culsamond, as a mere exercise of ecclesiastical jurisdiction in a purely spiritual matter, rests, in my opinion, on the most manifest sophistry, and amounts, indeed, to a begging of the whole question. It has been emphatically propounded, that, as applied to the admission of a minister to a parochial charge in Scotland—the duty of a presbytery with regard to which is designated by express Statutes—the veto law, in all its parts, as enacted in 1834, is in reality of no more legal value than a piece of waste paper, and that any attempt to use it as a bar to the taking on trials and admission of a qualified presentee, is a direct invasion of civil right, as to which this Court possesses undoubted jurisdiction, altogether irrespective of the powers of the church courts to judge of the qualifications of a presentee, or to decide in cases that relate solely to spiritual concerns. The Church is, in one word, utterly powerless in attempting to subvert, by its own authority, the law of patronage, which is a matter regulated by the statutory law of the land, and to which, till it is altered by the Legislature of the State, implicit obedience must be given by all men whatsoever.

Friendly, then, as I unfeignedly am, to the true welfare and prosperity of the Church of Scotland as by law established, and anxious to see its speedy return to the condition of universal respect in which it stood previous to the rash and ill-advised measure of 1834, I am decidedly of opinion that the interlocutor

of the Lord Ordinary ought to be altered,—that the note should be passed, and that the interdict should be granted, in terms of the prayer of the note of suspension.

Lord Gillies.—The question which we have now to decide is certainly one of importance. It has naturally excited a great deal of interest; and any judgment that we pronounce in it may be attended with consequences in which the public is deeply interested. For these reasons I have felt it my duty to bestow upon it careful and full consideration; and we have all the satisfaction of reflecting, that we have been powerfully aided by the learned and ingenious argument which we have heard from the bar, and of which I shall endeavour to avail myself in the observations with which I have now to trouble the Court. These, I trust, will not occupy a great deal of your Lordships' time; for the case, however important, does not, in the view which I take of it, require a lengthened discussion. I say this, because it does appear to me that the present case is settled by recent decisions, forming precedents which we are bound to follow, unless altered or reversed (which none of them have been) by a superior tribunal. On many cases of an older date that occur, and on Acts of Parliament referred to, I do not think it will be necessary for me to trouble your Lordships with any remarks.

In the learned, elaborate, and ingenious note with which the Lord Ordinary has favoured us, his Lordship states that he lays aside, unqualifiedly, "all that was either said or done in the Court of Presbytery as to matter connected with the Veto Act." Could I follow his Lordship's example in this respect, I must own it would tend to simplify the case. But I cannot lay aside the Act of Assembly 1834-5, commonly, and very properly I think, called the Veto Act; and as to which it has been found that it was illegal, and *ultra vires* of the Assembly. I cannot lay aside an Act in which it appears to me most evident that the whole proceedings on the part of the respondents originated, and which it was the manifest and avowed object of all that was said and done by them in the Presbytery, to enforce and to carry into effect; and by which, therefore, in my humble opinion, the whole proceedings at the instance of the respondents—from the first step to the last—from the first meeting of Presbytery on 22d September down to the deliverance by the Commission of Assembly—are tainted and vitiated. It is impossible for me, then, to lay aside the Veto Act, or to discard from my mind all that was said or done in the Presbytery as to matters connected with that Act. Were I to do so, in truth nothing would remain; for, in my opinion, so far as regards the minority of the Presbytery or the respondents, nothing was said or done in the Presbytery except in relation to that Act, or matters connected with it. If I were to adopt the suggestion in the note, I should therefore be obliged, or rather I should feel myself at liberty, to lay aside the whole case, and to regard the objections taken by the minority to the proceedings or resolutions of the Presbytery as a mere blank—a nonentity. In short, the proceedings of the minority of the Presbytery was just an attempt, or a series of attempts, to give effect to the Veto Act—an Act inconsistent with, and intended to defeat, the civil right of patronage. This is the conclusion at which I think your Lordships must arrive on carefully attending to what was done in the Presbytery.

First of all, then, it is necessary to keep distinctly in view the procedure which has taken place in this case, particularly the proceedings of the Presbytery.—(After narrating the proceedings of the first meeting on 22d September 1841, his Lordship proceeded.)

Thus parties were fairly at issue; the one stating truly that the Veto Act was illegal, and should therefore be disregarded; and the other insisting that the same Act should be obeyed and enforced. It is scarcely necessary to observe that this was a most improper attempt. It is now admitted in this Court that the Veto Act is illegal; and it is abundantly obvious that any attempt to enforce it must be at least equally illegal. This term "illegal" was found fault with. The term seems to me to be an appropriate one when applied to the Veto Act itself; and, in speaking of the conduct of those who attempt to enforce and to compel obedience to that Act, I do think it is the most gentle term that can be used.

But to proceed with the minutes of the Presbytery, which go

on as follows:—(His Lordship quoted the two motions,—the one to proceed with the settlement, the other to sist procedure,—and the carrying of the former.)

It may be proper to pause for a moment here. In all the proceedings hitherto, it will be observed that the whole contest lay betwixt the Veto Act on the one hand, and the established law and practice of the Church on the other hand. The friends of the Veto Act first proposed to carry it directly into effect by rejecting Mr Middleton. Failing in this, they moved that the case be referred to the General Assembly,—a motion directly at variance with the settled usage of the Church, and for which, setting aside the Veto Act, no ground, or even pretext, whatever was assigned.

It was at this stage of the proceedings, as appears from the minutes, that Mr Garioch dissented, and protested for leave to complain to the Synod in his own name, and in that of all who may adhere to him; and afterwards Mr Mitchell took an appeal to the Synod. The sentence from which Mr Garioch dissented is that which is embodied in the first motion, which I read a little while ago,—it being the only sentence the Presbytery could regularly pronounce in terms of the rules and usage of the Church previous to the Veto Act. This, then, was just a complaint and an appeal against the proceedings of the Presbytery in disregarding that illegal enactment. The Presbytery did not, and could not, pay any attention to this appeal. They considered it, and in law were entitled to consider it, as an impossibility that the Synod should countenance any attempt to enforce the Veto Act; and so, virtually and in substance, disobey and reverse the judgment of this Court and the House of Lords. It may be further observed, that the reference to the General Assembly, moved by Mr Mitchell, was altogether unconstitutional and irregular. In Hill's Practice (p. 30), it is stated,—“A reference cannot be made to the Supreme Court, if any court superior to that from which the reference proceeds meets before it.” Now, the Synod, in this case, was to meet before the General Assembly; and because this unconstitutional reference was negatived, Messrs Garioch and Mitchell complained and appealed to the Synod.

It is of importance to observe, that this meeting of 28th October was held for the express purpose of moderating in a call. At the previous meeting of 6th October, it was intimated “that the Presbytery will meet at the church of Culsamond, for moderating in a call to the said presentee, on Thursday the 28th current, and to hold public worship at the usual hour.”

By the established practice of the Church, except in so far as altered by the Veto Act, it was a meeting merely *ad hunc effectum*. The only way in which the Presbytery could perform its duty, or carry into effect the express, and in law, the exclusive object of the meeting, was by adopting the first motion, to sustain the call, to which no objections were made, and appoint the edict to be served. And how was this motion met? Why, by another motion to sist procedure, and report to the General Assembly; or, in other words, that the Presbytery should decline to perform its duty. This motion was rejected, and the first motion was carried. And then came forward Messrs Garioch and Mitchell, and protested, and complained and appealed to the Synod for redress. In admitting or listening to this appeal, it is evident that the Presbytery would have betrayed its duty just as much as if it had adopted the second motion.

In short, on the part of the minority of the Presbytery, the manifest object of all the proceedings I have hitherto mentioned was originally to get Mr Middleton rejected in terms of the Veto Act; and having failed in that object, they next attempted, by means of the same Veto Act, to prevent or delay his settlement,—1st, by moving a report to the Assembly; and, 2d, by an appeal, equally efficacious in point of delay, to the Synod;—thus defeating the presentation in Mr Middleton's favour, and depriving him for an indefinite time, perhaps permanently, of the benefice or *status* to which, by the established practice of the Church prior to the Veto Act, he was entitled,—no objection being made to his call to be immediately admitted.

These considerations seem to me conclusive. But whatever may be thought of them, this much is clear, that the Veto Act was the sole ground assigned, and the only ground that could or can possibly be assigned, either for sisting procedure and reporting to the Assembly, or for the complaint and appeal to the Synod.

In this state of matters, the following motion was made:— "That as the dissent and complaint of the minority, and the protest and appeal by the agent for the dissentients, against proceeding to receive and admit Mr William Middleton, the presentee, are founded on the Veto Act, which has been declared *ultra vires* of the Church, and illegal, the said dissent and complaint, and the appeal are inept and incompetent, and ought not to bar the execution of the Presbytery's finding,—the Presbytery accordingly proceed to the induction on Thursday, the 11th day of November, and that the record be now closed."

The propriety of this motion does not seem to me to admit of dispute, and, in truth, it was not disputed by the minority of the Presbytery. But at this stage of the proceedings, they again had recourse to the Veto Act, and resorted to a device for defeating the presentation, suggested by that Act. "Mr David Mitchell," as appears from the minutes, "now tendered special objections to the fitness of the presentee; and it was moved that the said objections be received and discussed."

Here it is necessary to attend to the established, and I believe, the admitted usage of the Church prior to the Veto Act. It will be recollected that it was at the meeting for moderating in a call that these special objections were offered. Now, at that meeting it is certain that no such special objections could be received by the Presbytery. On the contrary, the Presbytery at that meeting always did, as was done at this meeting; they appoint an edict to be served after an interval of some days, calling upon all the people who object to the presentee to come forward and state their objections, which cannot, therefore, be stated or received until after the services of the edict. It appears, indeed, to have been held, that if the objections were accompanied by a libel, they might, at any time, and before the service of the edict, be received by the Presbytery. In particular, this seems to have been the opinion of the late Dr Hill; and in referring to such high authority, I think it right to give it in his own words. "The second way in which the constitution of our Church provides for the voice of the people being legally heard in the admission of their minister, is by giving the inhabitants of a parish a right to appear as accusers of the presentee. At any time during the course of his trials, they may give into the Presbytery a libel, charging him with immorality of conduct, or unsoundness of doctrine. When they present a libel, they bind themselves, under pain of ecclesiastical censure, to prove it; but the Presbytery is not at liberty to proceed to the settlement till the libel be discussed. After the trials of the presentee are finished, all who have any objections to his life or doctrine are summoned, by a paper read from the pulpit, which we call an edict, to appear on the day appointed for his ordination, which is at the distance of not less than ten days from the reading of the edict, and may then, without the formality of a libel, state their objections as matter of charge."

Here it will be observed, that great care is taken to prevent undue delay by a wanton or vexatious tender of special objections. First, they must be accompanied by a libel; and, secondly, the objectors bind themselves, under the pain of ecclesiastical censure, to prove them.

Mr Dunlop's authority is to the same effect. But, in one respect, he differs from Dr Hill, and seems to doubt whether, at the meeting for moderating in a call, special objections can be received to the effect of delaying a settlement, even although accompanied by a regular libel. His words are—(Dunlop, § 239). There are other authorities to the same effect in the Compendium of the Laws of the Church by Mr Peterkin.

As to this matter, an important change was no doubt made by the first Veto Act in 1834. That Act was accompanied by regulations having the following title:—"Overture, with Regulations for carrying the above Act into effect." Regulation 4 is in these words:—"That it shall be competent (on the day appointed for moderating in the call) to any one or more of the male heads of families in the parish, in full communion with the church, by themselves or by an agent duly authorised, to state any special objections to the settlement of the person presented, of whatever nature such objections may be."

These regulations for carrying into effect the Veto Act were repeated in 1835, with some variations which it is unnecessary to notice. In 1836, however, an alteration of some conse-

quence was introduced. By the previous Acts, the special objections were to be first considered and judged of, and then the arbitrary dissents of the male heads of families were to be received. But this order was now reversed. It probably occurred that it would have an awkward appearance if the persons, whose special objections had been overruled, should afterwards have it in their power to give effect to them against the presentee by arbitrary dissents. The regulations in 1836, therefore, provided that arbitrary dissents should, in the first place, be received, and that, if the Presbytery shall find that there is at least a major part of the persons on the roll dissenting, they shall reject the person presented.

Then, as to the special objections, this regulation follows:—"That if, at the meeting for moderating in the call, dissents by a majority on the roll shall not be stated, and if any special objections to the settlement of the person presented, of whatever nature such objections may be, shall then be stated to the Presbytery by any person entitled to object by the general laws of the Church; and if such objections appear to be deserving of deliberate consideration or investigation, the Presbytery shall delay the farther proceedings in the settlement till another meeting to be then appointed, not later than eight days thereafter, and give notice *apud acta* to all parties concerned then to attend, that they may be heard."

It may be remarked, that in terms of this clause, it is only in the event of dissents by a majority on the roll not being stated, that special objections are authorised. Now, it will be recollected that, in this case, dissents by a majority had been stated, and therefore the special objections were not offered in terms of this regulation. I do not state this as a matter of much consequence; and, indeed, by a subsequent regulation, not very consistent with the one above quoted, it is declared,—"That the Presbytery shall not receive such special objections in any case, until after it has been finally ascertained whether there are dissents by a majority of the persons on the roll; but it shall always be competent, as soon as this is ascertained, to state special objections."

Taking it for granted that this regulation fully authorised the tender of special objections in this case, and ordered the Presbytery to receive and consider them, the whole thing appears to me to be of no consequence. For how does the case stand? By the established practice of the Church, it was not competent for the Presbytery to delay the settlement by receiving and considering special objections at the meeting for moderating in a call. This was altered by the Veto Act. Be it so: But the Veto Act was found and is admitted to be illegal. Oh, but it is said that this regulation as to special objections forms no proper part of the Veto Act, but is merely one of those rules which the Assembly is entitled to make regarding the proceedings of inferior judicatories. All this is very well, and might afford a pretext—though a very shallow pretext—for the argument which has here been maintained. But the respondents totally overlook and forget the title given by the Assembly to the regulations upon which they found:—viz., "Regulations for carrying into effect the Act of Assembly, May 29, 1835, on the calling of Ministers." That Act having been declared illegal and *ultra vires* of the Assembly, to maintain that the regulations made by the Assembly for the express purpose of carrying it into effect are nevertheless to be considered as valid, and be obeyed by the Presbytery, seems to me to be as extravagant and as absurd a proposition as ever was started by human ingenuity.

At all events, it will be observed, that this last proceeding, as well as the previous proceedings which I have mentioned, is entirely founded on the Veto Act, and on the regulations accompanying and forming a part of it. It was solely in virtue of those regulations that the special objections were tendered, or could be received, at the meeting for moderating in a call. But can it now be maintained that those regulations are not matter connected with the Veto Act, when it is admitted that they were made expressly for the purpose of carrying that Act into effect? In short, will the law enforce a regulation avowedly made for an unlawful purpose?

But to return to the proceedings of the Presbytery: It will be recollected that the motion to proceed to induction was met by a counter motion, founded on special objections tendered by

Mr Mitchell, who moved, "that the said objections be received, and discussed; which being seconded, it was agreed that this motion be put as an amendment on the former, and that the state of the vote be, first or second motion; and the roll being called, and votes marked (first motion, second motion), it was carried first motion by seven votes to five; and the Presbytery found and appointed in terms thereof. Against which sentence Mr Garioch declared that he protested for redress in the hands of Mr John Anderson, notary-public in Aberdeen; and Mr David Mitchell, aforesaid, declared that he protested in like manner in the hands of said notary-public."

Here it is important to remark, that no appeal to the Synod was taken against this resolution of the Presbytery. It is true that two protests were taken, one by Mr Garioch, and one by Mr Mitchell, in the hands of a notary-public. But these gentlemen—one a minister, the other a legal practitioner—must have been well aware that such protests were of no avail whatever; and that the resolutions of the Presbytery, when no appeal was taken against them to a superior tribunal, were final and conclusive. If acquiesced in at the time (and they must be held to be so, as no appeal was taken against them), the respondents had no title afterwards to bring them under review, or to complain of them to the Commission of the Assembly, or any court of judicature.

(After narrating the remaining proceedings of the Presbytery, his Lordship continued.)

All the above proceedings were perfectly regular, and in exact conformity with the rules of the Church prior to the Veto Act. Special objections were irregularly tendered, and therefore properly rejected, at the meeting for moderating in the call on the 28th October. But just fourteen days afterwards, viz., on the 11th of November, when the edict was published, and public intimation openly made, calling upon all persons to come forward who had special objections to state, no person appeared, and no objections were offered. It is very remarkable, too, that some of the persons who had formerly tendered special objections, when uncalled for, were present at this meeting on the 11th November, but declined renewing the objections when regularly called for. The legitimate inference from this is, in my humble opinion, that they had passed from their former objections, and withdrew or abandoned them.

But it is really too much that this delay of fourteen days, which the laws of the Church authorised and required for receiving special objections, should now be founded on as a ground for the severe and harsh sentence or deliverance of the Commission of Assembly.

On this point I shall only farther remark, that if the objectors had really believed that their special objections were relevant and sufficient, it is difficult to account for their conduct in keeping them back when called for, upon any other principle than this, that they were more solicitous to maintain the Veto Act, than to exclude one whom they professed to believe to be an unworthy presentee.

I have now done with the proceedings of the Presbytery; and, if I be not grievously mistaken, I think it has been shown that these proceedings, on the part of the majority, were perfectly regular and proper; and that no objection was, or is yet, stated to any part of them, except such as are founded on the Veto Act and its regulations. *First*, as to the appeal which followed the motion made to sist procedure, and report to the General Assembly, it will be observed that the Veto Act was the sole ground on which this motion was made, or on which it could be supported. Now, it was against the rejection of this motion that the appeal was taken. What, then, were the reasons of appeal? They are to be found in the Veto Act, or they are not to be found at all. It was, therefore, an appeal by reason of the Veto Act, or for no reasons at all that could be stated,—such an appeal as was never attempted before: an appeal without reasons, or founded on an act declared to be illegal. In either view it was inadmissible.

Secondly, As to the refusal of the Presbytery to receive the special objections offered at the meeting for moderating in the call, it has been shown, that by the practice of the Church, no such objections could be stated or received at that meeting; and that the only authority on which they could be tendered was to be found in one of the regulations appended to the Veto Act, and

intituled by the Assembly, "Regulations for carrying into effect the Act of Assembly, May 29, 1835."

Such are the proceedings which were brought under the review of the Commission of Assembly by the petition and complaint now under consideration. Some passages in this petition and complaint deserve notice. After mentioning that dissents had been lodged in terms of the Veto Act, it mentions that the agent for the dissentients took a protest, "setting forth that, as an apparent majority of dissents had been lodged and declared, the said Presbytery were bound, in terms of the laws of the Church, to take steps for the ultimate rejection of said presentee; but that, since they had resolved to take steps to the contrary, it farther represented the willingness of said agent, without prejudice to the effect of the said dissents, but in corroboration thereof, [i. e., of the arbitrary dissents] to tender special objections, and did thereby, then and there, tender the same."

The petition and complaint afterwards states,—“That your petitioners submit that said proceedings and said settlement are in contravention not only of the recognised laws of the Church prior to the Act of Assembly anent calls, in consequence of the refusal of the said Presbytery to receive special objections against the said presentee, and of their determining to proceed in the face of the due and regular dissents and complaints of the minority of said Presbytery, and of the protests and appeals of the agent for the dissentients against their findings, but more especially of the said Act of Assembly anent calls, and of an apparent majority of dissents received and judicially found under the same.”

Here it is said that the settlement was in contravention of the recognised laws of the Church prior to the Veto Act, "in consequence of the refusal of the Presbytery to receive special objections." This will appear rather a bold assertion, when it is recollected that, prior to the Veto Act, the regulations on which the respondents found, as their sole authority for tendering special objections, had no existence.

Again, the complaint bears that the petitioners "cannot now, without injury to their feelings, and dishonour to the Church, avail themselves of the religious services of the presentee." Finally, the complaint bears, "that, in these circumstances, your petitioners have been advised to petition and complain to the Commission of the General Assembly, at their meeting on Wednesday the 17th day of November curt., praying the Commission to adopt measures for vindicating the laws and dignity of the Church, and for protecting the spiritual interests of your petitioners, their families, and the other parishioners of Culsamond, who feel dissatisfied with the ministry of the said Rev. William Middleton."

I shall not trouble your Lordships by reading the prayer of the petition and complaint, with which you are well acquainted, and which is such as might be anticipated from the passages above quoted.

The Commission of the General Assembly, by its deliverance, appointed the petition and complaint to be served, and parties to give in answers. Farther, without waiting for answers, or hearing the parties, "the Commission in the meantime, and until a final deliverance shall have been pronounced in regard to the proceedings complained of, did, and hereby do, interdict and prohibit the Rev. William Middleton from officiating and administering ordinances in the said parish, and authorise and enjoin the remanent members of the Presbytery of Garioch, not complained of, to meet forthwith to provide for the ministration of the word and sacraments in the parish of Culsamond."

By this sentence, the civil right of patronage is encroached upon, and defeated to a certain extent, perhaps entirely; the induction and settlement of Mr Middleton are *pro tempore* set aside and annulled. He is degraded from his situation of a minister of the gospel, and is disgraced, as far as he can be disgraced by the Commission of the General Assembly, in the eyes of the public. Yet we are told, that this being purely an ecclesiastical matter, we can afford him no redress. My Lords, I always understood that the laws of this country were intended, and were sufficient to protect the subject in his person, property, and reputation; and that if, contrary to law, an injury is done to him in any of these particulars, he is entitled to ask and obtain protection and redress from the Supreme Court.

Such protection was sought for by the bill of suspension presented to the Lord Ordinary; and his Lordship having refused it, the case is now brought before us by the reclaiming note, on which we appointed parties to be heard, and on which, having heard them at great length, we are now to give our judgment.

In answer to this note, the argument mainly relied upon by the respondents amounted to a denial of our jurisdiction. The argument seemed to be maintained in a two-fold view: *Firstly*, It is said that this was purely an ecclesiastical case, in which the church courts had the sole and exclusive jurisdiction; and, *secondly*, On the supposition that this admitted of any doubt, it seemed to be maintained that this Court had no power to resolve the doubt, by sustaining its own jurisdiction, while that jurisdiction was denied by the church courts.

This view of the case seems to be pointed at in a part of the Lord Ordinary's note, where it is said,—“The only difficulty is, where to draw the line of demarcation between the action civil and the matter and cause ecclesiastical;—with the corresponding puzzle, by what authority shall the line be fixed? Fortunately, it is not necessary, in the present case, at all to deal with this *questio vexata*.”

My Lords, this may have been a *questio vexata*; but, in my humble opinion, it is so no longer. It was settled and set at rest in the Auchterarder case.

Reference has been made to the Courts of Justiciary and Exchequer, as possessing jurisdiction which we cannot control; and church courts are said to be in the same situation. But this must be understood with some qualification. The Justiciary, having exclusive criminal jurisdiction, may erroneously hold and give judgment in a case as criminal, which is purely civil; and we perhaps cannot set them right. That Court has power not merely to pronounce a final judgment, but to decide finally whether the case before it is criminal or civil, though this may possibly admit of doubt. But one thing is clear, that its judgment being given, the diligence of the law and executorial powers of the Court will carry into effect and execute that judgment. In the church courts it is otherwise: the Assembly may decide what is civil and what is ecclesiastical; but its decision upon this point is not final. It may be, and was in the Auchterarder case, altered; and we and the House of Lords determined accordingly. The *questio vexata*, as it is called, was there decided; and our decision in that case shows that it lies with this Court, and not with the Assembly, to decide it.

In the Auchterarder case, the jurisdiction of this Court was denied on the part of the Presbytery. To show the emphatic terms in which this denial was made, I shall take the liberty of quoting a short passage from Mr Rutherford's speech. Towards the conclusion of it, after stating that the Church did not exceed her powers in passing the Veto Act, he adds,—“She will vindicate her own proceedings to public opinion,—she will vindicate her proceedings before the Legislature of the State, if called upon to do so; but she denies she is under any necessity to defend herself in this Court; and the Presbytery of Auchterarder will not betray her interest or her rights, by entering into a defence, even before this high tribunal, in a matter as to which, however deep and sincere the respect she feels for your Lordships, she must disclaim its authority.”

In opposition to this eloquent address, we found that we had jurisdiction; and by the judgments which we pronounced against the respondents, and which the House of Lords affirmed, the *questio vexata*, as it is called, was virtually decided.

In the argument against our jurisdiction in that case, it was maintained, as your Lordships will recollect, that any judgment which we pronounced in the declaratory conclusions of the libel, by finding that the Presbytery ought to admit, and was bound in law to admit, &c., could be of no avail, as we had not the means of enforcing it; and the Presbytery might not, and, as it seemed to be insinuated, would not, obey it. It is curious to observe how this line of argument was received in the House of Lords. Lord Brougham says,—“Then it is said you have no means of carrying into effect the decree of the Court of Session, albeit supported by the authority of the House of Lords, which is a decision of Parliament, by its judicial character, upon the subject. In other words, although you say the Presbytery have acted wrong,—although you say that their reason for re-

jecting is of no avail whatever,—although you say the law is contrary to what they have supposed it to be,—and although you say, deciding upon the petitory part as well as the declaratory part of the summons (which, however, you are not called upon to do), let the Presbytery induct immediately, for it has no grounds for refusing,—still it is affirmed that the Presbytery may persist in refusing, and must prevail.”

On the same point his Lordship farther says,—“My Lords, I defend the Assembly against the arguments and the threats of their advocates. I protest on the part of the Assembly, as a body of Christian men, of whom the bulk are Christian ministers, against the imputations thus thrown out against them by this course of defending them. I say that my hopes of them—my confident expectations of what will be their conduct—are wholly the reverse of those prospects thus held out,—that it was an injudicious line of argument on their behalf; an argument which I am morally certain would be repudiated and spurned by the Assembly itself. My Lords, that Assembly will do its duty,—will show its veneration for the established authority of the law,—will rest satisfied with having entered its protest, and indicated upon its records its own opinions; but will, with its inferior judicature, the Presbytery, render a willing and respectful obedience to the law of the land as pronounced by the Court of Session, and as affirmed by your Lordships.”

Upon the same subject, the Lord Chancellor spoke as follows:—“If your Lordships shall concur in the opinions I have expressed, and by your decision inform the clergy of Scotland what the law really is, I cannot doubt but that they will, by their conduct and example, inculcate the sacred principle of obedience to the law,—of respect for the rights and interests of others,—and of the sacrifice of private feelings to the performance of a public duty.”

The eminent men whose words I have quoted are great lawyers, and, I think, sound moralists; but the event, I am sorry to say, has shown that they are very indifferent prophets.

But the argument which called forth the foregoing observations is founded on a mistake. Though not warranted in the Auchterarder case to go beyond the declaratory findings, the Court has power to enforce these findings by pronouncing a decree in terms thereof, ordering the Presbytery to proceed; and obedience to such decree may and will be enforced by all the diligence of the law. This opinion was expressed by Lord Brougham in the Auchterarder case,—and this was actually done in the case of Marnoch, to which I must now shortly request attention.

In that case Mr Edwards, the presentee, raised an action to have the Presbytery ordained to receive and admit him as minister of the parish of Marnoch. A majority of the Presbytery admitted that they could not resist decree to the effect craved; but the minority defended the action, and with them a record was ordered to be made up in common form. A motion by the pursuer for decree against the Presbytery and the majority was opposed by the minority, on the ground that the granting it would prejudice their pleas in defence; which were, *inter alia*, 1st, That the pursuer, as a mere presentee, had no title to maintain the action; 2d, That the Court had no jurisdiction to ordain a presbytery to admit and receive a minister, which implied the performance of the spiritual act of ordination; and, 3d, That the alleged majority, having been suspended by the church courts (a sentence which had already been suspended by this Court), had no power to admit and receive the presentee. The Court held that the pleas of the minority were not such as to warrant refusal of the pursuer's motion, and decreed against the Presbytery and the majority. But it is said, that this judgment is to be held as a decree in absence or by default; and is, therefore, of no authority as a precedent. By the consent or *non repugnantia* of the majority, it is said, that the defences stated by the minority were abandoned or waived, and were, therefore, as a matter of course, disregarded and repelled. But this seems to me to be a great mistake. Of the three pleas in defence urged by the minority, the first and the last,—*viz.*, the objections to the title, and the suspension by the church courts of the majority, were truly of little consequence; and as to them, the consent or *non repugnantia* of the majority might possibly be held sufficient to warrant the decree. But the second defence—the objection to our jurisdiction—stood in a very different situ-

ation. We all held that the consent or waiver of the majority was of no consequence to it. From the report of the case, I appear to have said upon this subject,—“The defenders object to our jurisdiction. Upon this objection the separate record has no bearing. It is an objection which need not appear in the record at all, which may be stated in any case and at any time, and which it is *pars judicis* to notice. If we think this objection well founded, we are bound at once to stop short. But I am humbly and very clearly of opinion that it is not well founded.”

Lord Mackenzie said,—“I come now to the second question, whether we ought to pronounce decree in favour of the pursuer, in the question between him and the Presbytery, as defended by the majority? And here I agree, that, notwithstanding the defences, we must be satisfied of our jurisdiction, otherwise, *ex parte judicis*, we ought to find the want of jurisdiction. But in regard to this I have no doubt. I think the question has been determined already by this Court and the House of Lords, because I think the determination of it a corollary from the points they have determined.”

Lord Fullerton said,—“But if there be one plea which more than another warrants the refusal of that sanction, it is that which is offered by the minority here—the denial of the jurisdiction of the Court. That of itself seems to be quite sufficient. That is clearly a matter in which the voice of the mere majority is absolutely inoperative. If an ecclesiastical body is entitled by law to act in certain ecclesiastical matters, free from the control of the civil court, no majority, however great, can bind the minority, however small, by a waiver of that right. And what is more, it appears to me, that even if the waiver were made, it is one which a civil court could not legally accept. It would resolve into a prorogation of jurisdiction; and that *de causa in causam*, which is eminently incompetent. For no Court can, as I understand, extend even by the consent of all parties, its jurisdiction to matters which the law has placed out of its resort.”

His Lordship's opinion, that on this point of jurisdiction the Court could not legally accept of any waiver, was concurred in by the whole Court; and the Lord President, accordingly, in delivering his opinion, entered largely into the question of jurisdiction, which was most fully and deliberately considered and discussed by all the Judges.

Finally, the Court sustained its jurisdiction, and this not as a matter of course, in consequence of the consent of the majority, but after the most careful and ample consideration. Now, the plea to our jurisdiction in the case of Marnoch is the only one which bears upon the present case, the decree in which, therefore, forms a precedent which we are bound to follow in any subsequent case in which our jurisdiction is, upon the same grounds, disputed.

There are two cases from the Presbytery of Strathbogie to which I shall content myself with barely referring your Lordships. In them, under nearly similar circumstances, similar interdicts were granted to that which is now sought here. But I shall not trouble your Lordships by stating the particulars, and still less by going over the multitude of cases which were referred to in the Auchterarder case, and the others which I have mentioned; and all of which will be well remembered by your Lordships.

I return to the consideration of the question more immediately and properly before us. Is the deliverance of the Commission a legal sentence? Is it warranted by law, or is it contrary to law? And in the latter case, are we entitled to quash it? Upon this point, very high ground was at one time taken. The *jus divinum* of the Church was founded on, in virtue of which we were told, that we had no right even to look at the proceedings of the Presbytery, or the deliverances of the Commission. The power of the Church, we were told, was derived directly from God; and very strangely an Act of Parliament was founded on, sanctioning, it is said, that doctrine; as if the sanction of Parliament could bestow superior efficacy upon powers flowing directly from such a source. From the consideration of this matter we are now happily freed by the leading counsel for the respondents, who candidly, and I think, wisely and judiciously, abandoned this line of argument; and admitted, I think, that sitting in this Court, we cannot recognise any powers in the Church,

except such as have been sanctioned or bestowed upon it by Acts of Parliament, or such as have been found to belong to it by the final and authoritative decisions of the Supreme Civil Court.

The deliverance of the Commission is entirely general. It does not specify or particularly mention any of the grounds upon which it proceeded. Looking at the general tenor of the complaint presented to the Commission, it is evident that the Presbytery's disobedience of the Veto Act formed the main ground on which its proceedings were objected to. The settlement, it is said, was in contravention of the laws of the Church, “but more especially of the said Act of Assembly anent calls, and an apparent majority of dissents received and judicially found under the same;” and it afterwards goes on “praying the Commission to adopt measures for vindicating the laws and dignity of the Church,”—clearly alluding to the Veto Act, and nothing else.

Upon the supposition, which I am convinced is the true supposition, that the ground upon which the Commission proceeded was the refusal of the Presbytery to be guided by the Veto Act, I really cannot think that the case admits of any doubt. The Veto Act had been found to be illegal, as destructive of the civil right of patronage; and it is needless to say, that such an Act could not legally be enforced; and yet, because the Presbytery did not act against law, by obeying and carrying into effect the Veto Act, their proceedings are condemned by the Commission,—Mr Middleton's settlement is suspended, and he is degraded from his *status* in society. Under such circumstances, I think and feel we are not only entitled, but bound to give him redress.

Aware that such is the light in which the case must be viewed, the respondents now wish to make their escape from the Veto Act, and to show that there were other irregularities in the proceedings of the Presbytery sufficient to justify the deliverance of the Commission. Two, and only two, alleged irregularities are founded on, and in narrating the proceedings of the Presbytery I have already spoken to both of them. The first is the refusal of the Presbytery to sustain the appeal; and the second, their refusal to receive special objections.

As to the appeal, its object was to establish indirectly the delay, which they attempted to obtain directly, by the motion which they made,—“That at present, in this case, the Presbytery do sist procedure, and report to the General Assembly.” Now, why should they sist procedure, or on what subject were they to report to the Assembly? It will be observed, that at that period of this procedure, the only question agitated in the Presbytery was, whether they should carry into effect the Veto Act? This was all that was before them. No other proposition had then been made, nor any other subject started or hinted at. Are you to proceed with the settlement, or are you to delay it, and carry into effect the Veto Act? There are only two appeals, and it was in this state of matters that both these appeals were taken, and their sole ground was the Veto Act. The Presbytery must have stultified themselves if they received such appeals. Nay more, they would have acted directly in defiance of law if they delayed the settlement of Mr Middleton, with the view of carrying into effect the Veto Act. Setting aside the Veto Act, it was, as I have formerly said, an appeal without reasons; for, apart from the Veto Act, no reasons were, or are, or can be assigned for it.

The next and only other irregularity of which the Presbytery is accused, is their refusing to receive the special objections tendered at a meeting held for moderating in a call. It has been shown, that prior to the Veto Act, no special objections could competently be offered or received at the meeting for moderating in a call.

It is no doubt true, that by one of the regulations made for carrying into effect the Veto Act, such objections could competently be received. The regulation provides, that “as soon as it is ascertained whether there are a majority of dissents, it shall always be competent to state special objections;”—a regulation, by the bye, which shows clearly the sense of the Assembly, that by the law as it previously stood, it was not always competent to state special objections, or indeed, competent at any time to receive them prior to the publication and return of the edict.

But the question here is, whether the Presbytery were bound

to obey the regulations expressly made for carrying into effect the Veto Act? That they were not bound to obey, and could not, without setting the law at defiance, obey the Act itself, must be admitted. How then could they be bound to obey the regulations for carrying it into effect? On what principles of logic the affirmative of the proposition can be maintained, I confess I am not able to discover; and I shall not attempt to answer reasoning which I cannot comprehend.

The whole question, then, resolves into this,—Are the proceedings of the Presbytery to be set aside, and is Mr Middleton to be degraded from his *status*, because the Presbytery did not comply with the Veto Act,—because they did not obey and carry into effect an Act which has been solemnly adjudged, and is now, I think, admitted to be illegal? On this question I feel no hesitation in giving my opinion; and I am therefore for granting the interdict now craved.

Lord Mackenzie.—After the full opinions of your Lordship and Lord Gillies, I think it my duty to occupy less of your time than I should otherwise have thought proper.

In the first place, in regard to the general nature of the case, and the proceedings in this Court regarding it, I need say nothing. It is enough for me to refer to the statement of them by your Lordships.

I think it most convenient then, briefly to state, first, what I conceive to be the law of the case, and then notice the facts, and its application to these facts.

The following propositions, into which I have abridged the fuller statement I originally contemplated, I conceive to be agreeable to the law of Scotland:—

1. Patronage was anciently a right to present a qualified person, whom the bishop was bound to admit to an office in the Church.

2. The qualification was of a known nature, consisting in good learning, life and manners,—i. e., morals, including doctrine, or, at any rate, in personal qualities,—all being qualities that might exist, and be known to the patron to exist, in the man presented at the time of presentation. (See, for these two propositions, the *Regiam Majestatem*, and Balfour, quoted in the Auchterarder case by myself and Lord Cuninghame; and also the speeches of Lord Brougham and the Lord Chancellor in that case.)

3. At the Reformation, the Reformed Church of Scotland set it down as one of their articles, that there should be no patronage. (See Books of Discipline, and the speeches of Lord Gillies and the Lord Chancellor in the Auchterarder case.)

4. Parliament refused them this article, and they gave it up,—only asking to have the sole power of examining presentees, to prevent improper nominations, and of admission, which was a religious rite competent only to the clergy. (See the speeches of Lord Gillies and the Lord Chancellor in the Auchterarder case.) This, and this only, was granted to them; patronage, as it anciently existed, being kept up by law. (See the Statute 1567.)

5. Patronage was, and is, a patrimonial or civil right. Lord Corehouse, in the Auchterarder case says (p. 218),—"There are two postulates which I assume without argument:—1. That patronage is a civil right. By patronage, I mean the right of presenting a person who, if he be qualified in the judgment of the Church, is entitled to be admitted to the benefice,—and that independent of all the accessories of patronage, as a right to free tithes, vacant stipend, a seat in the church, and a burial place there. The right of presenting alone, which affords honour and influence, and the privilege of performing an important duty, is prized on that account, and is the subject of commerce, I believe, in every Protestant country." And Lord Jeffrey, in the Lethendy case, says, (p. 169), "I take it to be fully admitted, that the right of patronage or presentation, and the patrimonial interests which a presentee may derive from its exercise, are purely civil rights; and that it belongs to the civil courts exclusively to adjudicate upon these rights." (See a multitude of decisions upon it by our civil courts, not one of which could have been pronounced if it had not been a civil right.) The Lord Chancellor, in the Auchterarder case, said, (p. 347), "From these authorities, it is clear that the Court of Session has jurisdiction to adjudicate upon the right of patronage, and to correct any infringement of it, as against another

claiming adversely, and against the Presbytery, whether claiming adversely *jure devoluto*, or simply rejecting, without cause, the presentee of the patron, as in the cases of Auchtermuchty, of Dunse, of Kiltarlity and Zetland, and the other cases referred to."

6. It is preposterous to suppose that this right was merely to make the presentation, and that it ended there. Such a right would have been futile. It has always been, and is, a right to present a man who was to be collated or admitted, by the proper official. It is sufficient here to quote Mr Erskine, who says (B. I. t. 5, § 10),—"In truth, patrons considered themselves, in those days, to have as strong an interest in church benefices as superiors had in temporal. Hence, upon the emerging of a vacancy, they not only named the person who was to supply it, but they collated him by giving him investiture or possession of the church, in these or the like words, *Trado tibi ecclesiam; accipe ecclesiam*. And though collation was soon declared to belong solely to churchmen as a spiritual right, which laics were forbidden to exercise, under the pain of excommunication (Decretal, L. III. t. 38, c. 4 and 10), yet patrons were universally acknowledged to have the right of presenting to the bishop a proper person for supplying the vacant church, whom it behoved the bishop to collate."

7. Accordingly, the obligation corresponding to the right of patronage, under presbytery, is defined by the Statute 1592, establishing presbytery, and which was joyfully accepted by the Church, and regarded as its charter. (See M'Crie's Sketches of Scottish Church History, pp. 123, 124.) This Statute not only gave the establishment generally to the Presbyterian Church, but it gave specially the admission of ministers to the Presbytery, which they had not before, and provided that the Presbytery should be bound and astricted to admit whatever qualified person should be presented to them by the patron. This was not a mere power, or even a mere direction, given to the Presbytery exercising jurisdiction, but a stringent obligation laid on it in favour of the patron, as the obligation corresponding to his right of patronage. The power of examination, to test the qualification of the presentee, as a matter for which only the clergy were fitted, and the actual admission, as a religious rite, were left to the Church; but the obligation to admit, if qualified, was absolute. The Statute of Queen Anne revived and re-enacted the obligation on the Presbytery constituted by 1592, again using a stringent word to bind the Presbytery,—viz., the Presbytery "shall be obliged."

8. This obligation was imposed, not by ratifying an article in the Confession of Faith, or canons of the Church, but against the desire of the Church, directly by Parliament; and the validity and efficiency of this obligation does not at all in any way appear to have been intended to be left entirely to the judgment of the Presbytery or Church,—the words themselves implying the direct contrary, expressing an obligation imposed in favour of the patron as a party, and on the Church as a party, having opposite pretensions and desires, but tied down withal, who never can be presumed to have been left absolute judge in its own cause.—(See the speech of the Lord Chancellor in the Auchterarder case.)

9. Patronage being a civil right, the obligation of the Presbytery, as the obligee under that right, could not possibly be a matter of mere ecclesiastical jurisdiction; for that would be just another way of saying that patronage was not a civil right, but a mere ecclesiastical right.

10. The Church has, in our Statutes, an ecclesiastical jurisdiction bestowed on it, distinct from, and exclusive of, the civil magistrate,—though this is qualified by the declaration of the right and duty of the civil magistrate to interfere in proceedings regarding religion. But in the Statutes establishing patronage, it is nowhere said that it is to fall under that exclusive jurisdiction. No such thing can be pretended in any Act after the Act 1567; and not truly even in that Statute, which gives exclusively to the Church only the examination of presentees.—(See the speeches of the Lord Chancellor and Lord Brougham in the Auchterarder case.) And that, too, was before presbytery, and under superintendents—a sort of bishops. The Act 1592 contains nothing that can found such a pretension, nor the Act of Queen Anne reviving the Act 1592. The long and laboured argument of the respondents, to show the existence of

the exclusive ecclesiastic jurisdiction of the Church, is, therefore, of no relevancy in the case.

11. The argument (to which, indeed, the counsel made not the least allusion), that a civil court decerning, or in any way causing the Presbytery to admit a presentee, is the same thing as the civil court ordaining him themselves,—and so is impiety, profanation, sacrilege, &c.,—and the minister so ordained a minister of the Court of Session or House of Lords, not of Christ, and so forth, is a palpable fallacy, fit only for exciting clamour. At that rate, Parliament “binding and astricting the Presbytery” to admit presentees, were doing the same thing as ordaining them themselves, and so were guilty of impiety, profanation, sacrilege, &c., on a great scale. Yet the Church gladly received the Statute 1592, containing this provision as the condition of establishing presbytery. If serious, such views must evidently make all establishments of religion sinful and sacrilegious, and, indeed, all interference by Parliament with religion at all;—strange things to be in the mouth of any friends of an established church. But, I repeat, they were not argued here. I may also, on this point, refer to the Statute 1571, c. 41, passed a few years after the Statute 1567, by the reforming party, and by which it was ordained, that if any of his Majesty’s “trew lieges” happened to be slain in his service against certain traitors and others, his enemies, “the nearest of the said benefited mennes kyne, abil and qualified, sall have the presentation, provision, and collation of his benefice, for that time allenarlie: And the samen to be disposed to the nearest of his kyn that happenis to be slayne, or decease, in maner forsaide, being alwaies abil and qualified therefore, as said is. And the profites of their benefices, with the fruits specialie on the ground, with the annat thereafter, to pertaine to them and their executors, alsweil abbottes, priores, as all uther kirkmen.” This provision for the remuneration of the slain, in the persons of their heirs, was surely meant to be implicitly obeyed, and absolute, provided only the heirs of the slain were qualified persons. The examination into that, therefore, was left to the Church; but evidently nothing more. It can never be supposed that the Superintendent, or General Assembly, at its pleasure, was to disappoint this instant statutory right, given on such an occasion as the reward of military service.

12. The Act, now commonly called the Veto Act,—that is, the primary and principal enactment of it in 1835,—is just an enactment by the General Assembly, that the legal presentee of the lawful patron, unless his presentation shall be followed by the assent or non-dissent of the majority of the male heads of families in the parish, shall not be admitted, but rejected by the Presbytery. (See the Act.)

13. In the Auchterarder case, the judgment of this Court, affirmed by the House of Lords, justly described by Lord Brougham as “Parliament in its judicial capacity,” and which stands in place of the Parliament of Scotland, which sat in one house, was, that “having heard the opinions of the said Judges,” &c.—(See the judgment.)—This was just a decision—(1.) that any presbytery rejecting a presentee under the Veto Act, would act illegally, and commit a wrong to the patron and presentee; (2.) that this Court has jurisdiction to decern and declare that illegality and wrong; for, I suppose, it will not be said that a presbytery rejecting, for want of non-dissents, a presentee whose qualification is apparent without examination (as in this case Mr Middleton’s was), are not equally illegal, undutiful and wrongful; or that this Court has less jurisdiction to decern and declare that wrong.

14. From the decision, it must follow as corollaries, that any Synod, General Assembly, or Commission, causing or attempting to force or cause any presbytery to reject a presentee under the Veto Act, or causing, or attempting to cause such rejection, direct or by overruling, to that effect, the act of a presbytery admitting a legal presentee, is equally acting illegally, in violation of Statute, and to the wrong of the patron and presentee; and also that such illegality and wrong fall equally within the jurisdiction of this Court to decern and declare; for if it be a civil wrong to do this, it must equally be a civil wrong to cause, or attempt to cause it to be done; and if it be a civil wrong, the Synod, General Assembly, or Commission, can no more do this wrong, without competent jurisdiction in this Court to afford a remedy, than where the wrong has been done by a presbytery.

Plain it is, that if the civil right of patronage is to be defended only against the direct rejection of presentees by the Presbytery on the Veto Act, it is, in fact, not defended at all. The Synod, the Assembly, the Commission, by rescinding, by deposing, by suspending, by delaying, may render the Veto Act perfectly effective, and patronage an empty sound, though no presbytery should ever violate the Act of Queen Anne; nay, if this proposition of law be rejected, then if ever the Assembly or Commission shall consist of ministers admitted under the Veto Act, they will have power, and may feel bound in conscience, *pro bono ecclesiae*, even to deprive all the legally patronate ministers at one sweep, on the ground that they all came in by intrusion,—i. e. patronage without a veto, which, as is said, was always against the fundamental law of the Church; and we should have no power to afford redress for this defiance of the right of patronage in its past, as well as its future operation.

15. It also follows as a corollary, that as this Court has jurisdiction to decern and declare these wrongs, it must have jurisdiction and duty to remedy them, as far as may be done by its decerniture in enforcement of the right, or prevention of the wrong. It is true we cannot give an adjudication in implement of the obligation of the Presbytery. We cannot examine and admit the presentee ourselves, or admit him if not needing examination, or order the Sheriff of the county to examine or admit; for that is a religious ceremony, which the clergy only have the power to adhibit. But we may decern the Presbytery to do it; and in all other ways explicate our jurisdiction, as usually it is explicated in cases of obligation *ad factum præstandum*, where the fact is prestable by the defender, not by the Court or its officers. This is evident in itself, for our judgments declaratory are not mere lectures on law, but intended to be followed by enforcement of the right declared. See, on this point, Bankton and Sir George Mackenzie, quoted by the Lord President. But it is farther proved by a number of cases,—by the case of Strathbogie or Marnoch, on deliberate consideration, if not argument, decerning a presbytery to admit an examined and qualified presentee,—by the second case of Auchterarder, finding a presbytery liable in damages for persisting in rejection of a presentee under the Veto Act,—by the case of Lethendy, where a presbytery were interdicted from admitting a rival presentee, in prejudice of one refused admission on the Veto Act, and censured for breach of interdict,—by the other case of Strathbogie, where there was an interdict against the Commission and General Assembly, from suspending and deposing a presbytery for not obeying the Veto Act,—and by the case of Mackintosh, where male heads of families were interdicted from offering dissents under the Veto Act. See also the speech of Lord Brougham.

I may remark, that of all those modes of enforcing the right of patronage, and preventing or remedying the wrong of the Veto Act, the mildest and least questionable is that by passing a note of suspension, and granting interim interdict.

All these propositions in law appear to me sufficiently clear.

I may observe, that there were several points maintained by the suspenders, on which I do not wish to rest my judgment. I have stated my grounds of law, and have no occasion to go beyond them.

1. I do not wish to hold that this Court can act on the right and duty which the Confession of Faith states to be in the civil power of keeping religion right, by calling of Assemblies, and seeing that things are managed agreeably to the mind of God.

2. I do not wish to hold, that we have a general power of reviewing the sentences of all courts, whenever they err in the construction of Statutes, provided they do not thereby go out of their jurisdiction.

3. I do not wish to hold, that we have a general power of reviewing all sentences of courts that are in excess of their jurisdiction, if they do not touch at all upon matter that is within our jurisdiction. But it is a very different thing, if their excess consists in doing a wrong which is within our jurisdiction to remedy. It is said we cannot interfere with the Justiciary or Exchequer, or they with us. That is too broadly stated. If it were possible that the Justiciary or Exchequer should pronounce a sentence depriving a man of his landed estate, on a question of heritable title, must he lose his estate? Could we not—must we not—suspend such a sentence as illegal and null?

Or if it were possible that this Court should order a man to be hanged for an alleged murder, must not the Justiciary interfere to save him? These are cases that can never happen; but in argument we may suppose them.

On the other hand, there are some things that have been said by the Church to which I cannot give any weight.

1. It has been said that the Church has a divine right, independent of, and superior to, the power of Parliament. That was not argued by the counsel; and Mr Rutherford particularly disclaimed it. Assuredly, such an argument can never be listened to here. We sit here a Court created by Parliament—the organ of Parliament—and must judge according to what appears to us to be the will of Parliament, or resign our office. I have felt no call to any such martyrdom, and shall certainly adhere to my duty of obedience to Parliament.

2. It is said that our own commission is limited; so that, independently of the alleged exclusive jurisdiction of the Church, we are barred from judging in this case by our own inherent want of power. I do not understand that. Suppose the Church had never been established, and had no exclusive ecclesiastical jurisdiction by law, but had been an independent sect, only tolerated like the Episcopal sect in Scotland; and then suppose that a presbytery, duly authorised by the sect, had entered into an agreement with A B, by which he agreed to build a church, and endow it; and the Presbytery, duly authorised by the sect, agreed that, upon a vacancy, A B should present a qualified person, whom the Presbytery agreed to ordain;—suppose, then, A B fulfilled his part, and then, on a vacancy, the Presbytery refused to fulfil its part,—would it ever occur to any body that we had not authority to enforce this contract? It would be no answer to say to us, you are not ecclesiastical,—you cannot ordain. The answer would be, no; and for that reason we discern you to do it as you agreed to do. Just as much must we have jurisdiction, unless it can be made out that we are excluded by ecclesiastical jurisdiction, given by Statute to the Church, where a right and obligation to the same effect are created *vis statuti*. In fact, patronage has, in justice, the support of contract, or quasi contract also, as well as of Statute. For Parliament, with the consent, I believe, of patrons, gave to the Presbyterians the whole establishment; and, on a vacancy in a church, enjoined the patrons to present a qualified man to the Presbytery to fill it; and that being done, Parliament bound and restricted the Presbytery to ordain or admit. And of this gift of the Establishment, with its condition, the Presbyterian Church accepted, which bound her in good faith, as well as allegiance, to observe the condition, and admit the qualified presentee.

Reverting, then, to the propositions in law I have stated, I now come to the facts of the case, in so far as they appear to be founded on by the parties on either side.

The suspender had been for some years an ordained minister of the Church of Scotland, and assistant in the parish of Cul-samond. On the 22d of September 1841, a meeting of the Presbytery of Garioch was held, at which there was laid on the table of the Presbytery a presentation by Sir John Forbes of Craigievar, patron of the church of Culsamond, in favour of the suspender, to be minister of that church and parish, as assistant and successor to the Rev. Ferdinand Ellis, existing incumbent, together with a letter of concurrence from Mr Ellis in common form, and the suspender's letter of acceptance, and the usual certificates. The Presbytery at that meeting sustained the presentation and relative documents, and approved of the arrangement under which the suspender was presented; and being satisfied with the allowance already guaranteed to him for his sustentation during the incumbency of Mr Ellis, they agreed to proceed with his settlement according to the rules of the Church. In this way, it is not disputed that there was a sufficient vacancy, and a sufficient legal presentation by an undoubted patron actually received by the Presbytery. See also cases of Mr Hunter and Mr Edwards. And the ordinary examination into his qualification was not necessary, from the station he already held in the church and parish. The duty of the Presbytery under the Statute 1592 and Act of Queen Anne, was therefore clear. But it appears that this Presbytery, very naturally, and I do not say very inexcusably, wished, if possible, to steer clear of both Scylla and Charybdis, and avoid violation either of the Veto Act of the Assembly or the statutory law of the land. Therefore, while they took the steps for the admission of Mr

Middleton in the legal way, they, at the same time, proceeded to make up a roll of the male heads of families, and actually allowed the dissents, without reason, of these persons to be received, in hope, doubtless, that these would turn out to be a minority. But they turned out to be a majority; and then the Presbytery, finding there was no middle course left open, determined to obey the Statutes, and go on with the settlement in the legal way, and disregard the Veto Act. They, no doubt, as stated by the respondents in their reasons of appeal, had sworn to obey the orders of their ecclesiastical superiors; but that oath was, of course, under the well-known and understood condition and limitation, that those orders should not be contrary to the law of the land. For it will not, I presume, be said, gravely and coolly, by any man, that the legal oath of ordination of the Established Church of Scotland is like the secret oath of an unlawful combination, such as has been known in the Court of Justiciary,—an oath binding on them to obey their leaders in everything lawful or unlawful. And, on the other hand, they had taken the oath of allegiance, which bound them to give obedience to Parliament, certainly without the exception, express or understood, that the Acts of Parliament should be agreeable to the will and pleasure of the General Assembly. Finding they must choose between the two, they being satisfied that the law under the Statutes of Parliament was contrary to that of the General Assembly, gave obedience to the superior authority. They sustained the call in favour of Mr Middleton. The minutes bear—(After reading them his Lordship continued.)—Here there was a proceeding in which the Veto Act was disregarded, and the settlement proceeded in, in the ordinary legal way. And against this part of the procedure there were an appeal and a complaint, founded wholly on the alleged breach of this provision in the Veto Act.

There is, however, an Act of Assembly requiring that, when an appeal is taken in the settlement of a minister, the admission shall be delayed; and to meet that, and complete the Presbytery's disallowance of the Veto Act, the record bears:—(His Lordship again read from the minutes.) I see there was a protest; but I see no evidence of any appeal against this vote. Such appeal is not noticed in the minutes as actually taken, nor is its actual existence before the Synod stated by the respondents. After this the Presbytery went on, and appointed Mr Bisset to preach at Culsamond on the 31st October, and take other usual steps for the admission of Mr Middleton. And accordingly, on that day, after two papers of reasons of protest and appeal had been allowed to be received, and the third paper, which is stated to have been reasons against the finding of the Presbytery refusing to receive special objections to the presentee, was refused to be received, the Presbytery ordered the edict to be called; and that being done, and no objections being thereon offered, they, after a great deal of violent interruption, admitted Mr Middleton minister of Culsamond, in terms of his presentation.

Such, I think, was the substance of the proceedings of the Presbytery, which were divided among a number of days, from which division I do not see that any consequences of importance followed.

A petition and complaint was now presented to the Commission by a number of persons, stating themselves to be male heads of families, and communicants in the parish of Culsamond,—and by certain other persons, stating themselves to be residents in the said parish, and communicants in the congregation thereof. This petition set forth the facts of the case, as the respondents now state them, referring to the minutes of Presbytery and protests produced; and in the concluding part bearing, “That your petitioners submit that said proceedings and said settlement are in contravention, not only of the recognised laws of the Church prior to the Act of Assembly anent calls,—(i. e. the Veto Act.)—“in consequence of the refusal of the said Presbytery to receive special objections against the said presentee, and of their determining to proceed in the face of the due and regular dissents and complaints of the minority of said Presbytery, and of the protests and appeals of the agent for the dissentients against their findings, but more especially of the said Act of Assembly anent calls, and of an apparent majority of dissents received, and judicially found under the same, and this while there was no reason at all for their precipitancy, no order, or pretended order, from any civil court, as in certain other cases, and

nothing but their own deliberate resolution so to do." And it concludes with a prayer for serving the petition and complaint on the majority and Mr Middleton, in which are repeated the alleged grounds of complaint, and praying the Commission to censure the suspenders, to rescind the settlement of Mr Middleton, and to provide immediately for the spiritual necessities of the parish, on the footing that Mr Middleton is excluded from his function as minister.

The Commission appointed answers to the petition and complaint to be given in to them or the General Assembly; and, in the meantime, they suspended Mr Middleton from the office of minister; the words being, "from officiating and administering ordinances." They suspended also the majority of the Presbytery from acting as members of Presbytery in this matter, and appointed the minority to act *pro tempore*.

This is the sentence brought before us by the present reclaiming note.

The present question may, I think, be reduced to a few points.

The first is, whether (whatever might be the powers of the General Assembly itself) the Commission of the General Assembly had jurisdiction to entertain a petition of this kind, for the suspension of a minister, at least *pro tempore*, and of a majority of a Presbytery, at least in part, on account of a matter not specially committed to them, but wholly arising after the commission was granted? On that, I concur in what is proposed by your Lordship and Lord Gillies, and therefore need say little. If they have no such jurisdiction, it seems pretty clear they must be interdicted by this Court from assuming it, and that at the instance of any persons having a reasonable interest to ask such an interdict. In that view, their proceedings are the proceedings of a party falsely pretending to have the authority of the General Assembly, but having it not,—as if any set of men whatever, or any one man, were to publish a false commission from the Assembly, and thereby to depose or suspend ministers or presbyteries. It would be strange if we had not power to prohibit that, at the instance of any party suffering evil from it. The question, then, here is, Have they such jurisdiction? Now, I may say (1.) that I cannot doubt at all that the General Assembly have power to appoint a Commission, with powers to some extent; (2.) I think it clear, that they have not power to appoint a Commission with powers wholly equal to their own,—a mere *alter ego*, to sit permanently, and still less to appoint an ecclesiastical dictator, free of all rules, restraints or limits, like a Roman consul, authorised to see "*ne quid respublica detrimenti caperet*;" and I think, accordingly, that they have never granted such Commission, though they have occasionally used some words that are borrowed from the Roman forms, and of which the sound is a little alarming. But whether the matter in this case was within the jurisdiction of the Commission granted, and competent to be granted to them or not, I think deserves further discussion and consideration. In reference to that question, therefore, I agree with your Lordship and Lord Gillies, that the note should be passed to try the question. But I should not be inclined, on that ground, to grant an interim interdict.

Setting aside that question, and assuming that the Commission had the full powers of the General Assembly, what is the ground on which it is next contended that their deliverance is the fit subject of suspension and interdict? The answer is, that it is a deliverance wholly founded on the Veto Act.

If that allegation be true, after the statement of law I have made, I can have no doubt that it ought to be suspended, and that we should pass the note, and grant interim interdict.

The Veto Act is solely calculated to defeat lawful patronage, and so cause civil wrong; and if, wholly under that Act, and for its illegal purpose alone, the Commission of the General Assembly ordered a newly admitted minister to appear in a process for rescinding his admission, and have suspended him in the meantime, and suspended, in part, the Presbytery,—this must be a civil wrong—the proper subject of suspension and interdict by this Court. I need hardly observe that the appeal or appeals make no difference. If the dissents and objections were illegal, and a civil wrong, the appeal or appeals in support of them could not be better. The appeal or appeals, too, were illegal steps taken under the Veto Act, and could afford no lawful ground for the deliverance of the Commission.

But is the deliverance of the Commission wholly under the Veto Act? It is a proceeding, as has appeared, on a petition

and complaint. That petition complains substantially of two things: 1st, That the Presbytery admitted Mr Middleton on his presentation, notwithstanding a majority of dissents. 2dly, That they refused to receive the special objections offered against him. Now, as to the first, it is manifestly founded on the Veto Act. As to the last, it admits of more question. The primary and proper Veto Act says nothing of such objections. But there is annexed to it a set of regulations "for carrying the above Act into effect." And it is by these regulations that special objections are ordered to be admitted at the meeting for moderating a call, as soon as the number of dissents, without reason, shall be ascertained. Before that Act was passed, such dissents were not in practice admitted until the edict had been served: so that there is no doubt that the special objections offered in this case were offered by virtue of the Veto Act. That, I think, has been demonstrated by Lord Gillies. It certainly does seem to follow pretty plainly, that they must be held to have been offered at that time for carrying that Act into execution; and if so, the offering of them at that time was subject to illegality of the same kind, as any thing else done for the illegal object of the Veto Act. It may be asked, however, how the offering of special objections, at an earlier period than was admissible before, could help the carrying into effect the Veto Act? I own I cannot answer the question. It may, however, serve that end in many ways that I do not see. And be that as it may, I agree with your Lordship and Lord Gillies, that we must hold the offering of these reasons, at that early stage, to have been done for carrying that Act into effect, since it is set down, and authorised to be done expressly for that purpose. If, however, they were so offered, it was right in the Presbytery to reject them; and the determination of the Commission, in so far as it may be founded on that rejection, is a deliverance for giving effect to the Veto Act, just as much as it is in reference to the other ground of complaint.

But that is by no means all. For, supposing we could view the offer of special dissents as not connected with the Veto Act at all, or as separable from it, the suspenders would still, on this supposition, be entitled to plead that the deliverance of the Commission proceeded, without discrimination, on two grounds,—one of which, and the chief, was the refusal to reject Mr Middleton, on account of the dissents, without reason; the other was the refusal to receive the special objections before service of the edict. Both were stated in the petition and complaint; and on that petition and complaint indiscriminately, the deliverance is granted. Now, I must say, it appears to me that, if granting the deliverance on the first reason alone would have been a civil wrong, and founded suspension and interdict by this Court, then the granting it in this indiscriminate way, on the two grounds, does not make it change its character. Even abstracting from some of the known facts of the case, what right could the Commission have to put their deliverance in such a form, that it may, at least, proceed on the dissents and the Veto Act alone? If this Court will interdict them from doing a certain civil wrong, will it not interdict them from doing a thing which, probably at least, is a civil wrong; and that, while they, by the mode of proceeding they adopt, withhold the evidence from which it ought to have appeared, whether it was a civil wrong or not,—or, at any rate, when there is an incurable uncertainty, whether this deliverance did not proceed on these illegal, incompetent, and wrong reasons or not? I must repeat, it seems to me, that such a mode of proceeding is itself a manifest wrong, to which no man can in justice be obliged to submit; that there must be a remedy for it; and that the only remedy is to quash or suspend the deliverance.

It is necessary for me to observe here, that this case, under the supposition now made, is quite different from the ordinary case of a judgment or order granted by an inferior civil court, on various reasons, of which some are bad, and which yet, on note of suspension or advocacy, we may support. But in that case, we can judge of all the reasons. We can find such a reason to be bad, but such other reason to be good, and therefore sustain the judgment on that reason alone, making it our judgment or order. But we cannot do that here on the supposition now adopted. On that supposition, we cannot try the questions of special objections at all; for, by the supposition made, they are matter of exclusive ecclesiastical jurisdiction. If so, we cannot find them valid, and on that, support the order of the Commis-

sion. We can support it only if we can find that the Commission itself has judged them to be valid, which they have not chosen to do, and, by neglecting to do which, they leave it open to be said that their deliverance proceeded on the Veto Act and dissents only.

To these, as they seem to me, obvious considerations of justice, it is not pretended that the respondents have any Scotch authority to oppose. But some English cases are referred to. I, of course, speak of them with much diffidence; but I shall venture a few observations.

First, the case of the *habeas corpus*, on the committal for contempt by the House of Commons, was referred to by the respondents. But that case, as I understand it, has no analogy. For it was a case of privilege of Parliament; and in it the committal did not proceed on ambiguous grounds, but without any grounds at all, that the Court thought they had right to know. It was thought that the House of Commons had the privilege of committing, without stating their grounds, and had done so, and so the court of law could not inquire at all about the grounds of committal. That is not the fact here at all, where the deliverance is on a petition, which we are perfectly at liberty to look at. And further, it does not appear that the right of the ecclesiastical courts in this respect is similar to the privilege of the Houses of Parliament. In Lord Brougham's speech in the Aucterarder case, he says, (pages 292 and 293), "*Dolus versatur in generalibus* is a maxim of the civil law adopted by all our Courts, frequently referred to by the Judges,—nowhere more frequently than in the Scotch Courts, and one which I have sometimes heard cited both in the General Assembly and in the civil courts. When a *quare impedit* was once brought in England, where the right of the patron is precisely the same as in Scotland, for he must present a qualified person, and the bishop is to judge of his qualification for the sacred office,—that is to say, his literature, his life and conversation, and his orthodoxy, which comes within literature; nay, according to the Calvinistic creed, may come both within literature and life in Scotland,—I am alluding to Specot's case, in 5 Coke's Reports, 57, 58, a leading authority here as to the limits of the bishop's power. When Specot was presented by the patron, and refused by the ordinary, it was held not to be sufficient for the bishop to return generally, that he was *non idoneus*; but if he had answered, *minus sufficiens in literatura*, that, it was held, would be sufficient; and as the Court have no organs to say whether he is or not, the bishop shall decide it, because literature is matter of clerical qualification and clerical competence. It is remarkable, that the Judges assign for a reason why the general return, *non idoneus*, wanted validity, *quoad dolus versatur in universalibus*. If they will not allow the bishop, or the Presbytery, merely to say *non idoneus*, without specifying in what, much less will they allow it to be said, 'we will not have you'; they must say why; and then the Judges add, 'for if it were otherwise, the patron's rights might be prejudiced.' So that, holding the patron's rights might be prejudiced by a general answer, they require a specification."

Now, what is applicable to the Presbytery rejecting a presentee, must equally be applicable to the Commission suspending proceedings, and rescinding his admission, as soon as it is granted by the Presbytery. And what Lord Brougham says, affords, I think, a good answer to any attempt to apply the case of the commitment of the House of Commons as an English precedent here.

I see no other case that is worth mentioning at all, on this point, except the case of *Hart v. Marsh*. In that case, it appears that the ecclesiastical court had before it, on a suit for deprivation of a clergyman, a great number of charges that were competent, and among them some that were contended to be not competent. The Court had taken evidence, and found the charges, for the most part, proved. In these circumstances, the Court of King's Bench refused to grant a prohibition; but the ecclesiastical court there was in the usual situation of being simply willing to do its duty, whether it had erred or not. It seemed certain, in fact, that this Court must have proceeded on some of the competent charges. And it was observed by Justice Pattison, that, "supposing some of these articles to be founded on charges not within the cognisance of the ecclesiastical court, that might have been shown before sentence; and

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that there was no affidavit that the Court proceeded on the objectionable articles."

Now, look at this case. The objectionable article here is the Veto Act,—a law made by the General Assembly. The ecclesiastical court here was that very Assembly, under the form of a Commission, notoriously adhering to their own home-made law, and resolute to support it, to the uttermost, against the Court of Session and House of Lords,—if not also against Parliament itself. Such is the Court before which the Veto Act is pleaded as the primary and chief ground, along with an informality in not receiving objections at one time, instead of another, as a ground of suspension from office of a newly admitted minister; and they grant the suspension without saying why. Can there be one atom of doubt that they did proceed upon the Veto Act? It is said we ought to presume the contrary. No wonder recourse is had to presumption, when there is not a human being in the Commission, or out of it, who would say it was so, in fact. But how can we admit such a presumption against certain fact? It would be a defiance of truth and justice; and there is no evidence of any received maxim of law to exclude the truth. No ecclesiastical court has a right to violate Statutes, and a right to do a civil wrong, under pretence of exercising its jurisdiction, to the direct effect of excluding our power of remedying that civil wrong; and just as little, I think, can any ecclesiastical court have right to put its judgment into such a form, that it is impossible to discover whether it has done this wrong or not. But, in the present case, there is no difficulty in that respect. Most undoubtedly the Commission did proceed on the Veto Act, and want of non-dissents. And how can we believe that they proceeded at all on anything else? They who held the Veto Act to be legal, must, in consistency, have held the special objections to have been improper and useless. For why object specially to a man after he is vetoed, and so excluded absolutely, whether objectionable or not? Again, how can we know, if the veto had been out of the case, whether the Commission might not have thought that the refusal of objections then was not material, as they were called for afterwards, and not offered? How do we know that the Commission, in that view, would not have called for the objections, and, finding them frivolous, have refused to suspend, or proceed against the minister, since he, at any rate, had no blame in that matter on account of them? But the veto was conclusive. On that, if they held it legal, they of course suspended,—and they did certainly hold it legal. Consider, for one moment, what must be the effect of holding our jurisdiction to be barred in this way. Can there ever be a case, under the Veto Act, in which some objection may not be added to the veto, which may be said to be within the competency of the Presbytery or Commission? Either of these courts, then, have only to reject the presentee, or to suspend him, or to depose him the moment he is admitted, without saying expressly that they proceed upon the veto; and then legal patronage is at once defeated by the exclusion of our jurisdiction. The objection may be, that the presentee is of evil life and manners, because he is known sometimes to take a pinch of snuff. On the veto, and on that objection indiscriminately, he may be rejected; and so our power to protect the civil right of patronage is excluded. Would not that be to make law a mere driveller? I cannot yield to what appears to me such a weak and blind abandonment of our function.

I therefore think that, even assuming that the refusal of the Presbytery to receive objections was an irregularity, independently of the Veto Act, yet that the deliverance the Commission did make upon the petition and complaint was illegal,—was one which, by the civil rights of the patron and presentee, they were barred from making,—and which, therefore, we ought to interdict *ad interim*, while we pass the note of suspension.

Lord Fullerton.—The real importance of this case extends far beyond the interests held apparently in the result by the parties. I do not mean to depreciate those interests. But certainly the question, whether, for a few weeks or months, Mr Middleton, or the minority of the Presbytery, shall officiate in the parish of Culsamond, shrinks into insignificance compared with the other question, which we must determine before we can adjudicate on those interests,—whether this Court is entitled to suspend and review a purely ecclesiastical judgment pronounced by an ecclesiastical court? This is not the first time I have had

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to consider the question. But now, with all the advantage, and it is great, which I have derived from the able argument we have heard, I have been able to come to no other conclusion, than that it ought to be answered in the negative, and that the Lord Ordinary's interlocutor ought to be adhered to. One advantage I think we have here. The facts are so simple and so little susceptible of dispute, that the point is brought out nearly pure for the consideration of the Court. In saying this, however, I do so under the impression, or rather the conviction, that here nothing can come under the description of facts, but matters which are substantiated by the written papers before us. For, as to the supposed personal views, party feelings, and secret motives of the parties, the presumptions and probabilities, that what they intended was something different from that which they did, I entirely discard them from my consideration. I have no means of discovering these secret matters; they are not brought to light by proof; and not being in any way ascertained, I am not only entitled, but bound to reject them as grounds for any judicial opinion.

In stating the facts, it is needless to go farther back than the meeting of Presbytery of the 28th of October 1841. Mr Middleton's presentation had been sustained; and as he was already an ordained minister of the Church, part of the more ordinary proceedings, such, I believe, as the taking him on trials, was unnecessary. Till that meeting the proceedings had been allowed to go on in accordance with the Act of Assembly 1834, respecting calls; and had all been directed to the purpose of ascertaining the number of the dissents of the male heads of families in communion with the Church. I mention this only in the way of narrative, and to dispense with the necessity of going into the details of the prior proceedings; for I found nothing whatever on the supposed homologation by the majority of Presbytery of the Act of Assembly. At the meeting of the 28th October for moderating the call, it was ascertained that the dissents amounted to a majority of the male heads of families on the roll; and at the second diet of the meeting on that day, the proceedings took place which appear at pages 12 and 13 of minutes of Presbytery.

Here it is necessary to distinguish between the first vote, that sustaining the call, in opposition to the counter motion "to sist procedure, and report to the General Assembly;" and the second, resolving to disregard the complaints and appeals taken against the former resolution, and to proceed with the settlement, being in opposition to the amendment moved for taking into consideration the special objections, by that time tendered, to the fitness of the presentee. For there is a great, and to me unintelligible, distinction made by the majority of the Presbytery, between the mode of treating the complaints and appeals against the first resolution, and the similar steps taken by the dissentients and minority of Presbytery against the second.

The complaint and appeal against the first resolution are received, and declared by the second vote to be inept and incompetent, as founded on the Veto Act, and, "therefore, not a legal bar to the proceeding with the settlement." This, whether a good judgment or not in substance, is quite correct in form. After receiving the appeal, it might be a fit subject of determination, that the appeal formed, in the circumstances of the case, no bar to proceeding with the settlement. But when the second resolution was carried, in opposition to the amendment, that the special objections should be received and discussed, it appears clearly, both from the notarial protest and the subsequent minutes of Presbytery, that reasons of dissent, and complaint and appeal, were tendered against that resolution too, and that those reasons of dissent, and that complaint and appeal, were not received, and were not entered in the record at all.

This is expressly stated in the protest; and it is placed beyond a doubt by the minutes of the next meeting which took place on the 11th of November. (See these proceedings, p. 16, beginning, "The clerk here stated," &c.)

Now, here the Presbytery admit and record the reasons of dissent and complaint against the receiving the memorial for certain heads of families, and also those against the first resolution sustaining the call. But as to the reasons of dissent ~~them~~, and complaint by, the minority against the second, and

by far the most important resolution,—viz., that against receiving the special objections, they find they—i. e., the reasons of dissent—"cannot be competently received, because they are *ex facie* based on an erroneous assumption, and, moreover, that the record was closed;" and at page 18, they treat the formal appeal by the parties against the second resolution with as little ceremony. "With respect to the third paper of reasons of protest and appeal lodged, inasmuch as the said reasons are *ex facie* equally ill based with those of the minority, which have been already refused, the Presbytery also refuse to record these reasons, and intimated this accordingly." The distinction between complaints and appeals, I understand to be, according to the forms of the church courts, that complaints are presented at the instance of the minority of the court, and appeals by the private parties.

This is certainly, to me, a very novel and unaccountable way, to say the least of it, of treating reasons of complaint and appeals. The question, whether the reasons or grounds of appeal are "based on an erroneous assumption" or not, is matter for the Court appealed to, not that appealed from, to determine; and then, as to the record being closed, that, whatever its meaning may be, is clearly no objection either to the appeals or complaints, because the resolution that "the record be now closed," is part of the very deliverance which is appealed from and complained of.

But my reason for noticing these proceedings in such detail is, that they bring out distinctly the fact, that there were two resolutions, and two distinct complaints and appeals; the one against the resolution sustaining the call in opposition to the majority of dissents, and the other against the second resolution to proceed with the settlement, in defiance of the special objections tendered by certain of the parishioners,—a distinction which will be found to be of great importance in regard to that speciality in this case, which is referred to in the Lord Ordinary's note.

The Presbytery, then, having, on the 11th of November, carried through the settlement in terms of the last resolution of the second diet of the meeting of the 28th of October, and in defiance of the complaint and appeal taken against that resolution, as well as those taken against the former resolution of the same day sustaining the call, a petition and complaint was presented by various parties, described as male heads of families and communicants in the parish of Culsamond to the Commission of the General Assembly. That petition recited the proceedings which had taken place, terminating in the settlement, and concluded with the following summary of the three grounds on which the complaint was founded:—"That said proceedings and said settlement are in contravention not only of the recognised laws of the Church prior to the Act of Assembly anent calls, in consequence of the refusal of the said Presbytery to receive special objections against the said presentee, and of their determining to proceed in the face of the due and regular dissents and complaints of the minority of said Presbytery, and of the protests and appeals of the agents for the dissentients against their findings, but more especially of the said Act of Assembly anent calls, and of an apparent majority of dissents, received and judicially found under the same; and this, while there was no reason at all for their precipitancy,—no order, or pretended order, from any civil court, as in certain other cases,—and nothing but their own deliberate resolution so to do." And the prayer is for warrant to serve the petition on the majority, and the Rev. William Middleton, the presentee; to appoint the said parties respectively to appear before the Commission of the General Assembly, &c.

Upon this petition the Commission, by their deliverance of 17th November 1841, "grants warrant to cite the parties complained of to answer before the Commission at its meeting in March next, or, failing such meeting, before the General Assembly," and also appoints them to give in answers to the petition and complaint, in writing, either to the meeting of Commission or to the General Assembly. And, "further, the Commission, in the meantime, and until a final deliverance shall have been pronounced in regard to the proceedings complained of, did, and hereby do, interdict and prohibit the Rev. William Middleton from officiating and administering ordinances in the said parish, and authorise and enjoin the remanent mem-

bers of the Presbytery of Garioch not complained of, to meet forthwith to provide for the ministration of the word and sacraments in the parish of Culsamond, in the manner which shall appear to them competent in the existing circumstances of said parish." This is the deliverance of the Commission, which is made the subject of the suspension and interdict now presented to this Court on behalf and in the name of the Rev. William Middleton, the party admitted, the majority of the Presbytery who admitted him, and Sir John Forbes of Craigievar, patron of the parish, for his interest.

The important part of the application is that which prays your Lordships "to suspend the proceedings, and particularly the sentence or deliverance of the Commission,"—to interdict the execution or intimation of the deliverance,—and to interdict the minority of the Presbytery from usurping and exercising any of the functions of the said Presbytery, by taking upon themselves the superintendence of the parish of Culsamond, and "from providing, or meeting to provide, for the ministration of the word and sacraments, &c., and from interfering with, or molesting the Rev. William Middleton in the discharge of his functions, and from preaching and administering the ordinances of religion in the church and parish of Culsamond." With regard to that part of the prayer of the suspension and interdict which relates to the molesting and disturbing the complainers, other than the Rev. William Middleton, in the performance of their duties as ministers of their respective parishes, &c., I see no room for it, as there seems to be nothing in the deliverance of the Commission of Assembly which is directed to any such object.

The chief objection on the part of the respondents, forming the three first pleas in law, truly resolves into a denial of the jurisdiction of this Court; and there is, besides, the 4th plea, "that, even if the Court had jurisdiction, which is expressly denied, the procedure of the complainers was inept and illegal, and contrary to the laws of the Church." It is obvious, both from the pleas themselves, and from the argument we have heard at such length, that the point mainly contested between the parties is the jurisdiction of this Court to entertain such an application. And, in order to arrive at any conclusive solution of this most important question, it is indispensable to keep distinctly in view, *1st*, The character of the body by which the deliverance complained of was pronounced; *2dly*, What that deliverance did, or was intended to do; and, *3dly*, What this Court is truly called upon to do by the suspension and interdict.

Now, in the *first* point, considering that your Lordships have resolved to defer any determination on the competency and powers of the Commission until the bill be passed, I am entitled to assume, as the parties did in the leading part of their argument (being the only part which we are now to notice), that the Commission of the General Assembly is a recognised ecclesiastical body, entitled to exercise jurisdiction in matters ecclesiastical; and, I presume, it may also be taken for granted that its judicial orders or determinations are subject to the review of the General Assembly.

On the *second* point, it is clear, from the terms of the deliverance itself, that though not, properly speaking, a sentence, it is a judicial order, prohibiting the Rev. Mr Middleton from officiating and administering ordinances in the parish, and directing certain members of Presbytery to provide for the consequences of Mr Middleton's disability, until a final deliverance shall have been pronounced on the proceedings complained of. It is not a sentence of suspension: that would only apply to the case of an incumbent legally and effectually settled. This is an interdict against officiating, until it shall be ascertained whether there was any legal settlement or not. It was not, and could not, from the circumstances, be pronounced *causa cognita*; and consequently the Commission had no means—no opportunity of discriminating between, and deciding separately on, the different grounds assigned for the application. It was exactly analogous to those interim orders which are pronounced in our own practice, on applications complaining of breach of law or private right, and in which an interim order or interdict is, without scruple, granted, unless it appears *ex facie* of the application itself that all the grounds assigned for it are ill founded. And it appears to me that the remark of the Lord Ordinary, founded on the practice of the Bill-Chamber, was

here perfectly relevant and well founded. It was made in answer to the charge of the supposed injustice of punishing a party by interdict before he had been heard,—an answer, I think, perfectly conclusive, as showing that the justice and necessity of such interim orders is recognised in the practice of our own Courts. And when it is asked, as was done in the course of the argument, what Statute authorised any kind of Bill-Chamber in the ecclesiastical courts, I rather think it will be found (though this is, perhaps, more appropriate to the reserved point—the power of the Commission), that the Bill-Chamber itself had originally as little statutory authority as the Commission, and that it, in all probability, takes its origin solely from the delegation, by the authority of the Court itself, of its powers to a part of its own members,—a delegation certainly anomalous in principle, but introduced and sanctioned in practice, on the ground of the necessity or expediency of preventing an absolute denial of all justice, while the body of the Court was not sitting. But without going further into this, all that it is necessary to remark here is, that this is a judicial order, pronounced by a body entitled to exercise jurisdiction.

As to the third point, namely, what is sought by the present suspension and interdict, it appears to me equally clear, that what is demanded is a review, in the form of suspension, of the judicial order pronounced by the ecclesiastical court. That is the true object and meaning of every suspension of a judgment of a court. It is true there is also an interdict craved; and, in the ordinary case of a suspension and interdict directed against a private party, the suspension is little more than introductory. It is the interdict which is the principal matter. The suspension is only the accessory, being the form of stating the claims of right on which the interdict is rested. But in a suspension and interdict directed against the judgment of a court having jurisdiction, there is a *prima facie* ground of right adverse to the interdict,—viz., the judgment itself; and that must be taken out of the way by a review and reversal, before the interdict can be finally sustained. The suspension there is the principal matter, and the interdict only the accessory. Before finally imposing the interdict, the Court called upon to suspend, must review the judgment complained of; and it is only on finding upon such review that the reasons of suspension are good,—in other words, that the judgment complained of is bad, that the interdict can be granted. Lord Stair, in describing reasons of suspension, says,—“It is termed a reason to difference it from defences proposed in ordinary actions, because a reason of suspension is a defence in the principal cause, and the answer is a reply thereto.” In short, here the reasons of suspension which this Court is called upon to take cognisance of, just express, under a different name, those defences or considerations which ought to have led the Commission to withhold the deliverance complained of. It is true the only interdict at present asked is interim interdict. But if the permanent imposition of the interdict, in such a case, necessarily imports the actual review of the judgment complained of, the laying on even of the interim interdict must assume, at least, the jurisdiction of the Court to review the judgment. As the judgment on the note, when passed, is necessarily a review of the judgment complained of, the passing of the note, without any qualification, and the granting of the interim interdict, is as clearly a rejection of the pleas against the jurisdiction. So that the question of passing the note and granting the interdict, necessarily raises the question of the jurisdiction of review.

And it is hardly necessary to observe, that the true legal character of that which is sought from this Court, cannot be affected by the name which the complainers choose to give it. All that they ask of the Court is, as they say, to *quash* the deliverance,—an expression which proves nothing; for, in order to quash any sentence or judicial order of a court entitled to exercise jurisdiction, it is indispensable to review it, in order to determine whether there were good grounds for pronouncing it or not. Indeed, it is evident from the very terms and object of the most important part of the application, that it does necessarily import a review and reversal of the order pronounced by the Commission. The interdict applies only to those positive acts which are authorised by the deliverance. But what is to be said to the negative or prohibitory part of the deliverance,—that interdicting Mr Middleton from officiating? It does

not follow, from the parties complained of being debarred from interfering with Mr Middleton, that he is entitled to officiate in the face of the interdict of the Commission. The restoration of his right to officiate, in so far as it can be assisted by any judgment in this suspension, must rest, not on the interdict, but on the leading part of the prayer to "suspend the proceedings complained of, and particularly the sentence or deliverance of the Commission against the complainers, of the date of 17th November 1841."

I am the more anxious to place this in a clear point of view, because the true character of the relief sought enters deeply into the question of jurisdiction. It excludes entirely the application of all those cases and principles which touch merely the competency and admissibility of determining, incidentally, in questions confessedly within the jurisdiction of the Court, points in themselves beyond it, but necessary for the extrication of the matter at issue in the principal action. Thus the civil court, though originally possessing no jurisdiction, and though, till very lately, possessing no jurisdiction *prima instantia* in Consistorial cases, had, when questions of marriage and legitimacy were raised in proper civil actions, the power to determine those matters, as the means of reaching the conclusions in the principal cause. In the same way, the fact of theft, or any other crime, when touching merely civil interests, must be taken cognizance of when urged in the civil court. Other illustrations of this well-understood principle might be offered. One of the most striking is the case of Lord Caithness, in which the Court of Session had no scruple in determining a question of peerage, on which a point competently brought before them, and within their jurisdiction, depended,—viz., whether or not a party was entitled to be enrolled as a freeholder? And, in relation to the matter in dispute in the present case, it might be granted, in argument, that even points settled by the decision of a court fell under the same principle. If, for instance, any question of civil right were raised in a civil process in this Court, and if the decision of that question of civil right depended on the legal effect and validity of the deliverance now under consideration, it might possibly be a competent subject for determination, whether that judgment was truly to be held conclusive or not. I think it would be difficult to say that it was not: I see no cases to the contrary. That of Kilbucko, referred to, is certainly not of that kind; for there the Court evidently did not go on the invalidity or illegality of the sentence of deprivation, but on the different ground, the legal defect in the evidence that any such judgment had been pronounced. But it is quite unnecessary to go into this here, because there is here no civil action,—no action clearly and legitimately within the jurisdiction of the Court, in which the point of the legality or validity of the sentence of the Commission is merely incidental, and its determination necessary for the determination of the principal cause. The legality or validity of that sentence or deliverance of the Commission, is the only point before the Court. The sole object of the suspension is the review and reversal of that deliverance; and the single point, in so far as jurisdiction is concerned, is, whether this Court has power to review that deliverance or not?

Holding, then, these premises to be fixed,—that the order complained of is the judgment or judicial deliverance of a body having jurisdiction, and that the remedy sought by suspension, truly and necessarily involves a power of review of that judgment or judicial deliverance,—I now proceed to consider the principles on which the jurisdiction of review always must rest. And here, I confess, I should have held these principles to be so elementary, and so well understood, as to require no formal exposition, had it not been for the doctrines, on this matter, propounded with such confidence, and enforced with such energy on the part of the suspenders. It seemed to me to be assumed that there was, in this Court, an inherent jurisdiction to construe all Statutes, and, in general, to expound authoritatively all law, in so far as that was necessary, to prevent other courts from committing what was called wrong. I know of no such principle,—which, on the contrary, I think is directly adverse to our constant practice in cases strictly analogous to the present.

The challenge was repeatedly given by the opening counsel for the respondents,—“How do you account, on that principle,

for the supreme fiscal jurisdiction of the Court of Exchequer, and the supreme criminal jurisdiction of the Court of Justiciary?” I could not observe that the counsel for the suspenders, in his reply, did respond to that challenge; unless we could hold it to be answered by the counter questions put,—“Is it no civil wrong to be deprived, even temporarily, of the exercise of the rights and functions of the ministry, and to be subjected to the intrusion of other parties substituted in the discharge of those functions against our will?” I am afraid this somewhat declamatory mode of dealing with the point will not do. If such considerations as these were admitted, there would be at once an overthrow of all the barriers by which the distinct jurisdictions, recognised by our system of policy, are separated. With all respect for the dignity and importance of the clerical functions, I think there could be little doubt that, tried by this test of civil wrong, the prohibition of preaching, for a few months, by the Commission of the Assembly, is somewhat lower in the scale than the infliction of penalties, to any amount, by the Court of Exchequer, or the pains of imprisonment, transportation, or death, inflicted by the criminal court. And if such a loose view of the matter would be laughed at, if offered as the ground for interference by the Court of Session with those separate jurisdictions, the same rule must apply to the equally distinct jurisdiction of the ecclesiastical court. For, as to any distinction supposed to be founded on the superior efficiency of the executorial powers possessed by those supreme tribunals, compared with those competent to the church courts, I entirely disregard it. In the question of jurisdiction, it affords no argument one way or other. If it operates at all, it creates only an additional obligation on the strong to be the more scrupulous how they encroach on the right of the weak. It is true we have artillery strong enough, in the shape of interdicts, and diligence, and fine, and even imprisonment,—and the church courts are now despoiled of the weapons of offensive warfare, once strong enough in their hands,—but what is that to the purpose in a question of right? The defensive armour of argument, reason, and justice, at least, are at their command; and I trust those are the arms by which every judicial contest in this Court is, and ever will be, decided. It is clear, when particular subjects of judicial inquiry are appropriated to different judicial institutions, the only point for the civil court to determine, in a question of jurisdiction, always must be, not whether the thing complained of is hurtful to the feelings, character, fortune, or person of the complainer, but whether the form and means through which those supposed injuries are inflicted, are within the cognizance of the Court.

The question, then, of the competency of a jurisdiction of review must be investigated by a somewhat stricter rule; and, with great submission, it appears to me, that if there be one rule which can be considered as fixed, both in principle and in practice, it is this, that no court can exercise a jurisdiction of review, unless it possess jurisdiction in the subject of the judgment which is sought to be reviewed. There are cases, no doubt, in which a court may possess a power of review, though it is debarred from exercising jurisdiction in the matter in *prima instantia*. But those will all be found to involve—not an extension of the jurisdiction of review beyond that which is otherwise inherent in the Court, but a limitation of the inherent jurisdiction of the Court from considerations of expediency, requiring that certain matters should, in *prima instantia* at least, be investigated in an inferior tribunal of the same class. Such, for instance, are causes proceeding on briefs; because, according to Mr Erskine, “briefs must be directed to inferior judges,” and causes regarding sums under a particular amount, and others of the same kind. These give no countenance to the principle, that a court may have the jurisdiction of review in matters not falling within its own proper competency; but are merely instances of the limitation of the jurisdiction competent to them, to the exercise of a power of review; for the practical reason, that the matters can be more conveniently discussed, in the first instance, in the inferior court. In this way, the greater number of civil causes cannot be taken up by this Court until they have been investigated by the Lord Ordinary; and the House of Lords can proceed only by review of judgments pronounced by this Court. But there cannot be a doubt that the jurisdiction of review rests, in all of these cases, on the inherent

jurisdiction of the court of review, in the subject of the judgment appealed from.

And the principle does not rest merely on theoretical views ; it is completely borne out in practice. It has, indeed, been very seldom attempted to suspend, in this Court, the judgments of any separate supreme tribunal. The questions of most frequent occurrence arose in attempted suspensions of the judgments of inferior courts ; and, even in those questions, the mode in which the matter was contested, affords a confirmation of the rule and principle already alluded to. As those inferior courts frequently had a mixed jurisdiction, civil, fiscal, and criminal, and as this Court has in certain matters a criminal jurisdiction, the point taken by the suspender generally was, not that the Court of Session had, from its general power to redress wrong, a jurisdiction of review in all matters, but that the special matter of the judgment suspended truly was itself civil, or, if criminal, was within the criminal jurisdiction of the Court of Session. The distinction attempted in such cases frequently involved points of great nicety and difficulty ; and certainly they seem, in our older practice at least, to have been ruled sometimes on very questionable grounds. Thus, for a long time, it was held that the Court of Session had a right to review criminal sentences pronounced by the Sheriff, if they had been pronounced without a jury, upon the somewhat loose notion that these were matters of police. But the rule was set on its right footing, and has ever since continued so, by the case of *Berry v. Walker and Rodgers* (17th January 1809), in which a suspension of the sentence of a Sheriff, condemning to pillory and imprisonment, was found incompetent in the Court of Session, though the sentence proceeded on a trial without jury. And certainly, if irregularities in procedure could have let in the jurisdiction of the Court of Session, there were irregularities enough there to justify the application. The whole procedure seems to have been one course of irregularity, beginning with the complaint itself, offered without the concurrence of the Procurator-fiscal.

Since that time various other cases have been determined on the same principle, which it is unnecessary to quote. But there are two pronounced on the same day, the 15th May 1810, which I cannot pass over, because they place, in the clearest light, the principle on which the jurisdiction of review in this Court truly rests. Those are the cases of *Johnstone* against *Guthrie* and *Finlay*. The first was an advocacy from the sentence of a Sheriff on the Statute of Usury, in an action at the instance of the Procurator-fiscal for the triple penalties, *ad vindictam publicam*. There the Court sustained its jurisdiction. The second was an advocacy of a sentence of fine and imprisonment pronounced by the Sheriff without a jury in a complaint against the same party for subornation of perjury ; and this advocacy was dismissed as incompetent.

Now, what was the reason of this difference ?

In the first case, it is clear from the report, that the defenders, the advocates, put their case on this, that the judgment must be viewed as involving matter falling within the jurisdiction of the Court of Session. They maintained that the offence charged did not amount to usury, but that, at all events, the complaint demanding penalties alone must be viewed as a civil action, or at least an action cognisable by the civil court, and had been uniformly so treated, as, according to Mr Hume, there had not been a prosecution of the kind, in the Supreme Criminal Court, for more than a century. Whether considering the matter then as civil, or, if criminal, as falling within the criminal jurisdiction of the Court of Session, the jurisdiction was good according to the principle already laid down.

But in the other case, in which the subject of accusation, subornation of perjury, was a crime not cognisable by the civil court, unless under peculiar circumstances, which did not there exist, " the Court was unanimously of opinion, that wherever the fine was solely *ad vindictam publicam*, they had no jurisdiction." Nothing can be imagined so well calculated to bring out the principle. In the one case the jurisdiction of review was sustained ; and in the other it was disclaimed ; the test for determining the point in both cases being, whether the Court of Session had or had not inherent jurisdiction in the matter forming the subject of the judgment complained of ?

And the principle is not in the slightest degree affected by

the circumstance of alleged irregularities in the procedure. If the matter of the judgment be out of the resort of the civil court, and be appropriated by law to a different class of tribunals, the civil court is not understood to know either the law or the forms of those separate tribunals. The irregularities committed by an inferior court are cognizable only by the higher tribunals of the same character. If committed by a court absolutely supreme, they are not reviewable at all, and can only be considered as unfortunate instances of that occasional failure to which all human institutions are liable.

Again, when the right of review, or of annulling the sentences or judgments of courts of a different character of jurisdiction, is put on the alleged excess of power or transgression of their due limits, it is necessary to make a distinction. The proposition will be found to be true or false according to the meaning attached to the terms ; for " excess of power or jurisdiction " has two meanings. It may mean that the inferior tribunal has, without going out of the province of the courts of the same class, exceeded its power in regard to other and higher tribunals of that class ; as, for instance, in the case of an inferior criminal court pronouncing sentence for a crime which is withheld from its cognisance, and reserved for the higher tribunals, or inflicting a punishment more severe than it was entitled to do. In another sense, excess of power may mean the transgression of those limits by which the jurisdiction of that class of courts is separated from that of another and totally distinct class of courts.

The necessity of this distinction is obvious in this question. Because the excess of power of the first kind will not open the power of review to any court but a superior court of the same character of jurisdiction. The infliction of a punishment by an inferior criminal court, severer than it had the power to inflict, or for a crime which was reserved from its cognisance, would never open the power of review to the Court of Session, but only to the higher criminal court. On the other hand, the excess of power, in the other meaning of the term, would open the power of review or challenge to the court, on whose peculiar province the judgment had transgressed. And why ? for the very reason which I have assigned above,—viz., that the subject of the judgment complained of was a subject in which the Court complained of had no jurisdiction, and the Court complained to had. This admits of being brought to a simple but conclusive test. If the fiscal courts happened to pronounce a judgment encroaching on the criminal court, or *vice versa*, there would be no room for a suspension, or any kind of review in the civil court, but only in the court whose jurisdiction the judgment infringed. I hold it, then, to be established, as firmly as any point can be established, both by theory and by the most authoritative practice, that the general power of the Court of Session to redress all wrong committed by other courts, has no existence in the law and constitution of this country. The pure and sole ground for interference in any way of the Court of Session, with the proceedings of any separate class of courts, is not that those courts have committed wrong, and exceeded their proper jurisdiction, but that they have done so by encroaching on ours.

Holding these principles, then, to be fixed, and I really regret that I have found it necessary to explain my views of them at such length, let us apply them to the present case. A judicial order has been pronounced by the Commission of the General Assembly, which is to be considered as an inferior ecclesiastical tribunal, inasmuch as its deliverances are subject to review by the General Assembly. By that order Mr Middleton is interdicted from officiating and administering ordinances within the parish of Culsamond, till the merits of the complaint are disposed of ; and certain members of the Presbytery, to the exclusion of certain others, are directed to take measures for supplying his place.

Now, on the principle which I have already submitted, there are but two grounds possible on which the right of review, by suspension or otherwise, in this Court, can be sustained. Either the judgment of the Commission must be considered as not in *re ecclesiastica*, and as involving matters properly civil ; or the Court of Session must be held to have, in this particular matter, proper ecclesiastical jurisdiction. These are the issues to which the question of jurisdiction is necessarily brought.

But, can either the one or the other of these propositions be made out? Can they be even plausibly maintained? I confess it appears to me that they cannot.

In regard to the first, can anything be well considered more purely, more exclusively ecclesiastical, than a prohibition against one clergyman preaching and administering the sacraments, and a direction to certain others so to officiate for him? If this be not in *re ecclesiastica*, I do not know what can fall under the description. For, as to the remark that civil consequences may follow from that order, it is here quite irrelevant. It will be time enough to discuss the validity of the order to that effect, when any question as to civil consequence is raised in a civil action. Here, in this case, as to the competency of review, we are confined to the consideration of the order itself, whether it be in *re ecclesiastica* or not. And if that question be, as I think it must be, answered in the affirmative, there only remains the other point, forming, on that view, the indispensable condition of our power of review,—has the Court of Session any ecclesiastical jurisdiction whatever?

Now, I should have thought that that question admitted of little doubt. This Court was, in its original character and constitution, a purely civil court. In some particular cases it has acquired, by usage or otherwise, criminal jurisdiction; but I am not aware of any authority, in principle or practice, for holding that it has even the slightest shred of any ecclesiastical jurisdiction. Indeed, all the authorities are directly the other way. It is expressly laid down by Mr Erskine, (B. I. tit. 5, § 24,) that "it is the business of Presbyteries to inflict Church censure on offenders, plant ministers in vacant churches, and ordain them, translate them from one church to another, suspend them from the exercise of their office, and deprive them of the office itself." And though he proceeds to state, that, in civil or criminal causes, churchmen are, since the Reformation, equally subject with laymen to the jurisdiction of the magistrate, he closes with the observation,—“Yet no act of a spiritual nature can to this day be exercised, nor any spiritual censure inflicted, either on the clergy or the laity, but in the church courts.” And it evidently follows, from the same principle, that no spiritual censure imposed in the church courts can be withdrawn or suspended but by the same courts.

But it would be doing injustice to this part of the case to confine ourselves to these mere general and theoretical views of the question. It admits of, and indeed requires to be more closely grappled with. For to me it does, with great submission, appear, that the absolute jurisdiction of the church courts in such matters, and the positive exclusion of all other courts whatever, is the subject of positive enactment by the Statutes of this realm—enactments far more explicit and unequivocal than could be advanced in support of many of the powers exercised without question by the Court of Session. Of course, in discussing the question upon this ground, I throw out of view, as entirely misplaced here, those theological propositions upon which the Church, naturally enough, perhaps, sometimes prefers to rest her pretensions. I may be permitted, however, to make one remark: When a religious system embraces particular theological dogmas in regard to the exclusively spiritual supremacy or headship of the Church, from which certain practical consequences, in regard to the independence of the church courts on all similar tribunals, necessarily flow, and when the Legislature sanctions and adopts that system as the established religion of the State, it would be difficult to deny that it *eo ipso* adopts and sanctions those practical consequences as to jurisdiction, which are inherent parts of the system.

That implication itself would go far to sustain in this country the absolute independence of the church courts in *re ecclesiastica*. But the matter is not left to stand on this implication. It has been made the subject of express and positive enactment. It would appear that, as early as the year 1567, the jurisdiction of the Kirk had engaged the attention of the Scotch Parliament and of the General Assembly. In the collection of the "Acts of Parliament," (fol. edit. Vol. III. p. 87,) there are various articles which seem to have been drawn up by the General Assembly for the consideration of Parliament. One of these is,—“That to this our Kirk be granted, and by this present Parliament confirmit, sic freesome privilege, jurisdiction and authoritie, as justly appertains to the true Kirk, and that na other face of

religion be permittit; and that na jurisdiction ecclesiastical be acknowledgit within this realm other than that quhilk as sall be within this Kirk, or flowes frae the same.”

There is one marginal note to this which is scored; but the note, appearing to be ultimately adopted, is simply “approvit.” This evidently was the foundation of the twelfth Act of the Parliament 1567, entitled, anent “the Jurisdiction of the Kirk,” (fol. edit. Vol. III. p. 24,) which, for some reason or other, is omitted in the small edition of the Acts. It begins,—“Anent the article proponet and given in be the Kirk to my Lord Regent, &c., anent the Jurisdiction justly appertaining to the true Kirk,” &c. The enactment is,—“The Kingis grace, with aise of my Lord Regent, and thre Estatis of this present Parliament, hes declarit and grantit jurisdiction to the said Kirk, quhilk consistis and standis in preicheing of the trew word of Jesus Christ, correctioun of maneris, and administratioun of holy sacramentis; and declaris that there is na other face of Kirk, nor other face of religioun, than is presentlie by the favour of God establischeit within this realme; and that thair be no other jurisdiction ecclesiasticall acknowledgit within this realme, other than that quhilk is and sall be within the same Kirk, or that quhilk flowes thairfrae concerning the premisses.” And it concludes with a commission to certain lords and ministers “to seirche furth mair specialle, and to consider quhat other special points or clauses suld appertaine to the jurisdiction, privilege, and authority of the said Kirk; and to declair their mindis thairanentis to my Lord Regent and the Estatis of this realm at the next Parliament.”

The meaning of this enactment I think clear. It is not that preaching of the word, correction of manners, or Church censures, and the administration of sacraments, are exercises of jurisdiction; that would be absurd. The meaning evidently is, that they are the matters or subjects to which the exclusive jurisdiction of the Kirk relates; that the authority to exercise those functions, as it flows from the Kirk, so it can only be bestowed, suspended or withdrawn, by their sentence. And, accordingly, the enactment is, that there be “nae uther ecclesiastical jurisdiction within the realm uther than that quhilk is within the same Kirk, or that which flowes therefrae concerning the premisses,”—i. e., concerning the preaching of the word, correction of manners, and administration of sacraments. And the object of the commission is to inquire what other points should appertain to the jurisdiction, privilege, and authority of the Kirk. Calderwood, in giving an account of this Statute (pp. 43, 44), describes it as ordaining “that there shall be no other jurisdiction ecclesiastical but that which is, and shall be, within this same Kirk concerning preaching of the word, correction of manners, and administration of the sacraments;” and concludes,—“So ye see what points they acknowledged clearly to appertain to the jurisdiction of the Kirk, and how they gave commission to search more specially, and to consider what other special points and clauses could appertain to the jurisdiction, privilege, and authority of the said Kirk.”

This Act is repeated in the sixth Parliament of James VI., 1579, containing a renewal also of the commission. Cap. 7 of the Acts of Parliament, folio edition, and cap. 69 (p. 137) of the common edition of the Acts, with this difference only, that the latter omits the commission, and gives the title of the Statute, “Quhairin consistis the Jurisdiction of the Kirk,” instead of the true title, “Anent the Jurisdiction of the Kirk,” which, like the former Act 1567, it bears in the more authentic copy of the record in the folio edition.

The next Statute which it is necessary to notice, is that of 1581, cap. 99 (small edition). It ratifies and approves “all freedoms whatever, privileges and immunities, &c., given by his Hienesse or his regents to the true and haly Kirk presently established, &c. &c., all and whatsoever Acts of Parliament, Statutes made of before by his Hienesse and his regentes anent the liberty and freedom of the said Kirk.” Various Statutes are particularly enumerated, and, among others, one entitled “Anent the Jurisdiction of the Kirk,” which, from the title and the position which it holds in the enumeration, is clearly that of 1567; and another, with the same title, which is as clearly that of 1579.

Then comes the well-known Act 1592, cap. 116. This Statute, besides its various provisions respecting the gradation

of Church judicatories, ratifies all the Statutes made before in favour of the Kirk, "and specially the first Act of the Parliament holden at Edinburgh the 24th day of October 1500 four score and one years, with the hail and particular Acts therein mentioned, quhillk shall be as sufficient as gif the same were here exprest." This is the Act 1581, quoted immediately above, being the first printed Act in the small edition. There is here clearly, then, through the medium of the Act 1581, what is equivalent to an express ratification and re-enactment in this Statute 1592, of the Acts of 1567 and 1579, "Anent the Jurisdiction of the Kirk," which were two of the particular Acts mentioned in the Act 1581.

The Act 1592, as it is well known, fixes the government of the Kirk by certain gradation of church courts, and when combined with the general ratification already alluded to, I think it amounts to a positive enactment that church government shall be absolute, and the church courts exclusive, at least in all matters declared to be within the "jurisdiction of the Kirk," by the Acts 1567 and 1579, or any of the other Statutes, expressly ratified and confirmed through the medium of the Act 1581, and the special ratification of it and all the Statutes mentioned in it.

This view is confirmed by other parts of the Statute. It abrogates and annuls all Statutes made at any time before, "against the liberty of the true Kirk, jurisdiction and discipline thereof, as the samin is used and established within the realm;" and it declares, "that the Act 1584, c. 129, shall nowise be prejudicial nor derogate anything to the privilege which God has given to the spiritual office-bearers in the Kirk concerning heads of religion, matters of heresie, excommunication, collation, or deprivation of ministers, or ony siklike essential censures, speciallie grounded and having warrant in the Word of God."

It is unnecessary to enter into a detail of the changes made on these Statutes regarding jurisdiction, by the introduction of Episcopacy in the after period of the reign of James VI. That system of Church policy being held to be not inconsistent with some degree of secular supremacy, changes were introduced in regard to the jurisdiction of the Church, considered not unsuitable to that change of system; and, as the Church government connected with it fell under the sweeping enactments in the latter Parliaments of the reign of King Charles I., and as these again fell under the general rescissory Acts passed after the restoration of King Charles II., it is sufficient to come down to this latter period when Episcopacy was re-established. And on that occasion there was, besides the general rescissory Acts applicable to the Statutes passed from 1639 to the Restoration, an express abrogation of the Act 1592, and the various other Acts passed in favour of the Presbyterian Church government in the time of James VI. These rescissory or negative enactments, the declaration in them of what once was, and is, declared to be no longer law, affords the strongest confirmation of what I conceive to have been law in regard to jurisdiction, under the former Presbyterian government of the Church.

The Act 1662, cap. 1, small edition, Vol. II. p. 283, is entitled, "An Act for the restitution and re-establishment of the ancient government of the Church by Archbishops and Bishops." It sets out with stating, that "the ordering and disposal of the external government of the Church doth properly belong unto his Majestie as an inherent right of the Crown, by virtue of his royal prerogative and supremacy in causes ecclesiastical." And again,—"And his Majesty considering how necessary it is that all doubts and scruples which, from former acts or practices, may occur to any concerning this sacred order, be cleared and removed, doth therefore of certain knowledge, and, with advice foresaid, rescind, cass, and annul all Acts of Parliament by which the sole and only power and jurisdiction within the Church doth stand in the Church, and in the general, provincial, and presbyterial assemblies and kirk-sessions; and all Acts of Parliament or Council, which may be interpreted to have given any church power, jurisdiction, or government to the office-bearers of the Church, their respective meetings, other than that which acknowledgeth a dependence upon, and subordination to, the sovereign power of the King as supreme. And particularly, his Majestie, with advice foresaid, doth rescind and annul the first Act of the twelfth Parliament of King James VI., holden in the year one thousand five hundred and ninety-two, and de-

clared the same, and all the heads, clauses, and articles thereof, void and null in all time coming." By the first Act of the twelfth Parliament of King James VI., 1592, is clearly meant the first printed Act, being the well-known Act 1592, cap. 116, ratifying the Presbyterian form of government of the Church. I think the fair, and even necessary inference from this description of the laws terminating in the Act 1592, declared to be annulled, is, that, by the law as it stood under the Act 1592, and prior Acts, the "sole and only power and jurisdiction in the Church did stand in the Church, and in the general provincial Presbyterian Assemblies and kirk-sessions, and that that jurisdiction was not dependent upon, and subordinate to, the sovereign power, as supreme," or of his ordinary courts of justice,—being the declarations exactly equivalent to those in the Acts 1567 and 1579, "anent the jurisdiction of the Kirk."

The next Act to be noticed is that of 1669, cap. 1, by which it is declared, that "his Majesty hath the supreme authority and supremacy over all persons, and in all causes ecclesiastical, within this his kingdom;" and it concludes, that "his Majesty, with advice and consent foresaid, doth rescind and annul all laws, acts, and clauses thereof, and all customs and constitutions, civil or ecclesiastical, which are contrary to, or inconsistent with, his Majesty's supremacy as it is hereby asserted." Various other Statutes were passed under the same reign, and directed to the same object,—such as the Act 1681, cap. 6, termed an Act "anent religion and the test," in which the oath to be taken by all functionaries, civil and ecclesiastical, bears, amongst other things, that "the King's majesty is the only supreme governor of this realm, over all persons, and in all causes, as well ecclesiastical as civil."

By these laws, then, the Presbyterian government of the Church was annulled; and the whole Acts, including the Act 1592, establishing the principle, which is understood to be inseparable from it,—viz., that the only ecclesiastical jurisdiction stood within the Church itself,—were rescinded.

So stood matters until the Revolution, when the restoration of the Presbyterian government was one of the objects which first attracted the attention of the Legislature. By the third Act 1689, cap. 3, Prelacy is abolished, and the Statutes restoring it are rescinded. Then, by the Act 1690, cap. 1, it is declared that the first Act of the second Parliament of King Charles II., entitled Act "asserting his Majesty's supremacy over all persons, and in all causes ecclesiastical, is inconsistent with the Church government now desired, and ought to be abrogat: therefore their Majesties, with the advice and consent of the Estates of Parliament, do hereby abrogat, rescind and annul the foresaid Act in its whole heads, articles, and clauses," &c.

Then comes the Act 1690, cap. 5, by which the Presbyterian Church government, as ratified and confirmed by the Act 1592, was restored; all the Statutes,—many of them specially enumerated,—"contrary or prejudicial to, inconsistent with, or derogatory from, the Protestant religion and Presbyterian government established, are annulled, rescinded, and made void." The special enumeration of the rescinded Acts includes the Act 1662, cap. 1, being that introducing Episcopacy, and which rescinded all the Statutes, declaring the only ecclesiastical jurisdiction to be within the Kirk and its courts. The Act 1690 also rescinds the Act "anent religion and the test," 1681, cap. 6, and ratifies the government of the Church as ratified and established by the Act 1592, "received by the general consent of this nation to be the only government of Christ's Church within this kingdom, and reviving, renewing, and confirming the foresaid Act of Parliament in the whole heads thereof, excepting that part of it relating to patronage,—a matter which does not touch the present question respecting jurisdiction.

Such, then, is the constitution of the Church government, which has been since frequently confirmed, and is now fully established; and I think it fairly warrants the following inferences:—In the first place, it may well be doubted whether the Court of Session, though possessing supreme and universal jurisdiction in all civil causes, can be considered, like some supreme courts in other systems, as the general depository of the whole judicial supremacy vested in the Sovereign, not otherwise expressly delegated. But even if it could be so considered,—and it is the only ground for holding that it could possess ecclesias-

tical jurisdiction,—all claim of the Court of Session to ecclesiastical jurisdiction of any kind, on this ground, is completely excluded by the existing laws, declaring that there is no supremacy in causes ecclesiastical vested in the Sovereign. Such supremacy is, by the Act 1690, cap. 1, expressly declared to be inconsistent with the establishment of the Church government, then described as desired, but afterwards definitively fixed by the Act 1690, cap. 5, which forms the existing law of the land.

2dly, Not only are the whole Statutes, annulling and rescinding those, by which "the sole power and jurisdiction in this Church doth stand in this Church," themselves annulled by the Act 1690, but, by the same Act 1690, the Act 1592 is expressly ratified and renewed, revived and confirmed, "in the whole heads thereof." Now, one of the most important heads of the Act 1592 was that ratifying and approving all liberties, privileges, immunities, and freedoms granted by his Highness, &c., to the trew and halie Kirk, and declared in certain Statutes there referred to,—and all and whatsoever Acts of Parliament made by his Highness and his regents anent the "liberty and freedom of the Kirk, and specially the first Act of the Parliament holden at Edinburgh the 24th day of October the year of God one thousand four score and nine years, with the hail particular Acts there mentioned, quhilk sall be als sufficient as gif the same were here expressed." So that all the particular Acts mentioned in the Act 1581 are declared, by the Act 1592, to be as effectually ratified as gif the same were here expressed. And again, the Act 1690 ratifies the Act 1592 in all its heads, and thus ratifies and re-enacts all the Statutes in favour of the Church mentioned in the Act 1581. Now, it has been already shown, that, besides various others, two of the particular Acts, specially mentioned in the Act 1581, are those "anent the jurisdiction of the Kirk," of 1567 and 1579. So that it appears to me clear to demonstration, in so far as that term can be applied to investigations of this kind, that, by the statute law of Scotland, there is no other jurisdiction ecclesiastical acknowledged within this realm, than that quhilk is within the said Kirk, concerning the preaching of the true word of Jesus Christ, the correction of manners, and the administration of the sacraments,—being the declaration of these Acts 1567 and 1579.

Then, again, see how this is confirmed by other Statutes. By the concluding clause of the Act 1693, c. 22, it is enacted,— "That the Lords of their Majesties' Privy Council, and all other magistrates, judges, and officers of justice, give all due assistance for making the sentences and the censures of the Church, and judicatories thereof, to be obeyed, or otherwise effectual." And the concluding passage of the Act 1695, c. 22, recommends to her Majesty's Privy Council to take some effectual course "for stopping and blundering those ministers who are or shall be deposed, by the judicatories of this Established Church, from preaching or exercising any act of their ministerial function, which they cannot do after they are deposed without a high contempt of the authority of the Church, and the laws of the kingdom establishing the same."

If this deduction of Statutes be correct, and I am not aware of any flaw in it, it seems to me to determine, and that upon the unanswerable grounds of statute law, that neither the one requisite nor the other here exists, for opening the power of suspension to the Court of Session. To warrant this, I have submitted, that either there must be some civil matter in the judgment sought to be reviewed, or this Court must have some ecclesiastical jurisdiction. Now, as to the first, there is absolutely no civil matter at issue. The only point is, who shall preach the word, and administer the sacraments within the parish of Culsamond, and who shall not, until the questions raised in the petition and complaint are finally determined. It humbly appears to me, that if there be meaning in language, these are the very matters which are declared by the Acts 1567 and 1579, and by the whole spirit and tenor of the other Statutes referred to, to fall within the jurisdiction of the Church, and to be matters ecclesiastical. 2dly, It is as explicitly enacted in these Statutes, that there be no ecclesiastical jurisdiction within the realm,—i. e., no jurisdiction which can take cognisance of such matters, other than that which is within the Kirk, or flows therefrom.

My reading of these Statutes, then, is, 1st, That by the sta-

tute law of this realm, the subject of the sentence or judicial order complained of is properly ecclesiastical; and, 2dly, That the civil court, possessing not a particle of ecclesiastical jurisdiction, either by usage or Statute, but being expressly excluded by Statute, cannot possibly have, upon the principles universally recognised in all analogous cases, any jurisdiction whatever to interfere with, suspend, review, or reverse that judicial order.

Indeed, in this view, the present application presents a strange inconsistency with the clauses which I read from the Acts 1693 and 1695. By those enactments, all courts and judges are required to assist in carrying into effect the sentences and censures of the Church judicatories, and making them to be obeyed. By the latter Act it is declared, that no minister can preach, &c., "after being deposed" (and the same rule must apply to preaching or exercising ecclesiastical functions after being suspended or interdicted), "without a high contempt of the authority of the Church and the laws of the kingdom." Now, what is asked in this suspension and interdict, but to obstruct and defeat the order or sentence of the judicatories of the Church, directly in the face of the Statute; and to authorise, so far as this Court can authorise, Mr Middleton to preach, though interdicted,—i. e., to do that which the Act 1693 declares to be "a high contempt of the authority of the Church and the laws of the land?"

While it humbly appears to me that this is clear on the Statutes, I think it equally clear that it is confirmed by practice, in so far as the infrequency of any similar attempts could justify the use of such an expression. There is hardly to be found an instance of any attempt to interfere with the peculiar ecclesiastical jurisdiction of the church courts; and when any such attempt has been made, it has been uniformly unsuccessful. Even in the elaborate argument which we have heard, I do not think one case has been pointed out prior to the case of Strathgogie, 14th February 1840, in which the Court of Session have ever interfered with a strictly ecclesiastical sentence. That case I shall afterwards take occasion to notice. In the meantime, I may further observe, that even on those very occasions on which the Court of Session did, in consequence of the questions of civil right involved in the judgments of the church courts, review, to a certain effect, those judgments,—that was always done solely on the ground, and to the extent, of the civil rights so involved in them, and on many occasions under an express reservation of the ecclesiastical jurisdiction of the church courts.

But I think it unnecessary to go into a detail of those older cases, because the whole question of the rights of the civil court to control, in certain matters, the church courts, and the true grounds upon which that control rests, are clearly brought out in the case of Auchterarder,—a case which, strangely enough as it appears to me, is founded upon by the suspenders. As I understand that case, it is, if not in express terms, at least by clear legal implication, an authority against them and in favour of the respondents.

To get at the true bearing of the case, we must not be satisfied with a merely popular view of it, but scrutinize the true object of the action and grounds on which it was determined.

It was an action brought by the patron and presentee against the Presbytery, setting forth that they had rejected the presentee, and refused to take him on trials, solely on the ground of the veto or dissent of the majority of heads of families in the parish, and without any special objections to his qualifications; the leading declaratory conclusions being, that the "Presbytery were bound to take him upon trial, and, if qualified, to admit him." "That the rejection of the pursuer by the Presbytery, without making trial of his qualifications, and without any objections having been stated to his qualifications or against his admission, and solely in respect of the veto or dissent of the parishioners, was illegal and injurious to the patrimonial interests of the pursuers." Though the summons also contained petitory conclusions, they were for the time waived by the pursuers. It was admitted on the record by the defenders, that "the rejection of the presentee proceeded exclusively on the ground of the veto, or dissents exercised by the alleged majority of heads of families or parishioners of Auchterarder."

The chief defence for the defenders, contained in their first

plea in law, was very general. "By the laws of the Church of Scotland, which are also sanctioned by those of the State, all matters relating to the trial and induction of ministers" (which they evidently construed as meaning all matters relating to the settlement of ministers,) "are subject to the jurisdiction of the church courts, whose sentences are final and conclusive."

Now, if the Court had sustained this, forming the major proposition of the syllogism involved in the defenders' argument, viz., that all matters relating to the settlement of ministers are ecclesiastical, and subject to the jurisdiction of the church courts, and had, upon that assumption, sustained their own jurisdiction to control the proceedings of the church courts, that might have been held an authority against the suspenders. It would have been an instance of the Supreme Civil Court controlling and reviewing the ecclesiastical court in *re ecclesiastica*, in a matter properly within the resort of the latter. But the course of reasoning there followed, and which led to the decision against the defenders, was very different. The major proposition was denied. It was maintained by the pursuers, and ultimately held by this Court and the House of Lords, that all matters relating to the settlement of ministers were not subject to the jurisdiction of the church courts: that, on the contrary, there was one point at least there involved—namely, the right of presentation—which was strictly a civil right; and that that civil right was infringed by the Presbytery giving effect to their only ground for rejecting the presentee, according to their own admission, namely, the dissents of the majority of the heads of families. The true ground of the control exercised by the Supreme Court in the case of Auchterarder was, not the assertion of any right to control the ecclesiastical courts, or review their judgments in matters properly ecclesiastical, but that the Presbytery of Auchterarder had determined, and wrongfully determined, a matter civil, by holding the right of the patron to be dependent on the will of the majority of the heads of families—a point which this Court and the House of Lords held to involve no properly ecclesiastical matter whatever. In order to support the jurisdiction of the civil court, it was found necessary to make out, as a preliminary, that the church courts had gone wrong, not in *re ecclesiastica*, but in *re civili*—a matter clearly within the inherent jurisdiction of the civil court, and therefore warranting them, according to the very principles I have already taken the liberty to submit, in reviewing and controlling the proceedings of the ecclesiastical court.

That this was the true ground of the decision must be perfectly apparent, not only from the opinions of the majority of the Judges in this Court, but from those of the learned Lords who moved the affirmance in the House of Lords. In the opinions of all the Judges who composed the majority in the Court of Session, sustaining the jurisdiction, the distinction was made between the proper ecclesiastical power and duties of the Presbytery in the settlement and induction of ministers,—being the determination of the qualifications of the presentee,—and the merely ministerial duty of receiving and acting on the presentation. In regard to the first point, it seems to have been admitted on all sides, that the determination of the church courts would have been by the force of the Act 1567, cap. 7, final and conclusive, as a proper exercise of ecclesiastical jurisdiction; while, in regard to the second, it was held that the rejection of a legal presentation, or the abridgement of its operation, by giving effect to dissents, without cause assigned, was an infringement of a civil right. Indeed, it is curious enough, that one of the special grounds of the declarator, on the part of the pursuers, was, that the Presbytery had committed error or wrong, not in the exercise of their proper ecclesiastical jurisdiction, but in refusing to exercise it, by delegating that duty to the majority of heads of families. Summons, p. 9. 2d and 4th pleas in law for pursuers. P. 25, Report Auchterarder Case, Vol. I., and App. p. 25.

The same distinction is also taken in the House of Lords. (See Lord Brougham's opinion, pp. 19 and 20-24.)

He admits the right of the church courts to determine finally on the qualifications; but he denies their ecclesiastical right to adjudicate on the right of presentation, which he takes pains to show they did do, and did wrongfully do, by letting in the dissents of the majority. (See passage, p. 32 and p. 38.)

The same inference as to the grounds of the judgment, in so far as concerns jurisdiction, is to be drawn from the opinion of the Lord Chancellor. (See passages, pp. 51, 59, 60, and many others. Report of Supp. to Auchterarder Case: Edin., 1839.)

Nothing can be clearer than the ground on which jurisdiction was in that case sustained. It was one which, in sound principle, could not be denied,—viz., that the act complained of was, in the opinion of the majority of the Judges here, and of the House of Lords, no exercise of ecclesiastical jurisdiction, but an erroneous and wrongful adjudication on a question of civil right. It was held that the operation of the dissent of the majority was the same in principle, and nearly the same in degree, as if the Presbytery had resolved that part of the right to nominate was truly vested in that majority. That being clearly a question of civil right, the ground of decision is clearly inapplicable to the present case, in which no particle of civil right is involved.

It is true there was another point determined in the Auchterarder case; but it is one which is not here disputed, and which does not touch that which is disputed. It was held as clear, and most justly, by the Court here and by the House of Lords, that as the jurisdiction of the Court depended on the point whether the particular matter was civil or ecclesiastical, the Court had jurisdiction to determine whether it was the one or the other. That, there is no room to dispute. It is only saying, in other words, that this Court, like every other, has jurisdiction to determine the preliminary point, whether it has jurisdiction in the proper matter of the action or not. But it would be a strange conclusion to draw from this, that therefore the Court had such jurisdiction in the matter of the action. Every court must have the power to determine whether it has jurisdiction in a particular matter or not; but having got so far, it must deal with the question according to the rules of law. If it has jurisdiction, the Court will sustain it; if it finds the contrary, it will so determine. Now that is just the course which is to be taken here. I admit that this Court has the power to determine whether it has jurisdiction or not. Nobody denies it. But then the conclusion I arrive at is, that, according to the law as declared in the Statutes, and even according to the principle of the case of Auchterarder itself, this Court is bound to find that it has no jurisdiction, and, therefore, ought to refuse the note of suspension.

The case of Lethendy was a corollary from the principle adopted in the case of Auchterarder. One presentation had been rejected by the Presbytery on the ground of the dissents of the majority. The rejected presentee brought a declarator similar to that in the case of Auchterarder. In the meantime, the patron gave a second presentation to another person. The Court granted an interdict against the Presbytery settling the second presentee till the competition of rights should be determined; and this interdict was ultimately found to be within the jurisdiction of the Court. There being there a competition of civil rights—there being in fact two presentations—the Court held themselves entitled to interdict the Presbytery from acting on one of those presentations till it was determined by the civil court, clearly the only competent court in that matter, which was the legal and valid presentation.

As I said before, the case of Strathbogie, February 1840, is the only case in which this Court has ever interfered with the judgment of a church court in a matter purely ecclesiastical. There it certainly was so. It was the temporary suspension of certain clergymen from the exercise of their functions; and your Lordships did, on that occasion, sustain the jurisdiction by passing the note and granting the interdict as craved. But I may be allowed to remark, that that judgment was pronounced in absence, and I understand that it is now under reduction. On that occasion, I took the liberty of dissenting from the opinion of the majority; and the view I then took of the case has been only further confirmed, informed as I now have been by that which is the most important, indeed the only satisfactory source of judicial information—the collision of debate between the contending parties. After obtaining and considering that information, I have rested in the opinion which I held in the case of Strathbogie, that this order of the Commission was strictly and purely ecclesiastical, and that there is no jurisdiction in the civil court to review or reverse it in the form of suspension, or any other form.

With regard to the second Strathbogie case (Dec. 18, 1840), it has no application;—it went solely on the consent of certain of the defenders. Four of the defenders objected to the jurisdiction, while seven did not object to decree being pronounced in terms of the libel,—viz., that the Presbytery, of which they were all members, should be decerned and ordained to admit the pursuer, the presentee. The Lord Ordinary did not repel the objection to the jurisdiction, but allowed a record to be made up, including this very point of jurisdiction. And the question came to be, whether the Court could grant decree against seven members of the Presbytery, while the question of jurisdiction was in dispute at the instance of the other four defenders? The majority of the Court thought it competent, and decerned accordingly. But that was, and could be, only a judgment of consent; for, in so far as the matter was under discussion *in foro contentioso*, the jurisdiction was then, and still remains, undetermined in that case.

But the mention of the first case of Strathbogie leads me to consider the single and special ground on which the jurisdiction of the Court was there rested, for I agree fully with the Lord Ordinary in thinking that there is a peculiarity here which takes this out of the principle of the case of Strathbogie; or, to speak more correctly, that the speciality which truly ruled the Strathbogie case does not exist here.

In that case, Mr Edwards had obtained a presentation to the parish of Marnoch. It was ultimately rejected by the church courts on the dissents of the majority of heads of families. The judgment in the case of Auchterarder had fixed that that ground of restriction was illegal, and the presentee ultimately obtained declarator similar to that in the case of Auchterarder, and an interdict similar to that of Lethendy, against the Presbytery proceeding on another presentation in favour of Mr Henry. The majority of the Presbytery of Strathbogie conceived themselves bound to proceed in terms of the judgment of this Court and the House of Lords, in opposition to the injunction of the Commission of the General Assembly. And the Commission, holding this to be an act of contumacy, suspended the majority of the Presbytery until they should submit to the jurisdiction of the Church. This led to the suspension and interdict on the part of the majority of the Presbytery, calling on this Court to suspend the order of the Commission, and to interdict its execution.

Now, I think it impossible to read the opinions there expressed by the majority of this Court, without seeing that the true and only ground of decision was the illegality, on the part of the Commission, of holding an act of obedience to the civil court to be an ecclesiastical offence. It was not laid down as law that every sentence, purely ecclesiastical, was subject of suspension by the civil court, but that that particular sentence was so reviewable, because it was pronounced against parties for carrying the order of the civil court into execution. This circumstance was held to let in the jurisdiction of the Court to set it aside. Even in that view, I could not concur in the judgment, because I thought the question as to the jurisdiction of review necessarily depended on the subject of the judgment itself, and not on the *rationes decidendi* of the Court, whose judgment was attempted to be reviewed. It appeared to me then, and does so still, that if any procedure at all could have been taken on the supposed abuse of the ecclesiastical jurisdiction, to the end of embarrassing and impeding the course of civil justice, it must be procedure for contempt, and by petition and complaint, and not by suspension and review. But again, the incompetency of even this last mode of procedure was fixed in a very strong case indeed, that of M'Queen, 21st December 1791; (Mor. 1791.) But without going further into this, what I meant to observe is, that there is no room in this case for the application of the principle which was the ground of decision in the case of Strathbogie. Here the order of the Commission did not rest on grounds which were illegal. It must be at once apparent, from looking at the procedure in this case, that there were grounds for the Commission issuing the order in question, without touching, in the slightest degree, on any one matter fixed by any judgment pronounced by your Lordships or the House of Lords.

The petition and complaint on which the deliverance of the Commission was granted, contained three heads of objection

against Mr Middleton's settlement,—*first*, the refusal of the Presbytery to receive special objections against the presentee; *secondly*, the dissents and complaints of the minority of the Presbytery, and the protests and appeals of the dissentient parishioners against their different findings; and, *thirdly*, the majority of dissents of heads of families declared to be conclusive against the presentee by the Act of Assembly, generally termed the Veto Act.

Now, assuming, on the authority of the judgment in the case of Strathbogie, that this latter ground of complaint having been declared illegal by the Court and the House of Lords, could not warrant the Commission of Assembly in founding on it any order, though in itself ecclesiastical, which was not voidable by the civil court; and though it were further admitted that the appeal against the resolution of the Presbytery on that head were tainted with the same illegality, there would still remain two other grounds for supporting the application,—namely, the absolute rejection of the special objections, and the disregard by the Presbytery of the complaints and appeals against that rejection. And if these two latter points involve no illegality—no infringement of the judgment of the Court—there can be no room for questioning the exercise of the ecclesiastical authority of the Commission in acting upon them by the temporary interdict, till the merits of the petition and complaint were disposed of. For, independently of the English cases alluded to on this point, on the part of the respondents, it seems to me little short of an absurdity to maintain, when a judgment, or rather interim order, is pronounced, of which the competency or incompetency depends on the legality or illegality of the grounds of the application for it, that the judgment must be held incompetent, if only one ground out of the three assigned for the application is bad. I am inclined to hold the contrary, that, both in law and common sense, the competency of the order must be sustained if any one of the grounds assigned for the application is good. And that is the course invariably followed in our own practice as to interim interdicts. The strange assumption involved in the contrary opinion,—viz., that a court must be held to have gone on the bad ground alone, and not on the good,—is too extravagant to require a formal refutation.

Here, then, the question arises,—Where was the illegality of the parties and the minority of Presbytery, requiring the Presbytery to consider the special objections? And if there was no illegality in that, how were the majority of the Presbytery entitled to reject the special objections, and to refuse to admit the appeal, and to proceed with the settlement contrary to the express provision of the Act of Assembly 1732? For it is in vain to refer to the authority of Bankton as to the reasons for passing this Act of Assembly. Whatever may have been the object or motives of those who introduced it, its enactments are unequivocal, unqualified, and imperative. It declares, that after appeal, all procedure shall stop short of the actual settlement. As yet, I have seen no satisfactory answer on the part of the suspenders to the above-mentioned questions. It is said, indeed, that the right of parishioners to tender special objections is part of the Act of Assembly 1834; that these provisions are merely subsidiary to the main object of supporting the dissent of the majority of heads of families; and that the whole of this Act was declared illegal by the judgment of this Court and the House of Lords in the case of Auchterarder. This does seem an extraordinary misapprehension. We have only to read the Act itself, and the proceedings in that well-known case, in order to satisfy ourselves of the contrary. So far from the clauses of the Act being subsidiary to what is termed the veto, the regulations are totally distinct in their object and nature. In the event of a majority of dissents, the presentee is to be rejected. But if there be not a dissent of the majority without reasons,—if there be no veto, and any one or more of the heads of families state special objections, those special objections are to be received and disposed of according to the rules prescribed by the 4th, 5th, 6th, and 7th articles of the regulations. And it is only in the double event of there being no special objections, and no dissent by a majority of heads of families at the meeting for moderating a call, that the Presbytery is entitled to proceed with the settlement. How can it be said that the tender of special objections is subsidiary to the veto, when the former are contemplated only in the case of the veto not taking place?

But, again, where is there any ground for the statement, that the judgment of this Court and the House of Lords, in the case of Auchterarder, determined the general illegality of the Act of Assembly 1834? Why, in so far as I can see, the Act of Assembly, though fully commented on in argument, is never once mentioned in the summons. The single ground taken there, and I think most properly taken, was the rejection of the presentee on the ground of the majority of dissents; and that is set forth in the summons without any mention whatever of the Act of Assembly, of which it happened to be a part. Nay, further, the summons seems evidently to imply that no exception could be taken, or was intended to be taken, to the regulations of the Act respecting special objections. One of the grounds of the summons is, that the Presbytery refused to take the pursuer on trials, though duly qualified, &c., "and though no objections had been stated against his qualifications." And, again, that the Presbytery, by rejecting the pursuer without making trial of his qualifications, and without any objections having been stated to his qualifications, acted illegally; and, as the pursuer had been rejected before trials, and at meetings of the Presbytery, long before there were any means for letting in all and sundry to make objections, after the edict was finally served for admitting him, I think the summons very fairly implies an admission, that there would have been no illegality in the tender of special objections at those meetings. This appears still more strongly from the pleas in law, and particularly the third: "As no objections were stated to the qualifications of the presentee," &c., "the Presbytery were bound to take him on trials,"—expressions which clearly imply that special objections were competent before taking him on trial. And this is set completely at rest by the express admission made by the opening counsel for the pursuers in the case of Auchterarder,—my friend, Mr Whigham, who, of all persons, both as a member of Assembly and counsel, was least likely to misapprehend the true object of the action. He expressly states (p. 55),—"If your Lordships will turn to the 4th, 5th, and 6th sections of the regulations of the General Assembly of 1834, you will find they just carry out this general principle of the general law of the Church; and, so far, these regulations are not now excepted against."

I cannot help thinking, therefore, that if the Commission went wrong in holding the tender of special objections, at that period of the proceedings, to be legal, and the rejection of them, without consideration, an unwarrantable act on the part of the Presbytery, they have been strangely misled—not only by the case of Auchterarder, but by the concurring authority of all parties in the General Assembly. For, in the year 1833, prior to the passing of the Act "anent Calls," it was carried by a vote of the Assembly—"That in all cases, it is competent by the law of the Church, sanctioned by the law of the land—competent for the heads of families in full and regular communion with the Church,—to give in to the Presbytery objections, of whatever nature, against the presentee, or against the settlement taking place; that the Presbytery shall deliberately consider these objections; and that, if they find them unfounded, or originating from causeless prejudice, they shall proceed to the settlement; but if they judge they are well founded, that they reject the presentation, the presentee being unqualified, it being competent for the parties to appeal from the sentence." (Report of debate 1833, p. 43: Edinburgh, 1833.) And a committee was ordered to draw up the necessary regulations.

In the following year, when the report ordered by this vote had been given in, the motion made by Dr Mearns, in opposition to that which ultimately sanctioned the veto, was, that the "report of last year's committee be approved of, and sent to all the presbyteries of the Church, with a view to its being declared the law of the Church in reference to calls." But the committee's report contains regulations as to special objections, almost identical with those on the same subject, in what is called the Veto Act. (Report of Proceedings of General Assembly 1834, pp. 61, 62: Edinburgh, 1834.) And as all the members of Assembly supported either one measure or the other, the result is obvious, that the competency of tendering special objections before taking the presentee on trials, and at the particular period which the Church thought most convenient, was recognised as the law of the land and the law of the Church by the whole

members—churchmen, lawyers and Judges—of which the General Assembly was composed.

And what reason could possibly be given against this? It is said that, by law, the proper time for tendering objections by the parishioners was after the edict intimating the settlement, and at the meeting finally held for that purpose. But, in the *first* place, though the edict was employed for the purpose of publishing the opportunity that all the parishioners might have of stating objections, I see no authority for holding that special objections might not, by the law of the Church, have been given in at any time. That, at least, is the law laid down by all parties in the General Assembly. But, *secondly*, when it is said that the tendering of special objections only after the edict, was the law of the land, it is forgotten that it was the law of the land, only because it was the law or usage of the Church. If the Church was entitled to receive and dispose of special objections, there was surely no unreasonable stretch of power in fixing the time when those special objections could be most conveniently received, and most satisfactorily investigated. And, again, to try this by another test, although it be now fixed that the patron has a civil interest in his right of presentation, to the effect of preventing the church courts from communicating, through the medium of dissents without cause assigned, any part of his right to the majority of the parishioners, can it be held, on any intelligible principle, that either he or his presentee has a *jus quiritum*, a civil interest, in holding the Church bound to investigate special objections only after, and not before serving the edict? And if the case of Auchterarder had been put, not on the rejection of the presentee in virtue of the dissents of the majority, but on the circumstance of the Presbytery receiving and considering special objections before, instead of after, the final serving of the edict, can any one—churchman or lawyer—seriously believe that either this Court or the House of Lords would have sanctioned the action? I think this question is sufficiently answered—not only by the general considerations above alluded to, but by the record, the argument, and the opinions delivered in the case itself.

With regard to the contents of the special objections, I can say nothing. Whether they were good or bad, I have no means of knowing. It rather appears to me that they cannot be much worse than the reasons assigned by the majority of the Presbytery for refusing to receive and consider them. But their soundness or sufficiency is not, and cannot be before us. The ground of the petitioners' complaint to the Commission was, not that the Presbytery rejected, *causa cognita*, objections which they ought to have sustained; but that they had refused to receive them, and to consider whether they were sufficient or not. Such being the nature of the complaint, these parties were not called upon,—indeed, I do not think it would have been in form for them to bring forward their special objections in this procedure.

I may here notice, however, another, and I think a very extraordinary exception, taken to the competency of tendering those special objections to the Presbytery at the particular time when they were tendered. It was said that, even by that new law of the Church, special objections are not to be received, unless there be no dissent by a majority of heads of families; and that, consequently, even by the Act of Assembly, special objections could not be received, because, in this case, there was a majority of dissents. I am not sure that I understand the argument, but that seemed to me to be its meaning. This does seem a strange perversion. True, if the Presbytery had given effect to the veto by rejecting the presentee, there would have been no occasion for investigating the special objections. But as they did not, is it not quite clear that, in fair construction and sound sense, the special objectors just stood in the same situation as if the power of dissent, without reasons assigned, had failed, from the deficiency of number, or any other cause? The object of the resolution was, that, even if there were not a sufficient amount of dissent, without reasons, the presentee should still be exposed to special objections; and the argument involves the strange proposition, that the presentee must escape from the special objections, because he had also been refused, without reason assigned, by the majority of the heads of families.

Upon these grounds, I think it perfectly clear that the tender of special objections in this case stood opposed to no law, and to no points fixed by the judgments of the civil court. Conse-

quently, the refusal of those special objections, and the rejection of the appeals founded on that refusal, seem to me to have been a perfectly justifiable ground for the Commission entertaining the petition and complaint. In the *first* place, in so far as I can judge of the laws of the Church, the absolute refusal of the objections, without consideration, was illegal by that law; and, *2dly*, the proceeding to the settlement, in the face of the appeal, was directly in violation of the Act of Assembly 1732. But really I do not feel myself authorised to go into the inquiry as to the law of the Church. Whether the Presbytery were, according to their own law, right or wrong in taking the course they did, will be determined by the Church Courts,—by the Synod or by the appeals,—or by the Commission, in disposing of the petition and complaint. It cannot surely be held, that, if the church courts go wrong in their own law, or their own procedure, we are entitled to set them right. On the contrary, the only ground for the judgment in the case of Strathbogie was, that they had abused their own law and procedure to defeat ours; so that it is enough for my view of the case, that the interdict or order of the Commission here, did not proceed, as in the case of Strathbogie, upon grounds hostile to points fixed by your Lordships or the House of Lords. There were grounds which were good, in so far as I am informed, according to ecclesiastical law, and which here were, at all events, no violation of the judgments of any civil court; so that, even assuming the principle on which jurisdiction was supported in that case of Strathbogie to be correct, that principle does not apply to the present, inasmuch as there is here a purely ecclesiastical sentence or order, resting on grounds which had never been determined by any civil court to involve any violation of civil right.

But I have already given my reasons for deciding this case on the broader ground. I think this order of the Commission was purely ecclesiastical. It related exclusively to the discharge of ecclesiastical functions, the preaching of the word, and the administrations of the sacrament, in the parish of Culsamond,—points in which this Court never had jurisdiction, and, in regard to which such jurisdiction appears to me to be denied to this Court, and confined to the church courts, by express Statutes, and the whole object and spirit of the Church government established by law in the country.

On the more general grounds, then, maintained by the suspenders, I think the jurisdiction cannot be sustained, and that the note, if resting on those grounds, ought to be refused, as was done by the Lord Ordinary.

As to the power or competency of the Commission as a court, there can be no objection to the course your Lordships have suggested, of reserving that point till the bill be passed “to try the question.” But as that course necessarily implies that the jurisdiction of the Court, on that ground, is questionable, I think the interdict must, even on that view, be in the meantime refused.

The Court pronounced the following interlocutor:

“Alter the interlocutor of the Lord Ordinary reclaimed against, and remit to his Lordship to pass the note of suspension, and grant the interdict as craved.”

Note of authorities referred to by the counsel in their pleadings.

Mr INGLIS.

Jurisdiction of Court of Session.—Campbell v. Brown, 3 Wilson and Shaw, 448, (Lord Lyndhurst.) Strathbogie Case, pp. 26 and 27 of separate Report, (Lord Gillies's Speech); *ibid.* 30 and 31, (Lord Mackenzie). Heritors of Corstorphine v. Ramsay, 19th March 1812. Dickson of Kilbucko v. Heritors of Newlands, 6th February 1768; Mor. 7464. Beaurain v. Sir Wm. Scott; 16 Vesey, junr., 346. Lords Brougham and Cottenham in Auchterarder Case, pp. 38–9 and 57–8. Statute 1592, c. 116. Erskine, I. 5, 24. Opinions of Lords Gillies and Mackenzie in Edwards v. Presbytery of Strathbogie, 18th December 1840.

Jurisdiction of the Commission.—Erskine, I. 2, § 2, 3, 13, 14, 15. Bankton, IV. 2, 8. Erskine, I. 5, 24. Bankton, IV. 22, 1. Confession of Faith, 1560, as in Thomson's edition of Acts, pp. 526, 530, 533. Acts in 1567. Same Confession ratified, Vol. III. p. 24; p. 23, cap. 7. Act 1574, 5th March, Commission of Parliament appointed, Vol. III. p. 89.

Repeated 15th July 1578; *ibid.* p. 105. 26th October 1579; *ibid.* p. 137. Acts of 1584. Act 1592, c. 116, read in connection with chap. 131 of Acts 1584. Book of Kirk (Peterkin), p. 498, 16th May 1601.

Merits.—Hill's Theological Institutes, p. 206. Dunlop's Parochial Law, pp. 291, *sequen.* Sections 243, 253, 4, 7, 8, (2d edition). Regulations appended to Veto Act (1841), pp. 30 and 31 of printed Act of Assembly. Case of Legertwood, Assembly 1798, printed Acts, and Peterkin's Compendium, Vol. I. p. 482. Act of Assembly 1732, c. 5. Bankton, IV. 22, 25. Pardovan's Coll., I. 1, 17, 18, 19. Peterkin's Compendium, Vol. I. p. 193. Revolution Settlement, 1690: Act 5. Confession of Faith, ch. 23 and 31. Acts of Assembly 1690; Acts, pp. 2, 22, 23, 24, 25. Letter to a friend in London, anno, 1690. Pamphlets, Advocates' Library (D D D.) Peterkin's Constitution of Church, pp. 112, 99. Assembly 1694: Form of Process (Peterkin's Compendium), pp. 19, 30. Pardovan, (Compend.) p. 256. Alexander Henderson's Work on the Government and Order of the Church, pp. 48, 51, 53, 54, 55. Formula in Acts of Assembly 1711, p. 18. Acts 1708, p. 16; 1717, p. 12. General Instructions; 1736, p. 26. Commission of 1839; Commission of 1841.

Mr MONCREIFF.

Merits.—Auchterarder Case, Vol. II. p. 61, as to the Directory of 1649, Lord Justice-Clerk Boyle's Speech, pp. 66, 72. Dr Cook's Resolutions of 1833. Report of Debate in General Assembly by Macgregor, 1833, p. 39. Proceedings of Assembly 1834, pp. 52, 61. Act of Assembly 1732, c. 5; Bankton, IV. 22, 25. Old Machar, 15th May 1729. Auchtermuchty, 10th May 1834. Gairloch, 17th May 1743, in Acts of General Assembly.

Jurisdiction.—Conferred by Recognition as well as by Grant, 1567; Thomson's Acts, Vol. III. p. 24, c. 12; *ibid.* p. 23, c. 7; 1579, c. 69. Act 1584, c. 129, repealed by 1592; 1592, c. 116; 1592, c. 117. Sir G. Mackenzie, Vol. I. p. 319 on 1592, c. 116; 1612; 1661, c. 11; 1662, c. 1; 1664, c. 4; 1669, c. 1; 1681, c. 6; 1689, c. 3; 1690, c. 1; 1690, c. 5. Confession of Faith, c. 23; 1693, c. 22; 1695, c. 22; 1707, c. 6, and Act of Union. Erskine, I. 5, 1; *ibid.* § 24. Kames' Law Tracts, p. 223. Lord Prestongrange, 1736. Mr Crosbie. Rutherford v. Presbytery of Kirkcaldy, 17th November 1785. Again to 1567, 1579. Blackstone, III. c. 4. Collision among Courts in 1616. Erskine, I. 5, 24. Ross v. Findlater; 4 Shaw, 514, 2d March 1826. Session Papers. Lord Glenlee's Opinion, p. 517. Act 1696, c. 26; 43 Geo. III. c. 54. Case of Bothwell, Maculloch v. Allan, 26th November 1793; M. 7671. Corstorphine Case, 10th March 1812; F. C., Lord President Hope's Speech. M'Queen, 25th July 1781; M. 7469. Dickson of Kilbucko; Mor. 7464. Beaurain v. Sir Wm. Scott, Kames on Jurisdiction, Hume, Vol. II. pp. 504, 509. Jobson, 29th November 1838. Robertson v. Bisset, 21st May 1829. M'Coll, 17th February 1838. Acts 1532; 1567, c. 18; 1587, c. 44; 1609, c. 6. Erskine, I. 5, 28. Blackstone, III. 4, 6. Burns, Vol. II. p. 68; (Coke's Inst.) *ibid.* pp. 61, 52. Roger's Ecclesiastical Law, p. 711. Stockdale v. Hansard; Adolphus and Ellis, Vol. IX. pp. 147, 288, 289; Vol. II. p. 277. Lord Raymond 1105, Reg. v. Parker. Roger's Ecclesiastical Law, 737, 735. Freeman's Reports, p. 290. Adolphus and Ellis, III. pp. 723, 724. Rogers, p. 750. Adolphus and Ellis, V. p. 590. Hart v. Marsh, Lord Denman.

Commission.—Cobbett's Debates, Vol. XVI. p. 861: Lord Erskine on Sir F. Burdett's Case. Gordon v. Bogle; Mor. 7532. Blackstone, Vol. I. p. 87. Book of Kirk, p. 14; 1563; 1565, p. 39. Book of Kirk, pp. 86 and 84, art. 3; 1567, c. 12 (Thomson's Acts); 1567, c. 7; Book of Kirk, pp. 122, 123, 1570; *ibid.* p. 157, 1576; pp. 163, 164; 1680, Synods, pp. 198, 205; 1582, p. 262; 1580, p. 204. Second B. of Dis., Peterkin's Compend., Vol. I. c. 1, of 2d Book, c. 7, adopted in 1582. Book of Kirk, p. 351, 1590, 1592; Book of Kirk, p. 382, 1593, p. 407; 1594, p. 416, 1595, 1597. Calderwood, p. 409, 16th May 1797. Book of Kirk, p. 378, 1600. Calderwood, p. 455, 1601. Book of Kirk, p. 521, 1602; “Last Faithful Assembly.” Black Acts,—ministers tried under them in 1606, and Guthrie in 1690. Sir Thos. Hope's Remarks, Calderwood, p. 610. Nesbit, Vol. I. of Woodrow's Hist. p.

184. Records of Kirk, p. 41, 1631; 1643, pp. 359, 360, 399, p. 418, 1645, p. 437, 4. Negotiations with King (Peterkin's.) Act of 1690, c. 5, Hethbrington, p. 665; 1694. Acts of Assembly 1690. Practice from 1700 to 1760. Case of Seceders, 1732. Inverkeithing, Morren's Annals, p. 230. 1752, Reasons of Appeal, p. 231. Principal Hill, p. 244. Burntisland Case, 1713. Act of Assembly 1736.

Mr ROBERTSON.

Acts 1592 and 1712, relative to the settlement of Ministers.

Merits.—As to the form of procedure antecedent to 1834 in settlement of ministers, Pardovan (Peterkin), Vol. I. p. 193. Hill's Theological Institutes (*ibid.*), p. 490. Hill of Dailly's Practice, pp. 58, 60. Dunlop, 2d edit., p. 294, *et sequen.* Sir H. Moncreiff, Constitution of Church, Note, p. 112. Bankton, p. 593, Vol. II. Sir H. Moncreiff, p. 46, as to old Machar. Auchtermuchty case; Auchterarder Report, Vol. I. p. 73.

Jurisdiction.—Blackstone, Vol. I. Introduction, § 2, p. 48, § 8, p. 88. Erskine, I. 5, 24. Bankton, IV. 22, § 1, 24. Erskine, I. 7, 3, § 11, 23. Kames' Law Tracts, p. 231. Stair, IV. 7, 2, § 18. Kilbucko Case, 6th February 1768; Mor. 7464. Corstorphine and Ramsay, 10th March 1812. Gorbals, 8th February 1823; Shaw, p. 194, and 9th December 1823, p. 664. Brown v. Heritors of Kilberry, 15th November 1823; Shaw, IV. 174; 12th June 1829, Wilson and Shaw, 31, 448. Lord Lyndhurst's Opinion. Ross and Findlater, 2d March 1826, 4 Shaw, 514. Lord Pitmilley's Opinion. Decisions in Auchterarder Case, Report, Vol. II. p. 451; Supplement, p. 32; Lord Chancellor, pp. 57–59. Damage Case, 4th March 1841; Dunlop, III. pp. 778, 798. Lethendy Case, 14th June 1839; Dunlop, I. 955. Lord Justice-Clerk's Opinion, p. 980. Lord Gillies's, 962. Daviot Case, Mackintosh v. Rose, 17th December 1839; Dunlop, II. 253. Lord Meadowbank, p. 256. Strathbogie Case, 20th December 1839, Dunlop, II. 258; 14th February 1840, p. 585. Lord Gillies's Opinion, pp. 591, 592; 11th June 1840, p. 1047; 11th July 1840, p. 1380. Declar. Edwards, 16th December 1840; 3 Dunlop, 282. Lord Gillies's Opinion, pp. 292, 294, 295. (1690) William and Mary, c. 5; Introd. pp. 223, 224, c. 20; p. 7, c. 23; p. 8, c. 25; p. 253, c. 30. Secession Act, 54, 57. Marchmont Papers, pp. 403, 405. Confession of Faith, 1660, p. 358; 1st Vol. of Small Acts, 356. John Knox's Appellation in 1558. Act 1689, c. 3; 1690, c. 1, 2, and c. 5. Confession of Faith, c. 20, 23, 30, 31. Act 1693, c. 22. Formula in Act of Assembly 1711. Baillie's Letters, 25th April 1645, p. 97, Vol. II. (of old edition), and p. 267 of new; and 17th March 1646, p. 195 of old edition, and p. 360 of new. *English Cases.*—Smythe, Vol. III. Adolphus and Ellis, p. 723; Hart, Vol. V. *ibid.* p. 602, 10th November 1836. Stockdale and Hansard, 1839; Adolphus and Ellis, Vol. IX. p. 1, Lord Denman. Lord Erskine's Opinion in Burdett's Case, p. 140. Spiritual Courts, p. 147. Justice Cole-ridge, pp. 215, 216, 237. Christian's Note from Hall, in Blackstone, I. p. 59.

Commission.—Special Commission of Assembly 1841, additional print, p. 24. The Queen's Commissioner—Acts of Assembly 1841, pp. 1, 2. Commission of Assembly 1841, print, p. 21. Act of Parliament 1567, c. 12 (in small Acts under year 1579, c. 69, p. 410). First case of Commission 1562–3, (Paul Methven's); Book of Kirk, p. 39; *ibid.* 1567, pp. 81, 84, 86. Cases after 1567; *ibid.* pp. 89, 92; 1570, pp. 122, 123; 1674, p. 140; 1576, p. 157. See also pp. 163, 164; 1580, p. 205; 1582, p. 262, and pp. 123, 124, 133, 136. Proceeding against Montgomery, 12th April 1582; Book of Kirk (Bannatyne Club, Edinburgh), pp. 571, 575. In 1590, Book of Kirk, p. 351 (Peterkin). Act 1592 silent as to Commission and Books of Discipline. Thomson's edition of Acts, Vol. III. p. 292, as to Acts of 1584; c. 129, Vol. I. p. 479 of small Acts; Act c. 131, p. 477, not rescinded; c. 129, repealed. Practice after 1592 to 1602. Calderwood, 268, two cases, one as to King, other the Earl of Home. Commission in 1593; Book of Kirk, p. 382. Another in 1594; *ibid.* p. 407. In 1595, *ibid.* p. 416. In 1597, Calderwood, p. 409. In 1600, Book of Kirk, p. 487. In 1601, Calderwood, p. 452; and Book of Kirk, 498; *ibid.* p. 507. Act of Estates in 1644; Thomson's Acts, Vol. II. p. 331. 1648, Records of Kirk, p. 494. Act 1690, c. 5, pp. 222, 224 (Small Acts). Act 1693, c. 22, p. 395.

Instructions and Commissions of 1690, print, p. 1, art. 8, pp. 4, 6, 7; 1694, pp. 9, 12, 3; 1705, p. 14. Form of Process, 1707; Peterkin's Compend. p. 155; § 2, 5, p. 156. Commission 1717, p. 15 of print. Proceedings of Seceders in 1732, 1740; Acts of Assembly; Morren, p. 9. Case of Inverkeithing, 1750–51–52, Acts of Assembly; Morren, pp. 263, 271. Commission 1736, print, pp. 18, 19; 1841, pp. 21, 22. Principal Hill's Theological Institutes, p. 121. Hill's Practice, pp. 97, 100. Sir H. Moncreiff (Constitution, &c.), pp. 51, 87—(Note), pp. 112, 113. Morren's Annals, preface, p. 1.

Cases.—Hepburn and Others, 16th November 1716. Ninlan Hume, 16th March 1718. Annexation Case, 1738. MS. Acts of Commission. Strathbogie Case, November and December 1839.

Mr RUTHERFURD,

Referring to the authorities generally quoted by Mr Moncreiff, cited only a few of them particularly, with the addition of the following:—M'Leod v. Buchanan, 10th June 1837; 15 Shaw and Dunlop, 1113. Calderwood's History, p. 372. Lord President Hope's Opinion in the case of Prestonkirk; 2 Connell on Titles, 325.

Lord Ordinary, Ivory.—For Suspenders, Robertson, Whigham, Inglis; Alex. Peterkin, S.S.C., Agent.—For Respondents, R. B.-ll, Rutherford, Moncreiff; Wm. Young, W.S., Agent.—[H. B.]

11th March 1842.

FIRST DIVISION.—(H. B.)

No. 163.—*The COMMISSIONERS for the HARBOUR and DOCKS of LEITH, Pursuers, v. The TRINITY HARBOUR COMPANY, Defenders.*

Process—Jury Trial—Statute—Verdict—*A verdict by a jury, summoned under a Statute which required them to fix both "price and damages" payable to parties having an interest in the lands and heritages dealt with under the Act, quashed, on the ground that the jury had only fixed the price, and "declined" to estimate the damages.*

By royal charter, 15th March 1603, commonly called the Golden Charter, and other charters and grants, the city of Edinburgh acquired right to the ports and harbours of Leith and Newhaven,—the latter extending from St Nicholas Chapel at Leith, westward to Wardie Brow, and including, *inter alia*, the whole of the sea-shore which lies to the northward of the lands of Trinity. Besides the right of collecting dues within these limits, the charter conveyed certain links which then lay along the sea-shore, but which have been gradually washed away by the sea. Any part of them said to be still remaining, is covered by the tide at high water. It having been proposed to erect a harbour at a place situated to the north of the lands of Trinity, the city of Edinburgh raised an action of declarator and interdict, in which they concluded to have it found and declared, both that their right of harbour excluded the erection of any other within the same bounds, and that the property of Mr Scot was not bounded by the sea or sea-shore, and that he had no right to use and occupy the shore adjoining his lands for any purpose whatever. Interim decree was pronounced in the declarator, finding that the claims of the pursuers were well founded as regarded the erection of a new harbour, but leaving the question as to the property of the sea-shore undecided. Shortly after the Statute 7 William IV. c. 51, was passed, incorporating the Trinity Harbour Company, and empowering them to construct a harbour at Trinity, but expressly providing by the 11th section,

"That nothing in this Act contained shall extend, or be con-

strued to extend to take away or to interfere with any right or claim which the Lord Provost, Magistrates and Council of the city of Edinburgh, as representing the community of the same, or the trustees for the creditors of the said city, under a certain Act of the 3d and 4th years of the reign of his present Majesty, have or may have to the shore adjoining the lands of Trinity, or any part thereof, nor any right or claim to exact or levy shore, harbour, or other dues on goods and vessels loaded or unloaded on or at the shore or any part thereof, or within the limits of the said harbour, dock or docks, piers, and other works and premises, or any part thereof, either for or on behalf of the community of the said city, or as trustees for the clergy of the said city, or for any other persons whatsoever: Provided always that the commencement and execution of the works of the said harbour, dock or docks, piers and premises, or any part thereof, shall not be in any manner interdicted or prohibited by reason of any action or suit for the purpose of ascertaining the liability of the owners of vessels or goods frequenting or carried into the said harbour, dock or docks, piers or other works, or of any person or persons, corporation or company whatsoever, for such dues as aforesaid, or for ascertaining the right of property on the said sea-shore, or by any judgment or decree in such action or suit: Provided also, that nothing herein contained shall extend, or be construed to extend to take away, alter, abridge or lessen, change, or infringe on any jurisdiction which the said Lord Provost, Magistrates and Council, of the said city have or may have as Admirals of Leith or otherwise on the sea or shore of the Frith of Forth, or any part thereof, unless in so far as the same is hereby altered or abridged."

By the 44th section power was given to the directors of the company to treat with owners and occupiers, or reputed owners and occupiers of lands and other rights, conformable to a schedule appended to the Act; and it was provided by section 46, that in case of refusal or inability by the parties to treat, it should be lawful for the directors

"to apply by petition to the Sheriff or Sheriff-substitute of the county of Edinburgh, setting forth this Act, and that the parties interested have refused or neglected to treat or contract, or are prevented from treating or contracting for the sale of such lands, grounds and heritages, or have not produced or evinced a clear title to the premises they are in possession of, or to the interest they claim, and therefore praying him to fix and ascertain the just amount and value of such lands, grounds, and heritages respectively; and it shall and may be lawful for the said Sheriff or Sheriff-substitute, and he is hereby empowered and required, upon receiving such petition, to order notice thereof to be given by advertisement in some one of the particular newspapers usually circulated in the city of Edinburgh, and also notice to be given to the owners and occupiers of the several lands, grounds and heritages, or their known agent or factor as aforesaid, if they reside within the county of Edinburgh, personally, or by a written notice left at their dwelling-houses; or if they reside without the said county, such persons being cited by letters of supplement from the Court of Session in the usual form, and upon leaving, together with the said notice, a copy of the said letters of supplement and a full copy of the said petition, with an order to give in their answers or objections, if they any have, within ten days after such notice; after which time is elapsed it shall and may be lawful for the said Sheriff or Sheriff-substitute, and he is hereby empowered and required to issue his precept or precepts for summoning and empannelling a competent number of substantial and disinterested persons, in number not less than twenty nor more than thirty, which persons so to be summoned and returned are hereby required to come and appear before the said Sheriff or Sheriff-substitute at such time and place, or times and places, as in the said precept or precepts shall be directed and appointed, of which time and place, or times and places for assembling the jury, the said parties interested shall have notice given them by advertisement in the said newspaper, at least six days previous to the said meeting; and out of such persons so to be summoned and returned, the Sheriff or Sheriff-substitute shall appoint, by ballot, a jury of twelve persons, before whom the said directors and

the parties interested may bring a proof by habile witnesses for estimating and ascertaining the just and real value and price to be paid by the said company for the said lands, grounds and heritages, including such damage as may be suffered by the proprietors of the ground or their tenants, or in any manner of way; and the said Sheriff or Sheriff-substitute is hereby authorised to summon before him such person or persons as shall by either party be thought necessary to be examined as witnesses before the said jury touching or concerning the premises, and shall and may administer oaths to such person or persons as shall be examined as witnesses on the matters aforesaid; and the said Sheriff or Sheriff-substitute, before proceeding to take the evidence, shall administer an oath to the jury to return a true verdict, and shall examine, or allow to be examined on oath in their presence such witnesses as shall be summoned for either party, and upon the depositions of the witnesses or other competent evidence, such jury shall determine the price or damages to be paid by the said company; and after verdict is pronounced as aforesaid, the said Sheriff or Sheriff-substitute is hereby required to adjudge payment of the value and amount of the loss, price, or damage thereby awarded to the persons having a right thereto; and the said proceedings and orders of the said Sheriff or Sheriff-substitute shall be final, and not removable by bill or letters of advocacy or suspension to, or subject to reduction by, any court whatever, any law or usage to the contrary notwithstanding."

In April 1839, the clerk of the Trinity Harbour Company addressed a letter to the clerk of the Commissioners for the Harbour and Docks of Leith (these commissioners now standing in right of the city of Edinburgh), "intimating that it was the wish of the said company to treat and contract for the purchase of those parts of the sea-shore of the Frith of Forth, and rights pertaining thereto, which would be required for the purpose of constructing the harbour of Trinity, and which lie within the boundaries of the harbour, as described in the Act of Parliament incorporating the company," and offering, "on behalf of the Trinity Harbour Company, to pay the sum of £200 Sterling to the Commissioners appointed for the superintendence and management of the Harbour and Docks of Leith, or to whosoever else should be found to have right to the same, as the full value and price of the said property and others, including all damages, on the company receiving a valid and unencumbered disposition thereto." The commissioners having declined to treat, a petition was presented to the Sheriff, praying him to take the requisite steps, by choosing a jury, &c., in terms of the Act of Parliament,

"for estimating and ascertaining the just and real value and price, and damages, if any, to be paid by the petitioners for those parts of the sea-shore of the Frith of Forth, and rights pertaining thereto before mentioned, and particularly described and referred to in the said Act of Parliament, schedule and notices, and for the other purposes particularly specified in the said Act of Parliament; and in general, to proceed in the said matter in terms of the foresaid Act of Parliament, and to decern in the whole premises."

The Sheriff-substitute granted warrant accordingly, and the trial took place on the 5th June 1839, when the commissioners adduced evidence to show "that the said Trinity Harbour Company, by depriving the said commissioners of their right to the said subjects and others mentioned in the said petition, and using the premises for the purposes set forth in the said Statute, would create loss and damage to a great amount to the commissioners, beyond the value or price of the premises so proposed to be appropriated; and more particularly, by injuring the existing harbour of Leith,

and the means of improving and enlarging the same, and by depriving the pursuers of the loss of dock and flag dues; and by increasing the expense of collecting the dues to be leviable by the commissioners at Trinity." After this evidence had been led, the commissioners lodged a minute, in which they

"consented that the verdict of the jury, and the judgment following thereon, shall be subject to be suspended or reduced in the Court of Session or House of Lords, in the event of the jury sustaining and assessing their claim of damages for injuring the existing harbour of Leith, and the means of improving and enlarging the same, and for the loss of dock and flag dues, and for the increased expense of collecting the dues to be leviable at Trinity, and in the event of it being found in said Court of Session or House of Lords that that claim was not competent in the present action."

The following verdict was returned:

"In the petition the Trinity Harbour Company, incorporated under the Act of Parliament 7 William the Fourth, c. 51, and the directors of the said Company against the Commissioners appointed by the Act 1st and 2d Victoria, cap. 55, for the superintendence and management of the harbour and docks of Leith, and for other purposes connected therewith"—(Names of jury).—"The above jury being enclosed, they made choice of the said Charles Cowan to be their chancellor, and the said James Craig to be their clerk; and having considered the evidence adduced on the part of the petitioners, and also the evidence adduced on the part of the respondents, and writings and plans produced by both parties, admissions of parties, and whole procedure, they find, 1st, That £60 is the value for the nine acres of ground as marked in the plan, No. 6-8 and 7-7.—2d, It having been left to the jury to consider the propriety of awarding damages in terms of the minute for the respondents, they respectfully decline doing so, reserving to the respondents all rights which they may possess, and claim for compensation for any injury which may accrue to the harbour and port of Leith from the erection of the works at Trinity: In witness whereof this verdict, written on this and the preceding page, by the said James Craig, our clerk, is subscribed by the said Charles Cowan, our chancellor, and by the said clerk, at Edinburgh, the 5th day of June 1839."

(Signed) "JAMES CRAIG, Clk., CHAS. COWAN, Cr."

The Sheriff pronounced the following interlocutor:

"The Sheriff-substitute having considered the foregoing verdict of the jury, and whole procedure, approves of the verdict, and finds and decerns in terms thereof; and farther, in respect that the verdict of the jury has been given for a less sum than had been previously offered by the pursuers for the ground in question, finds the defenders, the Leith Dock Commissioners, liable in one-half of the expenses of process, in terms of the Statute; allows an account to be given in for taxation, and decerns."

(Signed) "JA. MACDONALD."

The commissioners brought a reduction of the verdict on the following grounds:—(1st, formal).

"Secundo, The said pretended verdict or deliverance, and interlocutor following thereon, were *ultra vires* of the said jury and Sheriff, and were altogether unwarrantable, and null and void, in respect that, at common law, the said jury had no power to pronounce a verdict, and the Sheriff had no power to pronounce a judgment, in the said action or proceeding; that the only powers which either the said jury or the said Sheriff had in the said action or proceeding were those conferred upon them by the said Statute 7 Will. IV. c. 51; that by that Statute the jury were empowered only to pronounce a verdict for the amount of the just and real value and price to be paid by the said company for the lands, grounds, and heritages, including such damage as may be suffered by the proprietors of the ground or their tenants, or in any manner of way, and were not authorised to pronounce any verdict for such price or value, exclusive of such damages; and the said Sheriff was empowered to pronounce judgment only for the loss, price or damage, which might be estimated by a verdict pronounced in conformity with the Statute: That the foresaid pretended verdict or deliverance, however,

was not pronounced in conformity with the said Statute, inasmuch as, in the *first* place, the jury, while they thereby estimated the value of the nine acres of ground therein mentioned at the sum of £60, failed to estimate the value of the rights pertaining thereto, although these rights, which are of great value, were expressly set forth in the foresaid notice and petition of the defenders as part of what they were to acquire, and of which the price or value ought also to have been ascertained by the verdict of the said jury; and in the *second* place, the said jury not only failed to ascertain the amount of such damage as may be suffered by the foresaid commissioners, or their tenants, or in any manner of way; but they expressly declined to perform this part of their duty, although they did not find that no damages were due to them, but, on the contrary, expressly reserved to the said commissioners all rights which they possessed, and their claim for compensation for any injury which might accrue to the harbour and port of Leith, from the erection of the works at Trinity: That the said pretended verdict or deliverance of the jury having thus been at variance with what was prescribed and required by the Statute, the same, and the interlocutor of the Sheriff following thereon, are altogether unwarrantable, inept, and null and void. *Tertio*, The said pretended verdict or deliverance and interlocutor following thereupon, are likewise null and void, in respect that the same are at variance with the grounds and warrants whereupon the same bear to have proceeded; and, in particular, that although the petition of the said Trinity Harbour Company, as well as the interlocutors of the Sheriff remitting the same to the jury, expressly directed them to include the damages, yet the said jury disregarded the terms of the said petition and interlocutors, and of the foresaid Act on which they were founded, and did not return a verdict in conformity thereto."

The commissioners, on these grounds, concluded not merely for reduction of the verdict, but also to have it found and declared

"that the powers conferred on the said Trinity Harbour Company, defenders, by the 46th section of their said Statute, have, in terms of the 107th section of that Act, ceased, determined, and become utterly extinct, and that the said defenders have now no right or title to acquire, by compulsory sale, any part of the foresaid shore ground."

The pursuers *pleaded*—1. The verdict under challenge not having been duly authenticated, it, and the judgment of the Sheriff thereon, are null and void. 2. The said verdict and judgment are null and void, in respect that, while the jury and the Sheriff had no power or jurisdiction to pronounce the same, excepting under the Statute 7 William IV. c. 51, the same were not pronounced or returned in conformity with what is prescribed and required by that Statute, and it was *ultra vires* of the jury and Sheriff to return or pronounce such a verdict and a judgment as those under challenge. 3. The verdict and judgment are likewise null and void, in respect that the same are at variance with the petition of the company, and remit by the Sheriff, being the grounds and warrants upon which the same bear to have proceeded. 4. The powers conferred on the company by the 46th section of the Statute having expired, in terms of the 107th section thereof, the company have now no right or title to acquire, by compulsory sale, the subjects in dispute. 5. The subjects in dispute being the property of the pursuers, as commissioners for the harbour and docks of Leith, they ought to be protected in the peaceable possession thereof, in terms of law.

The defenders *pleaded*—1. The whole proceedings under the trial were correct and legal, and in terms of the Statute, and they are final, and not subject to review in this or any other process. 2. The verdict of the jury, in so far as it referred to the special claim

of damage advanced by the pursuers, was rendered necessary by the minute of the pursuers, and no objection can arise to the verdict upon that ground. 3. Even if the verdict of the jury were objectionable, that could not vitiate the prior proceedings held under the Statute, and entitle the pursuers to the interdict which they crave, or to a decree of declarator that the powers of the defenders under the Statute have ceased. 4. No protest or objection was taken to the verdict at the time, and therefore it cannot now be challenged. 5. The pursuers have not yet established their right to the shore in question, and unless they do so, they have no interest in bringing the present action. 6. If the shore belongs to Mr Scot of Trinity, the pursuers are ultroneously interfering with the operations of the defenders, and their right to the shore ought to be established in the first instance. *Lastly*, The directors are not personally liable for any act done by them in behalf of the company, and cannot be found liable in expenses.

The Lord Ordinary pronounced the following interlocutor:

"2d December 1841.—The Lord Ordinary having heard parties, and considered the record, repels the defences, and declares, reduces, and decerns, in terms of the libel: Finds the defenders liable in expenses, allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report.

"*Note*.—There are many reasons why parties engaged in contests like this should have the whole subject of dispute, in so far as it depends upon a jury, settled by a single verdict. It is sufficient to mention, that *value* and *damages* are frequently incapable of being strictly separated; and that every fair party has an interest in not being harassed by separate trials.

"But whatever the *reasons* may be, the fact is, that this Statute plainly directs that the juries shall dispose of both the damages and the value at once,—the 46th section ordains them to settle the value of the ground, '*including such damage as may be suffered by the proprietors of the ground, or their tenants, or in any manner of way.*'

"The petition by the defenders for a jury, and the interlocutor of the Sheriff for summoning one, proceed either on the express statement that they were to exhaust the whole matter in dispute, or on a general reference to their duty, as *prescribed in the Statute*; and if the Sheriff and the parties had decided on the principle of settling the matter piecemeal, by a successive series of trials, they would have been unwarranted by the Statute. The effect of a *clear agreement*, in barring the parties from objecting, need not be considered, because no such agreement was made. On the contrary, the minute lodged at the trial implied that the damage was before the jury; for it consented that the verdict should be liable to suspension or reduction, if damages '*to the existing harbour of Leith*' should be found due; and it is *admitted* that evidence on this subject was laid before the jury (condescendence and answers, article 12). Accordingly, the jury were aware that this matter was submitted to them, for their verdict states, that '*it had been left to them to consider the propriety of awarding damages,*' and that '*they respectfully decline doing so.*' There was no authority whatever for this fancy, which seems to have proceeded from a mistake of the meaning and object of the pursuers' minute.

"In this situation, the Lord Ordinary conceives that the case has been mislaid. It has not been tried as prescribed by the Statute. In principle, the verdict is just as much out of the Act of Parliament, as if the jury had only given value for four out of the eight acres, and left the rest to be valued by another verdict. The Sheriff should not have taken the verdict; or if, after it was signed and given in, he could not avoid receiving it, he should not have acted upon it."

The defenders reclaimed. At advising,

Lord President.—After hearing the subject fully discussed,

and looking at the way and manner in which the Statute prescribes the duty to be performed by the Sheriff as to the summoning of the jury, and carrying out the other purposes of the Act, I am of opinion that the verdict cannot be sustained. It is impossible to read the Statute without perceiving that there was no authority in the Sheriff or jury to do anything but what was expressly prescribed, viz., not merely to fix the value of the ground, but also to assess the damages. Now, on the face of the proceedings, it is obvious that the jury have not done what the Act required. Had they said that £60 was the value of the land, including damages, there would have been an end to the matter. But what is the fact? The Commissioners, in the course of the trial, lodged a minute, consenting to a suspension of the verdict by the Court of Session, in the event of the jury assessing damages, and the jury unfortunately interpret this to mean that it had been made optional for them to assess damages or not, as they saw fit. Accordingly, they tell distinctly in their verdict that they "*decline*" to assess damages. The lodging of the minute seems to me to have been a very unhappy interference with the proceedings of the jury; but its effect having been to mislead the jury, and make them expressly decline to perform part of their statutory duty, I think it is impossible that the verdict can be sustained. I am not prepared, however, to adopt all the conclusions of the summons. One is, that the trial having miscarried, and the time for carrying the Act into effect having expired, the defenders are now precluded for ever from acquiring the ground in question by a compulsory sale. The miscarriage of the trial was owing in a great measure to the minute lodged by the pursuers; and I am not prepared to adopt a conclusion which would give them all the advantages, and burden the defenders with all the disadvantages of that miscarriage. The utmost length that I can go, is to find that the verdict has proved abortive, and that the parties must begin *de novo*.

Lord Gillies.—I am clear that the verdict must be quashed. The Statute expressly provides that both the price and damages must be estimated; whereas the jury, instead of doing so, expressly exclude the damages. Had they said nothing on the subject, it might possibly have been inferred that the damages were included in the price; at least, they might have said that they meant the damages to be so included, and then there would have been no room for any question. They have done the reverse of all this; and their proceedings being in consequence contrary to the Statute, must be quashed. I agree, however, with your Lordship, that it is impossible to go farther, and find that the defenders have forfeited all their privileges under the Act.

Lord Mackenzie.—If it were apparent, or could be clearly proved, that there was no possibility of any damage, I am not prepared to say that the jury were bound to insert an express finding to the effect that no damages were due. Here, however, they have inserted an express declinature of part of their statutory duty, and I therefore think it impossible that the verdict can stand.

Lord Fullerton concurred.

The Court pronounced the following interlocutor:

"Recal the interlocutor of the Lord Ordinary: Find that the verdict returned by the jury in this case was not in terms of the Statute; and therefore, reduce, decern and declare, in terms of the reductive and first declaratory conclusions of the libel; and, *quoad ultra*, sustain the defences; assolvie the defenders, and decern, and find no expenses due."

Lord Ordinary, Cockburn.—Act. Robertson; John Phin, S.S.C., Agent.—Alt. A. McNeill; C. F. Davidson, W.S., Agent.—B. Clerk.—[H. B.]

9th March 1842.

SECOND DIVISION.—(G.D.F.)

No. 164.—RODERICK MACKENZIE, *Pursuer*, v. THE MAGISTRATES OF FORTROSE, *Defenders*.

Process—Jury Trial—Property, Right of Common—Possession—Competing Title—New Trial, motion for, on the ground of Surprise.—*The pursuer took an issue, whether, as proprietor of certain lands, he possessed as common proprietor along with the defenders, a portion of land called the Ness of Chanonry? Ruled at the trial, that the pursuer was bound to establish that he had possessed the lands in dispute in the character of proprietor of his lands, and not merely as a burgess or inhabitant of the community. A verdict for the defenders having been returned, the pursuer moved for a new trial, when the Court held that the fact of possession was properly left to the jury; that no complaint having been made at the trial against the admission of evidence or the charge of the Judge; and surprise not being made out, and being excluded by the course taken—Rule for a new trial discharged.*

Roderick Mackenzie of Flowerburn raised an action of declarator against the Provost, Magistrates, and Town-council of Fortrose, setting forth that he was proprietor of certain lands described in his summons, and that, in virtue of his titles to those lands, several parcels of land, in particular the Ness of Chanonry, possessed by the Magistrates and Town-council of Fortrose, and their feuars, belonged exclusively to him in absolute property; or otherwise, that the pursuer “and his predecessors and authors, have had a common and *pro indiviso* right of property in, and pasturage over, the said land called the Ness of Chanonry, along with the feuars and burgesses of Fortrose and others, and have been, in common with them, in the peaceable possession of the said common property and pasturage beyond the years of prescription, and past the memory of man; and they have been in the custom of preventing the adjacent heritors and neighbours from encroaching thereon, and of hindering the said feuars and burgesses of Fortrose, and others, from occupying or possessing any part thereof as their exclusive property.”

The defenders denied that the pursuer had any right of property in common in the Ness of Chanonry, or that he or his predecessors ever possessed the same as proprietors in common along with the defenders and others, or that they have ever been in the custom of preventing others from occupying or possessing any part of these lands as their exclusive property; and they maintained that, by ancient royal grants, the property now claimed belonged exclusively to the burgh, and was, for time immemorial, possessed without interruption or challenge as part of the property of the burgh.

The following issue was sent to trial:

“Whether for forty years and upwards, or for time immemorial immediately preceding the year 1816, the pursuer, or his predecessors and authors, proprietors of the said lands (the pursuer's lands, described in the schedule annexed to the issues), or part thereof, by themselves, or others, possessed as common property, along with the defenders and their predecessors, or their feuars, a certain triangular portion of land, called the Ness of Fortrose, extending to about 120 acres, bounded towards the south and north by the Moray Firth, and toward the west by a line running along the marches of old cultivated land, of the following names, viz.,—Cummer's Croft, the Nine Riggs, the Middle Riggs, the West-water Furrows, the Easter-water Furrows, lands belonging to Junors, the Longlands, and the Head Riggs of the Long-Ness?”

SCOTTISH JURIST.

The jury found for the defenders. A new trial was moved for on the ground of (1.) surprise; (2.) that the verdict was against evidence, and (3.) against law or substantial justice.

The nature of the case is sufficiently disclosed in the speech of the Lord Justice-Clerk.

Lord Justice-Clerk.—This rule for a new trial requires, I admit, deliberate attention; and the great care bestowed on the case at the trial, renders it fitting that we should bestow equal attention to the case. I am not at all prepared to concur in the views pressed upon us by the defenders, as to the grounds on which alone it would be competent or proper for the Court to grant a new trial, as against evidence, if dissatisfied with this verdict. The issue sent to the jury respects an heritable right, viz., the possession as common property, under heritable titles, of a piece of ground of some extent, and in regard to which valuable interests may arise. It is not a case in any degree analogous to simple actions of assault, or other pure or simple matters of fact in which it has been often and justly said in England, that as you have generally all the witnesses cognisant of the facts, the first trial commonly brings out the truth with less prejudice and colouring than any subsequent inquiry. The issue involves an inquiry as to possession of common property for forty years before 1816,—of possession as common property, which undoubtedly implies important considerations in regard to the character and quality of the possession. Again, the issue has reference necessarily and most directly to the titles in the pursuer, in respect of which the common property was claimed; and on this part of the case there is not the least doubt that there are also very material considerations which much enter into the trial of the issue. In such a case, then, I do not think that the Court are compelled to deal with the verdict with the same tenderness with which they must look to verdicts in the ordinary class of cases coming before them. If, on the whole, I had been satisfied that due attention had not been paid by the jury to the case, or to any important consideration applicable to any point in the case,—that there was any reason to suppose that they had not given due weight to the legal presumptions and views stated to them by the Judge, and bearing upon the case; or if, on the whole, it would have been more satisfactory to my mind, that a question of this description should be farther and again investigated and submitted to another jury—nay, even if, as to a question of heritable right, it were seen that more evidence might, with due time for preparation, accidentally not enjoyed, have been obtained, I would have had no difficulty in proposing to make the rule absolute. Again, if in a case of this description, my learned brother who tried it had been dissatisfied with the result, and on the whole wished the matter to be retried, that would with me have been a conclusive reason for a new trial in such a case as the present, even if my own opinion had been decidedly different. I have thought it right to make these introductory remarks, because it really would be very injurious to the system of jury trial, extended with us so much more widely than in England, and of which the process of review is a very necessary and important provision, if it were imagined that the strong expressions used in refusing new trials in the ordinary cases of simple fact were applicable to such cases as the present, or that we did not recognise a distinction which has been acted upon in England even to the extent of allowing a third trial before a permanent loss was to be permitted in *perpetuo* to an heritable right. But, on the other hand, it is to be kept in view that the question to be ultimately disposed of under this issue is, after all, brought to a proper question of fact, and when rightly prepared for the consideration of a jury, a question of fact of that character which they are peculiarly qualified to judge of.

There may be a good deal of law to explain to a jury in order to prevent error and misconception, or to obviate views pressed by the parties; and there may be important directions to give them as to the nature, bearing, and effect of certain legal rules founded upon the titles—not so much legal presumptions, as Mr Anderson termed them, as rules or directions respecting the burden of proof. But when all this is rightly and fully done—when the case is so prepared for the jury, the ultimate

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question is distinctly an issue upon fact, and an issue upon facts of that very description, which the understanding and minds of jurymen are best qualified to dispose of, viz., the possession of a piece of common in the vicinity of a small burgh. Observe what the ultimate and proper question is—(Read issue). This must be well and anxiously prepared for the consideration of the jury on the part of the Judge, more or less fully, according to the nature of the particular case. But still it is a proper question of possession—and of possession proposed to be proved in this case by plain simple overt acts—not by legal presumptions. Now, in considering whether the jury rightly considered this case, the first point is, were they fully enabled to do so by receiving all the aid which it was necessary for them to obtain, and which the parties had a right to expect from the Judge? On that point the pursuer makes no complaint. He does not complain of any thing the Judge stated or omitted. Nay, farther, he does not say, which might not have been a very clear ground of exception, and yet might have been a very fatal miscarriage in the case, and a good ground for a new trial—that the Judge treated it too much as a matter of fact; and though he satisfied the letter of the law by an oral explanation which a lawyer might understand, that he did not sufficiently instruct the jury as to the nature of the points to which they were to attend. No word of complaint is stated, even in the shape of remark, on the charge; and to us who have seen the very full notes, prepared by his Lordship after the adjournment of the trial, of the directions and explanations, in point of law, which he was to state, and did state to the jury, for the purpose of enabling them rightly to consider the facts, it is most apparent that no jury were ever sent to the discharge of that duty more fully, anxiously, distinctly and usefully instructed. The jury then were fully enabled and prepared by the Judge for the discharge of their duty; but with that preparation, his Lordship farther distinctly left the question to be answered to the jury, as ultimately and necessarily a proper question of fact, whatever explanations it was necessary to give them. Now, that course is not complained of, although there is no better ground of exception than that the Judge leaves a question to the jury which has turned out, on the trial, to be one of law, at least in part, and requiring the question left under the issue to be at least restricted and varied, if there is any question of fact left at all. I must hold, therefore, in the absence of any objection, and most certainly must hold, upon the case as I view it, that the question was ultimately left to the jury as a proper jury question, after being rightly and fully prepared for their consideration. This is no unimportant part in the present motion.

Accordingly, the greater and more forcible part of Mr Anderson's speech was more appropriate to enforce upon the Judge at the trial, and on the jury, their respective duties; for all the general part of it was of no use whatever upon the question, whether the opinion of the jury on the facts is wrong, when the jury were rightly instructed. Accordingly, Mr Anderson could not state his point without running invariably into the expression, that there was not legal or admissible evidence to control his title, and the rights under it; but he really meant and urged, as we know, nothing more than that the evidence was not, in point of fact, sufficient to warrant the verdict. We have no legal question before us except that to be presently noticed, which the issue presents, and to which the pursuer, in his argument, never attended. We are wholly upon a question of evidences. I must farther observe, that the very nature of the system of jury trial implies, that when any legal rules or presumptions as to the burden of proof, or the character of the evidences which ought to be given in any particular case, are stated by a Judge to a jury, and he does not declare the evidence in law to be insufficient, it is part of the proper province of the jury to apply these presumptions; and we must be very careful that we do not encroach upon that most valuable part of jury trial which brings the common sense of mankind to bear upon the practical decision of the actual case in hand, and materially benefits the system and genius of the law, by bringing their good sense into the actual application of legal presumptions to individual cases. No doubt the jury may err in that as in any other part of their duty. But if the legal presumption or rule is rightly and fully stated to them, while the case is still left to them as one of fact, it is their province to apply these presumptions and rules;

and of the application of them, in most instances, they are in fact the best judges, as they are in law the judges in the first instance. Throughout the whole argument, the pursuer did not attend, nor did the defenders sufficiently in the argument, or at the trial, to the character of the question raised by the issue, and to the requisites with which the pursuer must comply. The defenders seem to have put in their own titles, and thereby given a pretence to the pursuer of introducing at least observations quite out of the case. The defenders had no concern with their own titles. The alternative conclusion of the summons admits the defenders to be proprietors of the ground in question, if a common property shall not be established in the pursuer. But the issue puts this more precisely and distinctly. The right of the defenders to the ground in question is admitted upon the face of the issue. The pursuer found he could not get judgment against them, because they had no right and title to resist decree, or in case they could exhibit no title to the ground in question. Hence his position under the issue is this—that the defenders standing *prima facie* the absolute proprietors of the ground in question, he is driven, and undertakes to prove, that notwithstanding their right and title, he has actually possessed the ground in common with them as proprietor of certain lands, so as to qualify the right and possession otherwise absolute in them. Now, this is a very important view of the issue, to which attention has not been fully paid. The pursuer did not obtain an issue of this description, which I have sometimes seen: It being admitted, or found, that the Ness is possessed in common by such and such defenders, whether the pursuer has also possessed in common with them as a common property? He could not contend upon the titles that the Magistrates stood only in the situation of parties possessing in common with somebody or other: it being matter of inquiry who the common proprietors were, that would have been a most important point for him to have established. Whether he could have made it out, I cannot tell, for I have no information upon the subject. I have little doubt, that if the titles of the burgh had shown that their right was one of common property alone—I mean, of common property with other adjacent proprietors—not, of course, common property for the burgh,—the pursuer would have insisted, and he would have been well entitled to a judgment in the first instance, finding the third plea in law in the defences not maintainable, viz., that the lands formed part of the property of the burgh, but were only held by them as common proprietors. The issue, then, would have been very different, the pursuer's position quite different, and the burden on him very inferior to what the issue puts on him. That course has been frequently adopted in the discussion of such cases in the Outer-House, and in the division of commonities; and it materially affects the point to be decided—often terminates the discussion. But as the issue stands, that which the pursuer is to do is this, namely, to take from the admitted proprietor, by force of proof of his possession, that which otherwise belongs absolutely to the defenders,—however, they, and those for whom they hold, may enjoy it among themselves. Accordingly, even in the trial, the pursuer did not attempt to use or produce any of the defenders' titles in order to say,—here I begin by showing that your right in common with somebody or other, and my possession, is to be judged of in reference to that fact. I do not think this would have been competent under the issue, which admitted the defenders' right to be absolute, if the pursuer did not prove common possession; and I allude to it, in order to show more clearly that the point at issue was this, viz., that the pursuer was, by proof of possession, to take out from the defenders, to the extent of giving him common property, a part of the heritable estate *ex facie* belonging to them exclusively. This view of the matter is extremely material in reference to the argument of the pursuer, and still more in considering the character of the case; for I think it rides over the whole case in its progress to the close of the trial.

The pursuer, then, does not begin in the favourable way in which the case was pressed on us in the reply. The leading feature in the whole case—not a presumption to be applied by a jury in his favour on the title, but a point fixed against the pursuer;—the leading feature, I say, in the case is this, that the ground is taken and deemed by the issue to be the exclusive property of the defenders, unless he can establish by satisfactory evidence

that he has had possession, as a common proprietor, upon a competing title. He is to take then, by proof, out of the defenders, a part of the estate, admitted otherwise to be in them, and as to which his title alone avails him nothing; for he has been obliged to undertake the burden of proof. The true point then is, has the pursuer been enabled to do this by such strong evidence that it would be at least satisfactory to have the judgment of another jury upon the case? This view of the subject obviates, to a great degree, the whole strength and force of the observations and argument in the reply; the greater part of which I do not think, as I shall afterwards explain, at all applicable to the case under this issue. Another very important point is that raised and ruled at the trial without objection, and surely most justly ruled, viz., that the issue imports that the possession to be proved must be shown to be in the character of proprietor of the lands in the schedule, or of part of them. How any other notion could be taken up is very singular; because, when a party is to prove common property, that implies in him the title of a proprietor; and if he is described in the issue as proprietor of lands, it would be extraordinary if that was not inserted with a view to the right of common property claimed. But this point is of the uttermost importance (as the parties were well aware) in estimating the value of the evidence adduced of common property; for, if the possession was not shown, by proof satisfactory to the jury, to be solely as proprietor of the lands, if reasonable doubt was raised whether the possession was not upon another and different footing, if there was reason, even in the pursuer's own showing, for thinking that he or his predecessors might have possessed in another character, then the jury could not be asked to affirm that the possession was, as common proprietor under the titles, to the lands in the schedule, or part of them; for that very proposition, in point of fact, was on that view left by the pursuer in doubt. Hence, this matter of fact, viz., that the possession was in the adverse and competing character of proprietor in the lands in question, and also that it was a possession, not of pasturage, but of common property, were matters for the pursuer to establish as a part of the burden incumbent on him, so that the jury might be enabled to affirm both. If either was left in doubt, his case failed. I must farther notice, that the point thus raised by the pursuer at the trial, to escape from the obligation of showing that his possession was in the character, and by virtue of his title as proprietor,—rather in contrast to the line of argument pressed upon us in the reply,—contrasts still more, and in a very singular manner, with the ground of surprise now urged as one ground for a new trial; for, if the pursuer contended at the trial, and was prepared to establish that his possession was general, and not connected with his title to other lands, it does not occur to me how he could consistently maintain that there could be any surprise in the defenders stating that very view of the case in answer to the question put on him by the sound construction of the issue. His object in trying to alter the issue by this view was very plain; first, to say, as Mr Innes began by saying, that the evidence of the Rev. Mr Wood proved the pursuer's case, since any possession on any ground was sufficient for him; and, 2d, not to be limited to small portions of land, but if he got it under this issue, as for all his lands *quo cunque modo*, to claim in the division of the commonity a large share. These were his objects. And the first shows, that whether his counsel knew the case before the trial, the party well knew that it would be a great matter to be allowed to prove possession alone, irrespective of any title.

Three grounds have been stated for a new trial,—1. Surprise. 2. That the verdict is against evidence. 3. Against law or substantial justice.

1. Surprise, in the proper sense of the term, is a most solid ground for granting a new trial, when it is made out, and when stated, ought always to be carefully examined; for if there was truly surprise, the other party had got the verdict in a way more or less unfair, whether intentional or not. But we must be careful not to allow want of due knowledge, or previous preparation and actual surprise to the counsel,—especially when, as I think, Mr Anderson stated, and which is too often the case as to the leader, he had no previous knowledge of the cause,—to be confounded with surprise, in the legal sense of the term. This case is a declarator, with two conclusions,—one claiming the Ness as the sole property of the pursuer, the other

asserting that the pursuer, in virtue of the titles libelled, had a common and *pro indiviso* right of property in the Ness along with the defenders, and had, in common with the burgesses, possessed in common. The pursuer referred to the record in explanation of this plea of surprise, and I am inclined to think he may do so, if the surprise was not matter which required to be raised at the trial, which, in some cases, it might not be—here certainly it was.

The record, up to revision, contained no allegation of possession whatever as to alternative possession. Then the only averment made is,—“under the said titles the pursuer and his authors have had such possession as the situation of the subjects for the time permitted.” The answer to this is as short, but certainly all that the defenders were called on to state; see § 15 of the defenders' statement. The defenders had, in their defences, p. 5, stated expressly, that the Ness was disposed to them for the inhabitants as well as burgesses; and they had also stated, that they gave notice of the intention of feuing, in 1817, to the inhabitants as well as to the burgesses. On this record the question was at once changed, and limited to that in the issue. That a party who was prepared to prove possession, and, under a certain title, being bound to show that the possession was in that character, of proprietor, was not called upon to consider well, and examine into the nature and origin of that possession which he was to instruct, and to be prepared for that being referred to a ground or right quite inconsistent with that to which he undertook, as matter of fact, to show to the jury that it must be referred,—seems to me to be quite untenable. He must prove, as matter of fact, that the possession was in the character of common proprietor, under the titles which gave him a *prima facie* title as common proprietor. He must inquire into the character of his possession, and that of others possessing along with him. He must consider whether he can prove that his possession is different from others. And I cannot conceive a plainer, more obvious, and clearer answer, or an answer which the pursuer was more called upon to consider and be prepared for, than this: Your possession is under us, and as one of those for whom we, in whom you admit the right to be, if you cannot prove a competing right, hold it in trust. It was necessarily the counter view to his, if he had any possession at all, which he said he had. But then it was farther urged, that he could not be prepared for any connection between his lands and the right granted to the burghs of Rosemarkie or Ross, now Fortrose, in respect that his lands were not within the walls or precincts of the burgh.—Whether duly considered before the trial or not,—I say that, because Mr Anderson stated to us, that to him, new in the case, the answer was surprise,—it is quite plain that the pursuer ought to have been prepared for all views founded on the fact, that his own titles, as to the three parcels of land containing rights of commonities or common pasturages, expressly bear that the lands are within the burgh of Ross. Whether the effect of that in law, or on the facts of the case, had been duly considered, is not the question.

Then it was said, how could we be prepared for any distant line of boundaries of this burgh? Now really this is the assertion the pursuer is the least entitled to make of any; for in his titles—the most distant of the only three parcels to which it is necessary to attend—the bill of Rosemarkie, or Thomson's Hill, is expressly declared to be within the burgh of Fortrose,—so is the bit, called the Ness, at the other side of the common. Hence, his own titles told him that the lands to which alone he could ascribe his possession, were within the ambit of the burgh. Then again, in his entail, many other lands lying runrig with these are actually held of the burgh, and so within its proper territory. And really when that is the case, and the defenders had a grant, as he knew, of the Ness, for the burgesses and inhabitants, it was a strange inattention to the most obvious answer to the pursuer's case, or very great confidence in his own notions of his case, if he never thought of the effect of so striking a fact, or even attended to the fact itself, that his lands, at a distance from the burgh, were described as lying within the same. The fact is the more remarkable, as it occurs as to lands got from various proprietors, lying in most opposite directions;—indeed, the remark is applicable to nearly all the lands in the schedule, for which he originally claimed under the issue. When in his titles, also, some of the lands are

founded by the common muir of Chanonry Ness on the one side, I think he was most specially called on, by his own titles, to consider the very point which he says he never did.

But farther, the plea of surprise is completely excluded by the course taken at the trial, and I see very well why taken at the trial. I think the question, as to the possession of all the occupiers, was raised by the pursuer himself in the second witness, (p. 15); certainly in the examination of the third, fourth, and fifth. He was, I think, fully prepared,—that is, his witnesses on the point;—nay, he tried to give the case in 1838, in the examination of Sinclair, the very turn which the defenders have since done. Then the matter is raised in a very marked manner at p. 19, (reads). Now, if there was surprise,—that is, if there was matter proposed to be introduced in evidence, not being within the record, according to the meaning and understanding of parties, and not within the scope of the issue as understood, the evidence should have been objected to on that ground; and if admitted, the objection noted as an exception. This has always been done. See *Gye v. Hallam*, 24th March 1832, before Lords Cringletie and Medwyn. That was not done. The evidence was admitted as a proper, fitting, relevant, and pertinent inquiry in the trial,—that is acquiesced in;—we cannot alter it; nay, we are not entitled to think the evidence should not have been admitted, even if we differed from the Judge, which most certainly I do not. I think this excludes, of itself, the whole matter of surprise. But, still more, it was admitted that this evidence was never objected to on the Judge on the ground of surprise, but of general irrelevancy. It was admitted that surprise was never stated to Lord Moncreiff. How then can we listen to surprise now, when none was alleged at the trial? No doubt facts may come to a party's knowledge after the trial, which may entitle him to state the ground of surprise, or, more correctly, perhaps deceit. But surprise, as to a line of inquiry, and an answer to the pursuer's case, not once complained of at the trial on that ground, is perfectly new to me. But I perfectly understand why surprise was not stated. The pursuer wished to have two strings to his bow, and did not choose to give up one to rest solely on the other. He had still the plea which he pressed to the last,—so much so, that it was prominently referred to in the charge, that he might prove the mere fact of possession, and was under no obligation whatever to show that such possession was had in the character of proprietor; and that, without being under the necessity of establishing that point, he was entitled to a verdict if he proved possession, no matter what was its origin, or whether any origin or character could be given to it,—nay, that on the very evidence of the defenders as to possession, by all within the boundaries, he was entitled to a verdict, as Mr Innes argued to us. Having that plea to urge, it would have been rather inconsistent to allege at the trial that it was surprise to him to find that his possession could be ascribed to any other origin,—he wishing to shake himself free of origin under his title. I have thought it right fully to consider this point; and I have no difficulty in stating, that on these and many other grounds which might be explained, I can refuse the motion on that head with most perfect satisfaction to my own mind.

But then the motion for a new trial was supported and rested on the other two grounds stated: 1. That the verdict is against evidence: 2. That it is against law or substantial justice. These grounds may be taken together, as, more or less, they involve the general consideration of the verdict, and necessarily run into each other. I have not, indeed, been able to understand on what ground the verdict is said to be against law,—taken as a separate ground of challenge. When a Judge directs a jury that they are bound in point of law to find either on the whole case a verdict for one party, on the ground that there is no fact to go to them, as in *Wood v. Venables* before the late Lord President, or upon particular points, that they must hold one party to be in the right, and the verdict is either against the general or the special direction,—then the verdict is against law. Or if the verdict cannot be explained upon the facts, except upon the assumption that the jury had taken up a notion as to the law different from the Court,—say, for instance, in a question for the recovery of goods shipped, and it turned out, on the evidence, that in law the title was not in the pursuer, yet a verdict should be

returned for him. In these and such cases the verdict is clearly against law. But then there is a distinct and plain ground stated. But when the case of the pursuer is considered, it comes simply to this,—that in considering the evidence, the jury are said not to have applied correctly, or given due weight to certain presumptions as to the burden of proof which they were undoubtedly, in the first instance, to apply. The case was wholly left to them, with the aid of these presumptions; and therefore, even if the jury may have erred to such an extent as to require a new trial, yet still the verdict in this case would not be one challengeable as against law. The other grounds, that it is against substantial justice, or against evidence, are in this case truly identical.

Now, what is the general nature of the case? The pursuer is to take out of the right and title of the defenders what otherwise belongs to them, and that by proof of possession upon a title not expressly mentioning the Ness as granted in common. The burden of proof is, in the first instance, wholly upon the pursuer. Was it ever shifted so as to call upon, or warrant the Judge to say that the verdict must pass against the defenders? That is not pretended. He has to show that the title is applicable to the alleged common, and then that his possession was on that title, in which it will be an immense point for him that there is no other right to which it can be ascribed. But upon the pursuer's case, certain facts were established which, I think, rivetted down upon him the burden of proof to the close of the case; though I admit that the full weight of these facts in favour of the defenders have appeared more in the course of this discussion than perhaps they did at the trial. 1. There is the fact that the pursuer's lands all lie within the ambit of the burgh. That was proved by his own witnesses, to whom the facts were quite familiar. The boundaries were distinctly proved. That the boundaries of the burgh include much property beyond the buildings, could be no matter of surprise, but is most important with reference to the present question, viz., possession of the common by those living within the ambit of the burgh; for there the description in his title puts him exactly within the same case as all others who possessed. 2. His titles describe the lands as lying within the burgh,—a fact of leading importance on the point, whether his use of the common was on a competing title or not, in reference to the general and prior grant to the burgh. 3. A considerable part of his lands lie between the two towns, which are confessedly one burgh, and to which also the issue admits that the Ness belongs, though it may be for the common use of the inhabitants. Hence, lands lying between the two parts of the burgh evidently are connected with it. 4. The general understanding and belief that the Ness was a common to the inhabitants within the ambit of the burgh, including the tenants in the grounds in question, was proved on the face of the pursuer's case. This is distinctly established, I think, by the pursuer's evidence, confirmed by that of the defenders, especially the Rev. Mr Wood. But when proved by the pursuer's evidence, it seems at once to exclude him from asking the jury to affirm the issue. 5. The pursuer's titles contain common pasturage as well as commonies, and one of the three parcels only parts and pertinents. Thus, then, upon the pursuer's own case, there were raised most important facts which might give to the possession a character wholly different from that of a competing proprietor holding *pro indiviso* with the burgh. Has the pursuer cleared this up? If he has not, he does not satisfy the issue, and the burden which it imposes upon him. He will have the benefit of the subordinate right, but cannot get the higher. That parties entitled to the use of the common moor under the defenders should naturally insert in their titles the privileges of commonies or common pasturage, was a very natural occurrence, and in no degree proves that their right is not part and parcel of the general right of the burgh, especially as I think we have no original Crown grant produced by the pursuer. That the lands, though within the ambit of the burgh, hold of the Crown, is also of no importance. There are lands in the town of Edinburgh,—in the heart of the burgh of Brechin, which hold of the Crown, and within the territory of the burgh, that is even more common. Another important fact is, that all the acts of possession referred to are quite reconcilable with the alternative view raised by the pursuer's own case, viz., a right of pasturage and use, in respect of

the general right of the town. No doubt, in the common case, where two or more proprietors are maintaining that they have ground in common, the acts of possession upon equally good titles may often only be acts of pasturage. But then, in such a case, there is no alternative view to take of the matter, and the one has as good a right to give to his possession the character of a common proprietor as the other. But then the peculiarity of this case is, that the pursuer's own witnesses present a view of his possession different from that of a common proprietor, and perfectly reconcileable with his alleged acts of possession. How, then, can it be contended that the jury went wrong in this case? First, the pursuer was to prove possession as common proprietor, solely in respect of his own titles. If he leaves doubt upon that matter on the facts, then the jury were right without going farther.

Again, on the evidence, it was a point to be solved, whether the proof he led was of possession in any different character, and of any different kind from that which was common to him, with the other occupiers of land within the ambit of the burgh. That double view of the case being raised, I think the presumptions pressed upon us by Mr Anderson no longer availed the pursuer. If there was great difficulty in solving the point, that was a difficulty raised upon the face of the pursuer's own case, and that of itself the less entitles him to dispute the authority of the verdict. But who could be so good judges of the real character of the joint possession of a bit of common near this burgh as the jury, who not only heard all the witnesses, but whose habits of thought and knowledge of such matters make them infinitely better judges than the Court. It is in this double or alternative view of the pursuer's possession that we are to consider the importance of those acts proved by the Magistrates, such as the lease to MacRitchie, a tenant of Seaforth's, and whose agent was prompt, as the kind-hearted nobleman for whom he acted was ever prompt, to protect all who applied to him for redress, and who had recently before taken up the case of one of his tenants against the Magistrates. How long MacRitchie or his widow paid rent, is not very important. The fact is, that the Magistrates, without dispute, and openly, exercised the character of exclusive proprietors against Seaforth's tenant, and on the ground that they are entitled to regulate and control the pasturage as they like. There are other circumstances leading to the same conclusion, which I need not go over. Neither is the fact as to the kelp unimportant. It is not pretended that the town have an express grant of the kelp, as the pursuer has of the salmon-fishings; and their possession of the kelp was, therefore, in respect of their general right, and against the pursuer's pretension.

I thought it unnecessary to look to the minor point, viz., that possession for forty years before 1816 is really not proved; and the remarkable thing is, that the three or four old witnesses for the pursuer—I think the only old witnesses, Clark, Sinclair, M'Iver and Dunoon, and also Reid,—are those who seem the most clearly to establish that the Ness was a common for all within the boundaries of the burgh. I need not however go farther into the case upon the facts, for I think it was one very clearly for the jury—upon evidence peculiarly of a character for their consideration—that their view of it was a most natural and reasonable view, even if others should differ from them—that there is nothing to lead me to think that they did not address themselves to their duty with calmness and impartiality; and no trace of prejudice is shown. The place of trial was, I presume, chosen by the pursuer himself. He had long preparation for trial, for the issue had been settled in November 1840, and the deposition of Sinclair, taken in September 1838, opened up the whole case of the defenders to the pursuer,—and what is more, his own examination of that witness, at the foot of page 41, shows that he was perfectly aware of that very answer to his case which he now says was surprise. Nay, that at that time he wished to make out his own possession without reference to his title, and on the very ground which formed the answer to his issue. But not only am I not dissatisfied with the verdict, but I am bound to add, that I most thoroughly and entirely concur in the result at which the jury arrived. I would, on the proof, negative this issue. It is very plain to me that the pursuer has wandered backwards and forwards as to his own case. He seems originally

to have thought in 1838, as he wished to do at the trial, that it would answer the purpose of this action to prove possession in the same manner as other occupiers of land. That may answer, for aught I know, his object in preventing farther feuing, but it was not enough under this issue or under this action. I am of opinion that we must discharge the rule.

The other Judges concurred, and the Court *refused* the motion and discharged the rule.

Act. A. Anderson, Innes; Wm. Mackenzie, W.S., Agent.—
Alt. Whigham, E. S. Gordon; J. and J. Macandrew, S.S.C.,
Agents.—[G.D.F.]

11th March 1842.

FIRST DIVISION.—(H. B.)

No. 165.—CHARLES DUFF, Appellant.

Bankrupt—Sequestration—Statute 2 and 3 Vict. c. 41—Composition—Offer, Notice of—*The cautioners proposed by a bankrupt as security for a composition, which the creditors had agreed to accept at a meeting duly called for that purpose, declined to sign the bond of caution. Thereafter the bankrupt proposed an individual cautioner, of whom the creditors, at a meeting called only by advertisement, approved—Held that, in terms of the 113th section of the Statute, this second meeting ought to have been called by letter as well as by advertisement, and that the omission to do so was fatal to the composition-contract.*

The estates of Charles Duff having been sequestrated on 9th October 1839, under the Statute 2 and 3 Vict. c. 41, a meeting for the election of a trustee was held on the 8th November thereafter, when the bankrupt offered a composition of 6d. in the pound, and named four individuals as his securities. The creditors present unanimously agreed to entertain the offer, and accordingly the trustee gave notice by advertisement in the Gazette, and by letters to the creditors in the manner prescribed by the 113th section of the Statute. A meeting was afterwards held on the 12th December, when the creditors present

“unanimously approved of the composition offered by the bankrupt and securities, and authorised and empowered the trustee to take the necessary steps for obtaining his own and the bankrupt's discharge, on the cautioner's executing the necessary bond for the composition and the expense of sequestration.”

The cautioners named refused to subscribe the bond of caution, and the bankrupt having, in consequence, named Mr David Miller as his cautioner, the trustee inserted a notice in the Gazette intimating the refusal, and the offer of new security, and calling a meeting of the creditors on 27th January to decide on the security offered, but no notice was given to the creditors by letter. The meeting was accordingly held, and the creditors present unanimously approved of the cautioner, and

“authorised and empowered the trustee, on the said David Miller granting the necessary bond for said composition, to take the necessary steps for obtaining his own and the bankrupt's discharge, provision being made for the expense of the sequestration.”

It does not appear when the bond was subscribed, but it was not lodged with the clerk of Court till the 26th June 1840.

The trustee on the sequestrated estate having given in his report to the Sheriff, stating that the composition-contract had been carried through, his accounts audited, and the balance paid, appearance was entered by Robert Robertson, a creditor who had not been

present at the meetings when the composition was agreed to, and who objected that it had not been carried through in terms of the Statute,—both because no intimation had been given to the creditors, by letter, of the refusal of the first cautioners, and the subsequent offer of another; and also, because the bond of the last cautioner had not been subscribed and lodged with the trustee “forthwith.” The Sheriff pronounced an interlocutor, in which, after various findings in fact, he found,

“that if the said composition offer is to be held throughout as one and a first offer under the 113th and 114th sections of the Bankrupt Statute before cited, the same was not perfected in terms thereof; because, *first*, there were no letters sent to the creditors of the change in the essential matter of the caution for payment; and, *second*, the bond of caution was not ‘forthwith’ lodged in the hands of the trustee, and ‘thereafter’ reported to the Court: Finds, that if the said first composition offer is to be held as having become ‘ineffectual’ because of the refusal of the cautioners named therein to subscribe the bond (and to which view the Sheriff-substitute is strongly inclined), then the contract has not been perfected in terms of the 121st section of the Statute foreshaid; in respect, *first*, that the meeting of 27th January 1840 was not preceded by the written assent of nineteen-tenths in number and value of all the creditors ranked on the estate; *second*, that there was no offer subscribed by the cautioner proposed; and, *lastly*, of the delay in reporting to the Court: Therefore, finds that the composition-contract has not been duly and regularly made, and carried through, in terms of the Statute.”

The bankrupt appealed, but the Court refused the note, and affirmed the Sheriff’s judgment, on the ground that notice ought to have been given to the creditors by letter.

Act. Mackenzie; William Wishart, S.S.C., Agent.—Alt. Patton; Agent.—[H.B.]

11th March 1842.

SECOND DIVISION.—(G. D. F.)

No. 166.—JAMES MILNE, *Defender and Advocate*, v. MARY COBBAN or BLACKLAWS, *Pursuer and Respondent*.

Aliment—Parent and Child—Filiation—Bastard—Semiplena Probatio—Proof—Evidence held insufficient to constitute a semiplena probatio in a question of filiation, and along with the oath of the mother, emitted thereafter in supplement, not sufficient to establish the alleged paternity.

The nature of this case of aliment, at the instance of the mother of a bastard child, is sufficiently explained in the following interlocutors and notes of the Sheriff, and of the Lord Ordinary in the case.

“30th June 1841.—The Sheriff-substitute having considered the closed record, so far as relates to the question of the paternity of the pursuer’s child, mentioned in the libel, together with the judicial declarations of the parties, the proof adduced on both sides, and the minutes of debate, Finds facts and circumstances proved, amounting to a *semiplena probatio* of the defender’s being the father of the pursuer’s child, and entitling the pursuer to give her oath in supplement thereof; allows the pursuer to give her oath accordingly, and assigns 14th July next for her appearing to depone.”

(Signed) “HUGH FULLERTON.”

“Note.—It appears from the proof, that for a considerable time prior to the occasion on which the pursuer’s child is said to have been begotten, the defender had an eye to the pursuer; that he had her in his thoughts, and felt an inclination towards her; and as he states upon his oath, that he entertained no purpose or idea of marriage, the nature of his *penchant* for the pursuer cannot admit of much doubt.

“Mrs Kinnear, and her son John Kinnear, prove, that on one

occasion, soon after the pursuer’s husband’s death, the defender was in their house in Laurencekirk, and after having had some drink, and paying his reckoning, mounted his horse and rode away; but having met the pursuer on the street, he returned with her to their house, which the parties entered, and had some whisky together, and a good deal of jocular conversation passed between them.

“The defender, on two different occasions after the pursuer’s husband’s death, spoke to the witness, Ann Croll (Mrs Hutcheon), about the pursuer, calling her a fine ‘widow wife,’ and expressing himself in a way denoting that he admired her; and the witness, Mrs Croll (Mrs Hutcheon’s mother), repeatedly heard the defender speaking about the pursuer since her husband’s death, and on one occasion heard him say to Mrs Hutcheon ‘that he knew few young women like the pursuer.’

“The pursuer states that the child in question was begotten on her by the defender in her own house in Laurencekirk, on the evening of 1st August 1839, being the day on which the market of Saint James’ Fair of Garvock, in that neighbourhood was held. It appears in evidence that the defender, who had been in that market, left it in the afternoon, and proceeded along the road through Laurencekirk, having been preceded by his friend Mr Durie, farmer at Muiryoan, whom (according to the defender’s statement) it was his object and expectation to overtake. In this pursuit, however, he does not seem to have been very zealous. Having fallen in with one David Clark, a ditcher, the defender went in with him to George Henderson’s public-house in Laurencekirk, where they sat for some time, and drank one or two gills of whisky together. From Henderson’s, the defender proceeded westward to another public-house in Laurencekirk, kept by John Kinnear, where he put up his pony and entered the house. Margaret Walker, who was then in charge of the house, deposes that the defender, on coming in, asked her ‘if any of her folk (meaning the Kinnears) were come home from the market;’ and on her answering in the negative, the defender said ‘he would away down and see Mrs Blacklaws (the pursuer), and thereupon left the house.’ And the witness farther states ‘that she does not recollect that the defender said anything about Mr Durie of Muiryoan.’

“The defender then proceeded straight to the pursuer’s house, where he found her alone, and having fastened his pony to the paling in front of the house, went in. He states in his declaration that his purpose in calling at the pursuer’s house was to buy some snuff, and to see if his friend Mr Durie was there; but it does not appear that he either bought snuff or inquired about Mr Durie; and from what he had said just before to Margaret Walker, his real object was ‘to see Mrs Blacklaws.’

“That the defender, on this occasion, was alone with the pursuer in her own house; and that, after being either in the kitchen or the front room, he retired with the pursuer into a small back bed-room, where they remained some time in privacy together, appears to be satisfactorily established. No doubt there are some discrepancies in the proof; but the evidence of Margaret Laurence, George Croll, and George Charles, seems to the Sheriff-substitute sufficiently to instruct the material facts, and to outweigh the evidence of the defender’s witness, Charles Robertson (in itself suspicious), so far as his evidence is at variance with theirs. Now, what possible reason, except one, could the defender have had for retiring with the pursuer into this back bed-closet, where they were shut up together? The pursuer’s front room, where her customers were usually received and entertained, was empty; and if the defender only wanted drink, he could have got it in that room with much more convenience and propriety than in a back bed-closet, into which, for that purpose, he had no earthly occasion to retire. There is the strongest ground for presuming that the defender had another purpose, and that he accomplished it at that time, and in that place (*viz.*, the back bed-closet), by having carnal connection with the pursuer, as averred by her. Previous inclination, temptation, and opportunity, all concurred—add to which the incitement occasioned by liquor; for it is proved that the defender was, to a certain degree, intoxicated.

“After leaving the pursuer’s house on that night, the defender never entered it again; and between eight and nine calendar months thereafter the pursuer was delivered of the child mentioned in the libel, the paternity of which, at an early period of

her pregnancy, and uniformly and solemnly, she imputed to the defender, and to him alone.

"Considering the whole circumstances then as appearing in evidence, and taking also into view the terms of the defender's judicial declaration, the Sheriff-substitute is humbly of opinion that a *semiplena probatio* is established, and that the pursuer is entitled to give her oath in supplement."

"14th July 1841.—Appoints the reclaiming petition for the defender to be answered against 28th inst."

(Signed) "HUGH FULLERTON."

"Stonehaven, 4th August 1841.—Having considered the reclaiming petition for the defender, with the answers thereto for the pursuer, refuses the desire of the said petition; adheres to the interlocutor reclaimed against, and decerns; and prorogates the term for the pursuer's appearing to give her oath in supplement till the 18th instant." (Signed) "HUGH FULLERTON."

"Stonehaven, 21st August 1841.—The Sheriff having advised this process, dismisses the appeal, affirms the interlocutors complained of, and appoints the pursuer to appear and depone on the 6th September 1841."

(Signed) "GEORGE DOUGLASS."

"Note.—This case having resolved itself into a mere question of paternity, instead of a complicated action of damages for breach of promise of marriage, the said action becomes reduced to a very narrow compass, and must be entirely decided according to a fair construction of the evidence adduced, as well as the general conduct of the parties towards each other. The Sheriff has therefore, after mature consideration, come to the conclusion that there are, upon the whole, sufficient grounds for finding a *semiplena probatio* established, and the petitioner entitled to give her oath in supplement. In the first place, the statements of the defender, contained in his deposition and declaration, betray obvious inconsistencies, and are at variance with the proof adduced on both sides, which circumstances go far to support the pursuer's plea; and in the second place, the total absence of any evidence of the charges against the pursuer's moral character, so profusely thrown out by the defender, tends much to render his veracity questionable, in so far as the circumstances of this case are concerned."

"6th September 1841.—On the motion of parties, prorogates the term for the pursuer's appearing to depone in supplement till the 9th instant." (Signed) "HUGH FULLERTON."

"14th September 1841.—Having considered the pursuer's oath in supplement, and advised with the Sheriff-depute: Finds that the same supports the previous *semiplena probatio* adduced by the pursuer, and completes the proof of the defender's being the father of the pursuer's child mentioned in the libel: Therefore repels the defences stated on the head of paternity, and decerns against the defender for £3 of modified inlying expenses, and also for alimony for the said child at the restricted rate of £7 Sterling yearly, payable quarterly, and in advance, and with interest as libelled, until the said child attain the age of ten years complete: Decerns also for the dues of extract: Finds the defender liable to the pursuer in expenses of process, so far as incurred by her in establishing the paternity of her said child: Finds the pursuer liable to the defender in the expenses incurred by him in defending himself against that part of the pursuer's action which relates to damages; and in regard to which a decree of absolvitor was pronounced in his favour on the 3d day of February last; and appoints the parties to give in accounts of these expenses respectively against the 28th instant."

(Signed) "HUGH FULLERTON."

Thereafter in the advocacy:

"18th December 1841.—The Lord Ordinary having heard counsel in this advocacy, and thereafter considered the proof adduced in the Inferior Court, and whole process, finds it established by the proof, and the oath of the pursuer in supplement thereof, that there was carnal intercourse between the pursuer and defender on the evening of the 1st of August 1839, and that the pursuer was delivered of the child libelled on, upon the 13th of April 1840, being only a few days less than nine lunar months, posterior to the said connection: Therefore approves of the interlocutor of the Sheriff complained of, finding that the defender was the father of the said child: Repels the reasons of advocacy, and remits the cause *simpliciter* to the

Sheriff: Finds the pursuer entitled to expenses, as the same may be taxed by the auditor, and decerns.

"Note.—The Lord Ordinary coincides almost entirely in the views of this case expressed by both of the learned Sheriffs, in the interlocutors and notes now brought under review. He conceives it to be established—1. That the previous character of the pursuer was unblemished, and more especially that the advocator has totally failed to prove (as he averred) either any looseness, or even levity of behaviour on her part, towards other men. 2. That the defender had previously expressed that sort of general attachment or *penchant* towards the pursuer, which was likely to seek indulgence when the parties were off their guard. 3. That on the evening when the child was probably conceived, the defender, after being considerably excited with drink, went to the pursuer's house, found her alone, even her children being absent from the house, and remained in a room containing a bed, alone with her, for a space varying from half an hour to an hour; and 4. That the oath of the pursuer (which the defender allowed to be taken before advocacy) is positive and consistent in itself, and completes the proof of the pursuer."

"The anxious pleading for the defender in this Court, was chiefly directed to various supposed inaccuracies in the deposition of Margaret Lawrence, who, from her residence as a lodger in the pursuer's house in 1839, and the charge she took of her children on the night of the fair, was necessarily a material witness for the pursuer. Her evidence is attempted to be impeached by an appeal to the testimony of Charles Robertson, the principal witness for the defender. But on a careful perusal of the testimony of both witnesses the Lord Ordinary is of opinion that Margaret Lawrence is the more credible of the two. Robertson is a person in the occasional employment of the defender; his very call at the pursuer's house on the night in question, seems to have been suggested by suspicion or curiosity; and his refusal, when precognosed, to tell the agents of this poor woman what he could say on oath, was not consistent with the feeling of a fair and impartial witness."

"At the same time, it would be going too far in this, or in any case of the kind, to hold that any of the witnesses could be exempt from a few mistakes, as to minute particulars of what passed in a house, on an evening, at the distance of many months prior to the investigation. When it is kept in view that the witnesses were not called on to swear as to the facts for nearly two years after they happened, no one tasking their own recollection as to the minute incidents after a long interval, will hastily ascribe trifling discrepancies in the testimonies of such witnesses as were necessarily adduced here, to a wilful breach of veracity."

"With a small allowance, however, for errors in the calculation of time, the proof on both sides is perfectly reconcilable, and the Lord Ordinary has been much impressed with two circumstances mentioned by the witnesses of the defender, which have appeared to him to corroborate very strongly the statement of the pursuer and her witnesses. Thomas Durie, a near neighbour and friend of the defender, who was at Garvock fair with him on the 1st of August, swears that the defender and he agreed on that afternoon to ride home together, but that the defender was detained by speaking to another man, and 'desired Durie to ride on and he would soon overtake him.' And the witness adds, he thinks it may have been between four and five o'clock when he left the market. If a quarter of an hour be allowed for the detention of the defender, he must have left the market (which is said to be about two miles from Lawrencekirke) at or about five o'clock. This being fixed, the next witness, James Watson (the defender's own servant), swears that he looked his watch when the defender came to his farm on the night of the fair, and he found 'it was about half after seven o'clock on said evening he first saw the defender arrive at his own house.' Thus, between the time that the defender left the fair, and the period that he reached home, a space of between two and three hours elapsed. After making all allowance, therefore, for the time passed by the defender in Henderson's public-house, and for the usual pace at which horses generally return to their own stable, there was left more than half an hour for him to pass with the pursuer on the night in question."

"A separate point was urged here, of some importance in

Nothing could be more contrary to equity, or more pernicious. It would just be holding out a premium to unwarrantable litigation. In this way, if there were two or three very large claims on an estate, the rest of the creditors, by laying their heads together to resist the ranking, on grounds however untenable, might contrive, out of the interest accruing in the meanwhile, substantially to increase their dividends. But, then, it is maintained that the Statute excludes all demand for interest, by providing, that in such a case as the present, the interest arising on the deposited sums belongs to the creditors at large, and not to the successful claimants. The 46th section of the Statute will not bear out the plea which is thus founded upon it. That section provides, "that no creditor shall draw any share of the different distributions, unless his grounds of debt, and oath on the verity thereof, shall have been lodged with the trustee previous to the respective times before mentioned;" but that, in the next distribution, after the grounds of debt are so produced and proved, he shall be entitled to draw, out of the first of the remaining fund, a sum equal to the former dividends on his debt, "with deduction of the interest obtained on the said dividends, which is to be retained by the trustee for the common behoof, on account of the creditor's delay." The trustee maintains, that though the pursuers produced an affidavit, no grounds of debt were produced along with it, and that the 46th section of the Statute is therefore fatal to their claim. The first answer to this plea is, that it is at variance with the judgment which has already been pronounced. If, as the plea implies, the pursuers were not entitled to be recognised as claimants till 1841, the judgment finding that the trustee was bound to have set apart a sum equal to the dividends on their claim in 1826, must be erroneous. It is now too late to impugn that judgment. Besides, there is nothing in the plea itself. The 46th section does not refer to the case where a claim, after being lodged, is disputed by the trustee, but to the case where the creditor does not come forward at all. The section properly applicable to the present case is the 45th, which provides for the lodging of a sum in bank equal to the utmost amount of the dividends on the disputed claim. Even if the 46th section did apply, it would not avail the trustee, for grounds of debt were lodged, and vouchers tendered, at the same time with the affidavit. As to the accumulation of interest, the claim for it seems equally good as that for interest simply. It is the practice to settle bank accounts once a year, accumulating principal and interest into a balance carried forward to next year's account. Had the trustee deposited the dividends in bank, it must be presumed he would have settled the account, and accumulated the interest yearly. This was his duty; and the pursuers must be put in the same situation as if the duty had been done.

Pleaded by the defender—

The 45th and 46th sections of the Bankrupt Statute contain a general enactment, to the effect that no creditor shall draw any share of the different distributions, unless his grounds of debt (which, in the 45th section, are used as synonymous with vouchers) shall be lodged with the trustee previous to the times when the dividends are declared, but that in the next distribution, after his grounds of debt are produced, he shall draw an equalizing dividend, but expressly without interest, which is to be retained for the common behoof. The pursuers produced no vouchers with their affidavit—none with their petition—none till June 1841. The utmost, therefore, which they could demand under the Statute is, that in the next distribution subsequent to that date, they should have had an equalizing dividend, putting them on a footing with the other creditors, but without any interest. But, independent of the Statute, there seems to be no principle of law or justice on which the pursuers can claim interest. By neglecting to produce these vouchers, they never put themselves in a position to claim payment of the dividends. There was therefore no *mora* in paying them; and there being no *mora* as to the principal, it is impossible to understand on what footing interest can be demanded. There is no instance, in the practice of this country, under the Bankrupt Act, where interest, in such circumstances as the present, has been allowed; and from the case of *1 Montague and Ayrton*, 670, it would seem that in England such a demand has been invariably

refused. Besides finding interest due, the Lord Ordinary has also found that the trustee was bound to accumulate the bank interest yearly. The Statute has not prescribed any such duty. By the recent Statute, the bank in which unclaimed dividends are deposited, must accumulate the interest yearly, but no duty, as to the accumulation of interest, is laid upon the trustee. Unless a new rule of law is to be introduced, it is impossible that that part of the interlocutor, which allows accumulated interest, can be supported.

At advising,

Lord President.—The question here raised is of considerable importance, and the Court judged it proper to have it discussed in minutes of debate. After attentively considering these minutes, and the whole circumstances of the case, the doubts I at one time entertained as to the soundness of the interlocutor have been removed, under this qualification, that I think it cannot be sustained as to the accumulation of interest. A great deal of argument is employed by the defender in impugning his liability for the principal sum. But it is impossible to give any effect to that argument against a deliberate finding of the Court that he was bound, as soon as funds came into his hands, to set apart a sum to meet the pursuers' dividends, and to supply the loss which had been caused by the misconduct of the former trustee. It must be presumed that this judgment is good; and I am bound to say, after reconsidering it, that I see no cause to doubt its soundness. As far back as 1816, when the claim and affidavit were lodged, the trustee, though objecting to them, had laid aside funds to meet the first and second dividend. The objection to the claim led to long litigation both here and in the Court of Chancery; but ultimately it was found that the claim was good to the extent of more than £20,000, and that the pursuers were entitled to be ranked for that amount. As to the objection to the claim of interest founded on the terms of the Bankrupt Act, I cannot see that it ought to be sustained. It is said that, by the terms of the 45th section, the dividend is not payable until the vouchers are lodged, and that *de facto* the vouchers were not lodged till 1841. Various considerations diminish the weight of this objection. In the *first* place, though the 46th section speaks of vouchers, the 45th speaks of grounds of debt. Now, it appears that here there was produced, along with the affidavit, a copy of the account-current. In the *second* place, the 46th section appears to apply to the case of creditors neglecting to claim at all within a certain period, in which case it postpones their right as a penalty for the delay. In the *third* place, the true question here is, if there was any delay, in the proper meaning of the Statute, on the part of the pursuers? It is impossible to maintain that there was. On the contrary, their complaint against the trustee was presented so early as 1816. The delay was occasioned entirely by the obstinate litigation of the trustee. Besides, it is not easy to see how it can be said that the vouchers were not lodged; for it appears that, when recovered from the hands of a third party, they were handed over to the trustee, and remained with him for some time, and were again returned. This fact is sufficient to obviate this very critical objection. There may be some technical difficulty in their not having been lodged in the process of sequestration, and docketed and marked; but when they were lodged in the process in England—a process between the very same parties—it would be a hard construction to hold that the parties had failed to establish their claim by not having them lodged at the same time in the process in Scotland. The trustee never states this objection to the non-production of the vouchers. He denies the right of the pursuers to rank, but on different grounds altogether, and the delay which followed was occasioned entirely by the discussion of this objection. In these circumstances, the trustee cannot be allowed to resist the payment of interest on a debt which was all along due. I am not prepared, however, to adopt the principle of accumulated interest. That principle is not much countenanced, and we have received impressive hints on the subject from the House of Lords, to the effect that unless the claim for accumulation is of the most plain and palpable nature, we are not to be guided implicitly by what is called the usual practice of bankers. For the regularity of their proceedings, banks may have adopted this practice; but I don't find that, in the general case, so rigid a rule must necessarily be

applied, and I therefore think that the interlocutor must be altered, so far as regards the accumulation of interest.

Lord Mackenzie.—The Statute is explicit in requiring vouchers or grounds of debt. It uses these terms as if they were synonymous; and I cannot therefore think it possible to draw a distinction between them. In the present instance, it appears to me that there was a failure on the part of the pursuers to produce such grounds or vouchers; and I am not able to get over the provisions of the Statute. Certain things were laid before the trustee, but they were not such as I can consider sufficient to supply the place of vouchers. On the second point I agree with your Lordship. A great difficulty has been always felt as to the allowing of accumulated interest. I have never been able to discover the principle; and were I left to speculate on the matter, I would rather be favourable, in many cases, to accumulated interest; but the tendency of the law, as it now stands, is unquestionably to discountenance it.

Lord Fullerton.—I agree with your Lordship on both points. The chief argument of the defender is truly directed against the former interlocutor; for the ground on which he maintains his non-liability for interest, would equally prove his non-liability for the principal sum. The trustee having become aware of an objection to the pursuers' claim, states his determination to strike it out, unless the securities which they had obtained were abandoned. Then a suggestion is made, that a petition and complaint should be presented against the trustee's decision, but nothing is said of the want of vouchers. On the contrary, the trustee sets apart a sum to meet the disputed claim, and a protracted litigation takes place. At last the claim is sustained by the decision in Chancery. But then the dividends which had been set apart were improperly drawn out by the original trustee; and action having been brought against the next trustee for not having replaced them, he was found personally liable; and this liability applies just as much to the interest as to the principal. We might easily suppose a case in which the only objection to a claim was, that the vouchers were not produced in proper time. Here the objection was totally different, and the parties accordingly treated it as totally different. The language of the trustee was, that he would not rank the claim unless the securities were abandoned; and this obviously implied, that if they were abandoned, there was no objection for want of vouchers. In the circumstances, I think the trustee is barred from now urging this objection. But though I have no doubt that the trustee is liable in interest, I am not prepared to say that it ought to be accumulated. Liability to that extent would require a very strong case indeed.

Lord Gillies absent.

The Court *recalled* the interlocutor in so far as it decreed for accumulated interest, but *adhered quoad ultra*.

Lord Ordinary, Cockburn.—*Act.* Maitland, Penney; John Court, S.S.C., *Agent.*—*Alt.* Rutherford, More; Andrew Howden, W.S., *Agent.*—*N. Clerk.*—[H. B.]

20th May 1842.

SECOND DIVISION.—(G. D. F.)

No. 169.—*MRS ISABELLA CLEPHANE or MINTO and JOHN MINTO, Pursuers, v. JOHN KIRKPATRICK, Defender.*

Legitim—Parent and Child—Personal Exception—A parent executed a general settlement in favour of his son, of all his personal and heritable property, and under burden of paying an annuity to the donee's sister. The deed contained no exclusion of the legitim, in consequence of which the daughter brought an action, and was found entitled to draw her legitim—Held, in a separate action to recover the annuity, that though the right to legitim could not be affected or taken away by the settlement of the parent, the deed necessarily imported an intention on the part of the maker to exclude any such claim, but that this intention was thwarted, and the settlement itself in so far frustrated, by insisting and prevailing in the claim for legitim, and consequently, that the daughter having thereby

impugned and repudiated the settlement, could not thereafter take benefit, or maintain any claim under it, for the annuity or otherwise.

John Sime, senior, who was a shipbuilder in Leith, died in 1777, survived by a widow, and a son and daughter. By his settlement he conveyed to his son, John Sime, junior, his whole real and personal property, under burden of paying his mother certain provisions, and in particular, of paying to his sister, Margaret, an annuity of £50 Sterling. The settlement contained no clause excluding the legitim of either child, or providing that the annuity to the daughter should be taken as a satisfaction of her claims on that ground.

Sime, junior, survived his father till 1796, and up to that period he and his sister lived in family together. On his death he left a trust-settlement, by which, and after payment of certain provisions, he constituted the defender his residuary legatee, who accordingly intermitted with, and took up the succession.

During Sime junior's life, the annuity to the sister had never been paid; and after his death in 1797, she raised an action against her brother's trustees, and the defender as residuary legatee, to enforce payment of it and the arrears, which was met by various defences of compensation, &c. After the action had been brought into Court, Miss Sime appears to have then discovered her claims under the head of legitim, and she accordingly, after setting forth that she had never homologated her father's settlement, she gave in an amendment of the libel, which had the effect of converting the conclusions for payment of the annuity into the alternative conclusion, that if she failed in enforcing her claims of legitim which she concluded for, she should be found entitled to the annuity. The Lord Ordinary, and afterwards the Court in 1800, found that she had not homologated her father's settlement, and that she was entitled to legitim; and this decision was affirmed on appeal to the House of Lords, 22d July 1811.

Miss Sime died in 1816, having executed a settlement in favour of trustees, whom she also constituted her sole executors, of all her means and estate, but there was no destination over to the heirs of the trustees. In virtue of her settlement, James Clephane, the pursuer's father, who was one of, and the survivor of Miss Sime's trustees, sisted himself in the action, but he died in 1825. Thereafter his widow, Mrs Clephane, who was a cousin-german of Miss Sime, as executrix-dative *qua* nearest in kin to her, but without having made up any title by confirmation, and John Gavin, as an adjudger on a bond by Mrs Clephane and her daughter the pursuer, the wife of John Minto, sisted themselves in the action, and proposed to insist therein; but this was opposed by the defender. The title, however, of Mrs Clephane and of Mr Gavin were sustained in this Court, but the case was appealed to the House of Lords, at which stage of the proceedings Mrs Clephane died, but the instance, so far as she was concerned, was taken up by Mr Minto, her executor-nominate, and he was accordingly sisted as a pursuer in the Court of Appeal, and their Lordships, on 30th May 1826, sustained the title of Mr Minto and Mr Gavin to carry on the action.

When the case returned to this Court from the House of Lords, the Lord Ordinary found the pursuers en-

titled to the claim of legitim insisted for in Miss Sime's action, but his Lordship pronounced no decision in reference to the alternative conclusion of the action for the annuity. His Lordship, in his note (see case as reported *ante*, Vol. V. p. 376), observed, that it was "unnecessary to inquire what decision the Lord Ordinary might have come to as to this claim, for he does not find any plea in law applicable to this claim. This omission might have been obviated by allowing such a plea yet to be added; but it would be incompetent under the summons, which only claims payment of this annuity alternatively, and if the pursuer should be unsuccessful in her claim as heir, executrix, or nearest of kin of her father, to the share of his effects and estate due to her in such character, her claim on this account being sustained, it is incompetent for her to claim also the annuity under this summons."

The Inner-House adhered to the judgment of the Lord Ordinary; and afterwards, on the report of an accountant, and by interlocutors of the Lord Ordinary (Jeffrey), the claims of legitim were ascertained to amount, as at 7th March 1835, to £1622. This sum was consigned in bank by the defender on 7th March 1835, under authority of the Lord Ordinary, "subject to the orders of the Lord Ordinary or the Court—the pursuers' executing and delivering a valid discharge and assignation in favour of the defender, before drawing payment of the money;" and the Lord Ordinary (7th July 1837) pronounced decree therefor in favour of Messrs Minto and Gavin, and granted warrant of payment in their favour on the bank, on their joint receipt. This decree became final and was extracted.

The present pursuers—who, on the one hand, were Mrs Minto, the daughter of Mrs Clephane, and executrix-dative *qua* nearest in kin of the late Miss Sime, and Mr Minto (her husband), as *curator bonis* upon the trust-estate of the said Miss Sime—now brought this action, subsuming, that in consequence of the alternative conclusion introduced into the summons at Miss Sime's instance, it had been found only competent to decern for the legitim in that action, and not for the annuity, and, accordingly, they now concluded against the defender for payment of £1900, as the sums of annuity due to the late Miss Sime under her father's settlement, for the period of time she survived after her father's death, being thirty-eight years and a-half.

Pleading, inter alia.—1. The obligation to pay these annuities still subsisted,—the said annuities never having been paid or satisfied in any way, and having never been discharged or abandoned. 2. The claim to the annuities was not affected by Miss Sime, and her representatives having claimed her legitim, the former having been granted without reference to or prejudice of the other.

In defence it was *pleaded*.—1. The present action was cut off by the negative prescription. 2. The claim of Miss Sime and her representatives for legitim, successfully maintained in the former action against the defender, and given effect to by payment, was directly at variance with, and in opposition to, her father's settlement in favour of the defender, and was and could be maintained only on the hypothesis that she reprobated and rejected that settlement. 3. Miss Sime and her representatives having rejected and repudiated her father's settlement, the pursuers, as in her right, are not now entitled to insist in the conclusions of the present action, which are founded exclusively upon the said deed of settlement.

The Lord Ordinary pronounced the following interlocutor:

"14th July 1840.—The Lord Ordinary having heard the counsel for the parties on the closed record, productions, and whole process, and made *avizandum*, finds that the settlement of the late John Sime the elder, by which the annuity of £50, now pursued for, was provided for his daughter Margaret Sime, was a total or general settlement of his whole means and effects, in favour of his son, John Sime the younger, who was thereby expressly burdened with the payment of the said annuity: Finds, that though the said Margaret's right to legitim could not be affected or taken away by this settlement, it necessarily imported an intention on the part of the maker to exclude any such claim; and that this intention was thwarted, and the settlement itself in so far frustrated and disappointed, by the claim afterwards successfully made by the said Margaret for her legitim: Finds that, by insisting and prevailing in this claim, the said Margaret did directly impugn and repudiate, and, to a certain extent, defeat the said settlement; and could not therefore take benefit from, or maintain any claim under it, and that the claim now insisted in by the pursuers, as in her right, cannot be sustained; and therefore sustains the defences, assoilzies the defender, and decerns: Finds expenses due; allows an account thereof to be given in, and remits to the auditor to tax and to report.

"*Note*.—The decisions in the cases of Henderson in 1782, and Collier in 1833, seem of themselves sufficient to settle the principle on which the interlocutor proceeds. But the solemn and unanimous determination of the whole Court, in the very recent case of Lord Breadalbane's trustees (5th March 1840), takes away all ground of hesitation.

"There was a separate defence on the ground of the negative prescription, which the Lord Ordinary would have thought entitled to very serious consideration, if it had been necessary to go into it. But as it was evidently liable to much more question than that which was thought clearly sufficient to entitle the defender to *absolvitor*, it was thought better not to come to any decision with regard to it."

The pursuers reclaimed, but the Court unanimously adhered.

Lord Ordinary, Jeffrey.—*Act*. Marshall, Macfarlane; Lockhart, Hunter and Whitehead, W.S., *Agents*.—*Alt*. H. J. Robertson, Moncreiff; Eneas Macbean, W.S., *Agent*.—*F. Clerk*.—[G.D.F.]

21st May 1842.

FIRST DIVISION.—(H. B.)

No. 170.—THE RIGHT HON. VISCOUNT MELVILLE and MESSRS WHYTOK, *Suspenders*, v. WILLIAM DENNISTON, *Respondent*.

Property—Water—*Servitude*—Conterminous Proprietor.—*A party having right, in common with the inhabitants of a village, to lift water from a well for domestic purposes, laid a pipe for the purpose of supplying certain houses with water from the surplus which escaped from the well—Interdict against this operation granted at the instance of an owner of property bounded by a stream which was partly fed by the water escaping from the well.*

A spring rises in the march between the glebe of Lasswade and a property belonging to William Denniston of Oakmount, and a stone cistern of two feet square, sunk in the glebe, receives the water of the spring. From this cistern the inhabitants of Lasswade have been accustomed to supply themselves with water by dipping in pitchers. To allow the surplus water to escape, a hole has been made in the cistern about five inches from its top, and the water which runs through it, falls shortly after into a small stream, called the Spout Burn, which, a little lower down, bounds a property belonging to Lord Melville, and on which a carpet manufactory has been erected by his tenants, Messrs

Whytock and Company. At a short distance from the cistern in the glebe, Mr Denniston has sunk, on his own property, another cistern four feet long, three feet wide, and two feet deep. Its upper side is about an inch and a-half below the hole in the glebe cistern; and by means of a pipe placed at this hole, the surplus water which runs through it, and used to fall into the Spout Burn, is carried into Mr Denniston's cistern, from which a leaden pipe, three-fourths of an inch interior diameter, has been laid to convey the water to two new houses which Mr Denniston has built on other property belonging to him, and situated at a considerable distance from the spring. Into these houses three branch pipes have been laid, furnished with brass stop-cocks, to be turned by the hand. To carry off the surplus water remaining after supplying these houses, a waste pipe has been placed in Mr Denniston's cistern, to carry it, as formerly, into the Spout Burn. To prevent Mr Denniston from completing these operations, two actions were raised,—the one a declarator by McGill and others, inhabitants of the village, in which Mr Denniston was assoltized, on the ground that his operations have no tendency to diminish their supply,—(*vide ante*, Vol. XIII. p. 550); and the other the present suspension and interdict at the instance of Lord Melville and his tenants, Messrs Whytock.

The suspenders *pleaded*—1. Conterminous and successive proprietors have the use of the water of a running stream as it descends, and no one proprietor is entitled by any *opus manufactum* to carry off or diminish the supply without the consent of the others. 2. The proprietor of a stream which flows into a brook or rivulet, is not entitled to divert its waters, or to appropriate them to his own purposes. 3. The respondent is not entitled to extend his use of the waters of the spring in question beyond the limits which custom has fixed, without the consent of the other parties interested.

The respondent *pleaded*—1. The suspenders have no right, title, or interest to challenge the operations of which they complain. 2. The operation complained of being perfectly lawful, the suspenders are not entitled to challenge the same. 3. The respondent being entitled to a supply of water for all domestic purposes to the inhabitants of his properties in Lasswade, and according to immemorial usage,—and the operations complained of being formed merely to facilitate the conveyance of water to these properties for these purposes alone,—that operation is unchallengeable.

The Lord Ordinary pronounced the following interlocutor:

"7th July 1839.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, continues the interdict, and decerns; finds the respondent liable in expenses; appoints an account thereof to be given in, and when lodged, remits the same to the auditor to tax and to report.

"*Note.*—The effect of the respondent's operations is, that, by carrying away and appropriating what he calls the surplus water, he cuts off part of the main feeder of the Spout Burn, and thereby diminishes the quantity of water which would otherwise flow through the property of the complainers, who are inferior heritors. He does not divert the whole burn, but he diverts part of it, and he does this, not for the use of any property of his conterminous to the stream, but of a property at a distance.

"It is quite clear that, under the general rules, this is illegal. No justification of it is to be found in the cases of Ogilvie,

24th November 1791, or of Ritchie, 15th February 1822, relied on by the respondent. In both of these the person taking the water was an heritor along the stream, and he only took it for the domestic purposes of the adjoining property.

"But the respondent says that the water which he withdraws is contained in a well, which is open and common to the whole inhabitants of Lasswade—that he is one of them—that he only takes it for fair ordinary domestic purposes; and that this being the case, he is not obliged to resort to the well with pitchers, but may economise time and labour by making its water flow to him through a pipe. This is his case. It rests upon his right as one of the inhabitants,—a character in which the complainers are equally entitled to meet him, for they or their people are inhabitants also, and they are entitled to protect the privileges attached to their properties. Now,

"1st, The respondent does not merely draw from the public well. He prevents it from ever being filled. His pipe is fixed into it five inches below the top of the well, (stat. 5.) so that the water can never rise above this till his houses be served—all above this he calls surplus water. But how is it surplus? Or if one inhabitant may pierce the side of the well five inches from its top, why may not another pierce it lower, or even at the bottom, and call all the water surplus?

"2d, The doctrine of conterminous heritors taking water for domestic purposes, and taking it in any way they like, whether by pipes or vessels, has no application to this question. This is the case of a public village well—that is, of a spring collected into a built receptacle, to which the people resort with such vessels as they have, and after serving them, the spare water ought to flow in its natural course to the lower heritors. So long as the people use the well in the old way, it supplies them all impartially; and the very awkwardness or simplicity of their mode of taking the water is a security that the poor will have their share as well as the rich. Is a wealthy man entitled practically to destroy their comfort and rights, by coming with his pipes, and scientifically sucking the whole water away without moving a step? It is plain that, with so small a supply as this is admitted to be, this would just be an extinction of the well. For if one person uses it in this way, another may, and the public fountain is made a mere reservoir for the few. The respondent says he leaves the fountain full to within five inches of the top. But his legal principle entitles him or others to withdraw every drop of it. A conterminous heritor may perhaps use a stream for domestic purposes, though this may exhaust it. But the Lord Ordinary is not aware of any law which enables a distant owner who, as one of a community of villagers, has a right to make a common use of a public well, to exhaust it, as in competition with his fellows by machinery inconsistent with their enjoyment of it."

Denniston reclaimed. At advising,

Lord President.—It appears from Mr Jardine's report, that the effect of the respondent's operations is to divert from its present course a quantity of water, estimated at forty gallons a-day; and the question is, whether the respondent is entitled by means of a *novum opus*,—by laying pipes and forming communications through ground which is not his own property, and that without the consent of other parties having an equal interest and title by use and wont to the enjoyment of the water—to draw off a larger supply than formerly. I have always understood that, in questions of this nature, the Court are not influenced by the *quantum* of injury, but that if there is any violation at all; they will maintain the old state of possession. I recollect well the case of Lord Glenlee, where his Lordship complained of the attempt of a party to interfere with the river of Ayr, by collecting and detaining the water in tanks. The Court held that this was a diversion of the stream, and on that principle, without regard to the *quantum* of injury, granted interdict. The diversion, in the present instance, amounts only to forty gallons a-day; but if once this is allowed, it is not easy to see when it is to stop, as all the other inhabitants have an equal right to make similar constructions. The Spout Well is one of the supplies of the Spout Burn. The effect of the respondent's operations is to diminish that supply; and holding the principles of law applicable to such cases to be fixed by a

series of decisions, I am clear for adhering to the Lord Ordinary's interlocutor.

Lord Mackenzie.—The present question has nothing to do with the well; for if there were no well, the objection to the respondent's operations would be the same. The question relates only to the extra water which flows through the hole in the cistern. This water Mr Denniston has endeavoured to carry off by means of a long pipe communicating with certain houses which he has built; and the question is, is he entitled to do so? I am clear that he is not. Even a neighbouring proprietor is not entitled to divert the water to a different channel; and these houses are situated on a property not connected with the houses at all. It is admitted that the effect of the respondent's *novum opus* is to increase the consumption of the inhabitants of those houses, and diminish the supply which falls into the burn. The extent of this diminution can scarcely be calculated. Is Lord Melville to appoint a party to watch the proceedings of the respondent's tenants, and see that not more is taken by the tenants than the estimated quantity? On the grounds stated by your Lordship, I think the interlocutor must be affirmed.

Lord Fullerton.—I am of the same opinion. The present question is between parties having an interest in the spring, and Mr Denniston, who is not a conterminous proprietor. He has nothing more than the common right of the inhabitants to take water from the well; but here he is actually endeavouring to divert the stream, by carrying part of it away to houses built on property which has no communication with the stream. I concur entirely with your Lordship.

Lord Gillies absent.

The Court *adhered*.

Lord Ordinary, Cockburn.—*Act.* Anderson, W. P. Dundas; Mackenzie and Sharpe, W.S., *Agents.*—*Alt.* Solicitor-General (McNeill), Marshall; Thomson, Elder and Burn, W.S., *Agents.*—*N. Clerk.*—[H.B.]

21st May 1842.

SECOND DIVISION.—(G.D.F.)

No. 171.—THOMAS MATTHEW, *Advocator*, v. ROBERT FAWNS, *Respondent*.

Diligence—Arrestment—Title and Interest to Object—Circumstances in which held, that the manager of a public company, in whose hands an arrestment had been used, which was alleged to be ex facie unwarranted and informal, was found entitled to resist the delivery of certain goods thereby attached, until the issue of a process which would determine the question as to the competency and validity of the use of the diligence.

Fawns presented a petition to the Magistrates of Dundee in these terms:

"That there arrived at the port of Dundee yesterday (the 2d day of June 1841), on board the vessel called the Forth, belonging to the Dundee, Perth and London Shipping Company, of which company Mr Thomas Matthew is the manager, and party from whom delivery of goods on board the vessel is got, thirty-seven packages of furniture and effects addressed to the petitioner, and in which packages there are a variety of goods and clothes, and other articles, the property of the pursuer's wife, and as such belonging to the pursuer.

"That the petitioner called upon the said Thomas Matthew for delivery of the packages addressed to him, and was willing to pay the freight thereof, and is still willing to pay the freight of the same, but the said Thomas Matthew declined to make delivery to the petitioner, in respect of a copy of an arrestment which he showed as having been used in his hands for behoof of the company at the instance of Adam Fisher, shoemaker, residing in Kilmarnock, against David Crom, shoemaker there, and a copy of which arrestment, given to the petitioner by the said Thomas Matthew, is herewith produced.

"That the arrestment so used is not a legal warrant of interpellation or of attachment, so as to authorise the said Thomas Matthew refusing delivery to the petitioner of the said thirty-seven packages, which were brought for him in the said vessel

the Forth, as aforesaid, and the petitioner is entitled to get delivery of the said packages upon payment of the freight, which he is still willing to pay.

"That the petitioner is suffering great inconvenience, loss, and injury by the said packages being kept from him, and his wife also is suffering greatly thereby; and the petitioner is therefore obliged to present the present application.

"May it therefore please your Honours" "to find that there has been no legal attachment or interpellation to prevent delivery of the packages to the petitioner; and that the petitioner is entitled to get delivery of the same on paying the freight thereof; and to decern and ordain the said Thomas Matthew to deliver up to the petitioner the foresaid packages on receiving payment of the freight of the same; or may it please your Honours to do otherwise and farther in the whole premises as to you may seem just."

The advocate, in his answers, stated, that he

"has no knowledge of the actual rights of the parties claiming the effects in question. He herewith produces a copy of the arrestment referred to in the petition, whereby he is specially interpellated from delivering the effects to the petitioner, until surety be found to make them forthcoming to Adam Fisher in Kilmarnock, as being in reality the property of David Crom, shoemaker there, a debtor of Fisher's. The respondent is perfectly ready, on payment of the freight, to deliver the goods to any party whatever having the best right thereto; but, under the circumstances now stated, he cannot do so without judicial authority. He deems it proper to call the attention of your Honours to the fact, that although there are here competing parties, neither the arrester nor Crom has been called into the field. He submits to your Honours for consideration, whether this should not still be done, or a process of multiplepoinding raised. The respondent also respectfully calls the attention of your Honours to the circumstance, that the petitioner does not go into any explanation of the facts connected with the property of the goods."

And he pleaded, (1.) That he could not safely deliver, till it was determined who had the right to the goods: (2.) That in order to ascertain this right, the requisite legal procedure should be adopted, in such manner as should be determined by the Court; and, (3.) That he was entitled to the expenses of appearance in the action, as he had had no alternative but to lodge answers.

In the replies, Fawns did not claim the goods specially as his, further than was done in the petition, and *argued*—That the messenger had no authority for arresting, and, consequently, that the diligence was inept as against him: That Matthew, as a public carrier, was bound, on payment of the freight, to deliver the goods to him, as the party for whom they had been transmitted: That he would not enter into any question as to the property of the goods, which it was *jus tertii* to Matthew to raise; and he stated that he took "his stand upon this, that the defender, admittedly having the packages addressed to him, he is bound to deliver them up to him, and is not entitled to keep up these packages, and call for a lawsuit to be introduced by multiplepoinding or otherwise about them. The defender will be sufficiently discharged by delivering them to the pursuer, and that is all that he requires."

The Magistrates

"having advised this process, finds that the defender, or the parties he represents, are common carriers by sea, and they received the articles sued for, for behoof of the pursuer: Finds that the arrestment used against another party cannot attach the effects in question as against the pursuer; repels the defences, and decerns in terms of the prayer of the petition: Finds the defender liable in expenses; appoints that an account of the pursuer's expenses be lodged; remits the account, when

lodged, to the clerks of Court to be taxed: Finds the defender also liable in the dues of extract, to be ascertained at extracting, and decerns."

In the meantime, the arrester raised a process of multiplepoinding in the name of the Shipping Company; and thereupon the advocator presented a reclaiming petition to the Magistrates against the above judgment, submitting in the then circumstances, and in principle, that the action against him should be sisted till the issue of the multiplepoinding; or that, at all events, the finding of expenses against him should be recalled.

The Magistrates adhered, however, to their previous judgment, when Matthew presented a note of advocacy against the deliverance, principally *maintaining*, (1.) That the address on the goods being in the name of the respondent, was not conclusive evidence of his right of property in them; and that he, the advocator, as the manager of a public company, was not entitled to disregard the arrestment, by which he was interpellated from making delivery: (2.) That he was not bound of himself, without judicial authority, to judge of the regularity or validity of the arrestment; and, even assuming that there was any apparent irregularity in the face of the arrestment, he was entitled to the protection of judicial authority, as a guarantee against consequences, before making delivery; and (3.) That the regular course for the Magistrates, after the raising of the multiplepoinding, was either to have sisted the summary application for the result of the multiplepoinding, or to have ordered the arrester and common debtor to be in the field before disposing of the application; at all events, and as the application did not originate through any fault of his, there was no ground for awarding expenses against him.

Fawns *pleaded*—1. That the packages in question having been *nominatim* addressed to the respondent, to whom they belonged, delivery was due directly to him, on payment of the freight, which was tendered; and the advocator acted illegally and unwarrantably in refusing to give them up: 2. That the arrestment afforded no legal interpellation or bar to the delivery—1st, Because that arrestment was confessedly used, not against the respondent, Robert Fawns, but against "David Crom, shoemaker in Kilmarnock;" and 2d, Because no arrestment, however formal, against the latter, could legally attach goods belonging to the respondent, against whom it was wholly inept and incompetent.

The Lord Ordinary ordered minutes of debate, in which the pleas of parties, as already stated, were further elaborated. In the advocator's case, he, besides, called attention to the fact, that the respondent, in the application to the Magistrates, did not claim the thirty-seven packages as his, but merely certain articles therein contained, which, he said, belonged to his wife. He claimed these, but it was argued that he did not claim the other goods, with which his wife's goods were mixed up. The respondent, besides arguing the whole case in the pleas already indicated, maintained that the multiplepoinding was incompetent.

The Lord Ordinary pronounced the following interlocutor:

"19th March 1842.—The Lord Ordinary having made avizandum with the revised minutes of debate, and whole process,

and considered the same, Appoints the said minutes to be printed and boxed to the Lords of the Second Division of the Court, and that by the second box-day in the ensuing vacation, in order that the same may be reported to the Court.

"*Note*.—In this case thirty-seven packages of furniture, &c., addressed to Mr Fawns, Dundee, were arrested in the hands of the manager of the Dundee, Perth, and London Shipping Company, by a schedule left by a messenger-at-arms of all sums of money, goods, &c., in their hands and custody pertaining to David Crom; and, 'in particular, a quantity of furniture presently on board the vessel 'Forth' of Dundee, addressed to Mr Robert Fawns, Dundee.'

"The manager of the company appears *bona fide* to have considered these packages, addressed to Mr Fawns, as thereby arrested in his hands. The Magistrates of Dundee, on an application made to them by Fawns, ordered them to be delivered, and found the manager of the Shipping Company liable in expenses. After the case had been before the Magistrates, a multiplepoinding was raised by the arrester, in name of the Shipping Company, before the Sheriff.

"It is a question of some importance, whether the manager was bound to consider such an arrestment as altogether void and null, and, without regarding it, to deliver the goods to the person to whom they were addressed, although the schedule bore that he should hold them for Crom.

"It appears to the Lord Ordinary that the messenger was not authorised, if there was a general precept against the goods of Crom, to make out a schedule in different terms. At the same time, the manager was placed in a very difficult situation, as acting for the company, if he was bound to disregard altogether the schedule he received; and if that is the law on this subject, it is very important that it should be generally known. The facts that may come out in the multiplepoinding before the Sheriff-court may materially affect this question, yet the merits of that action cannot be judged of in this advocacy. If the manager had actually known that the goods belonged to Crom, and were only addressed to Fawns as a cover, he would not have been entitled to disregard the arrestment; but if it shall appear that *de facto* that was the case, Can he be in a worse situation by having *bona fide* obeyed a schedule to that effect? The advocator's situation would be very hard indeed if decree were pronounced against him in this action for delivery to Mr Fawns, and in the multiplepoinding to the arrester."

At advising,

Lord Justice-Clerk considered, that the case did not depend on the general law applicable to carriers, but on the specialties of the question; and his Lordship could not overlook the fact, that the pursuer did not, in his original application, claim the goods as his. Further, he could not at present say if the arrestment was irregular; and he did not know, besides, if that was a point which was necessary for deciding the present case. The goods were said to be the property of Crom, and they were specially described as his in the arrestment; and in these circumstances, the demand was for delivery to the pursuer, without any guarantee against Crom for re-delivery, and no notice to the arrester. Then, before the decision of the Magistrates, the multiplepoinding is brought; and whether that is a competent multiplepoinding or not, it was not practicable, and not necessary to decide in this case. Certainly the raising of that process was sufficient for an alteration of the Magistrates' judgment. These goods are in the hands of the Court, and till the result of the multiplepoinding, the present question ought to be sisted.

Lord Medwyn concurred, and thought that the application ought to be dismissed with expenses. The manager had no right to disregard the arrestment, and that particularly in the circumstances, where the petitioner did not aver that the goods belonged to him.

Lord Meadowbank agreed. It was a very particular statement which was made in the petition; for the party only said that the packages contained some of his wife's clothes, and he did not aver that he had right to the whole.

Lord Moncreiff also concurred, and doubted as to the real intent with which the petitioner had applied to the Magistrates for possession. He ought to have stated more explicitly his con-

nection with the goods. If the goods really belonged to the petitioner, he should have said so; and as to the wife's clothes, he could recover them in the multiplepinding.

The Court

"Recal the interlocutors complained of, and dismiss the petition, and decern: Find the respondent liable to the advocator in the whole expenses incurred by him, and appoint an account," &c.

Lord Ordinary, Murray.—*Act.* Rutherford, Deas; Brown and Miller, W.S., *Agents.*—*Alt.* Neaves; Wotherspoon and Mack, W.S., *Agents.*—*F. Clerk.*—[G. D. F.]

25th May 1842.

FIRST DIVISION.—(H.B.)

No. 172.—*The late EARL of FIFE'S TRUSTEES, Pursuers, v. The MAGISTRATES of ABERDEEN, Defenders.*

Superior and Vassal—Sasine—Register—Where lands originally burgage were held in feu under magistrates, who were specially empowered to grant such feus—Held that the sasines taken in them could be validly recorded only in the General Register of Sasines or Particular Register of the county in which they were situated, and not in the Burgh Register.

By charter, dated 10th December 1319, King Robert I., "concessisse et ad feodofirmam assedasse ac presenti carta nostra confirmasse" to the burgesses and community of the burgh of Aberdeen, the forest of Stocket, with the pertinents, to be held by them and their successors "de nobis et heredibus nostris in feodo et hereditate et in libero burgagio per omnes rectas metas," &c.

In 1551, the burgh obtained a license from Queen Mary, empowering them to feu the lands, &c., thus granted, under the limitation that they were to be feued "convivibus et liberis burgensibus dicti nostri burgi." The terms of the license are—"assedandi, arredandi, locandi ac in emphyteosim seu feudifirmam, nunc et in omnibus temporibus futuris quotus vacare contigerit, in perpetuum hereditarie dimittendi pro annua augmentatione firmarum earund." The charter and license of Queen Mary were confirmed in general terms by James VI. in 1617, and more explicitly in 1638 by Charles I., who, without repeating the limitation of feuing to burgesses only, gave a general power "locandi et assedandi hujusmodi dict. terrarum suarum communium dictæ forestæ de Stocket quæ hactenus non assedantur et locantur ad utilitatem et commodum dicti burgi nostri per assedationes longas vel infeofamenta feudifirmæ pro solutione feudifirmarum." By charter of resignation, dated 29th January 1774, the Magistrates of Aberdeen gave, granted, and in feu-farm and heritage disposed and confirmed to Alexander Udney Duff, and Mrs Margaret Udney Duff, his spouse, and the longest liver in liferent, and the heirs or assignees of the survivor in fee, certain "parts and portions of the lands of Forresterhill," forming part of the forest of Stocket, conveyed as above. The *tenendas* of the charter declares, that the lands are to be held of the Provost, Bailies, Council, and community of Aberdeen, and their successors, "in feu-farm and heritage for ever." The *reddendo* is in the following terms:

"Giving and rendering yearly therefor the said Alexander Udney Duff, and Mrs Margaret Udney Duff, his spouse, and their foresaids, to us and our successors, and to our treasurers or collectors of the feu-mails of the said burgh for the time, the sum of thirteen pounds Scots money, as a proportional part of the sum of twenty pounds Scots money, being the feu-duty payable

for the whole lands of Forresterhill, and that at two terms in the year, Whitsunday and Martinmas in winter, by equal portions, or at least within twenty days immediately after each term, in name of feu-farm; and doubling the said feu-duty of thirteen pounds Scots, at the entry of every heir, as use is,—the heirs, successors, and assignees of the said Alexander Thomson being liable in the yearly payment of the sum of seven pounds Scots, as the remaining feu-duty effeiring to their part of the said lands perpetually in all time coming; as also, paying the taxations, impositions, subsidies and contributions, as the same shall happen to be taxed in the said burgh: And it is hereby declared, that the said Alexander Udney Duff, and Mrs Margaret Udney Duff, his spouse, and their foresaids, shall be subject, and subject themselves to the Courts, suits, and jurisdictions of the Magistrates of this burgh, and that they shall perform and give obedience to the officers and governors of the same, conform to the custom of the citizens and inhabitants of this burgh, and all singular successors entering to the said lands, paying to the treasurer of Aberdeen for the time, such compositions for their entries as are due and payable by law; as also, all and every singular successor and successors, whether male or female, and all heirs entering to the said lands (not being burgesses of guild in this burgh,) paying to the dean of guild of Aberdeen for the time, the usual compositions and other dues payable by entering burgesses of guild; providing always that it shall not be lawful to the said Alexander Udney Duff, and Mrs Margaret Udney Duff, his spouse, or their foresaids, to do any real injuries to their neighbours, or to labour, manure, or any other way appropriate, upon any pretext whatsoever, any part of our commonry, without the bounds of the property above written, nor even within the foresaid bounds to burn any heather, except in arable ground fit for growing corn, grain or grass;—and that for all other burden, question, service or demand, that may be anyways asked or required by us for the lands above disposed in any manner of way."

The charter contains a precept of sasine which is directed to the then bailies of the burgh *nominatim*, or any of them, conjunctly and severally, or to any other bailies of the same for the time, and orders sasine to be given by delivery of earth and stone of the ground thereof, as use is in such cases. In virtue of this charter and precept, an instrument of sasine was expedite in favour of Alexander Udney Duff, and Mrs Margaret Udney Duff, as having been infest and seised in the said lands and others, under the hand of Alexander Carnegie, then town-clerk of Aberdeen. This instrument is dated 3d February 1774, and is recorded in the burgh register of sasines, but not in the general register of sasines, or the particular register of the county of Aberdeen. Part of these lands were disposed during the lifetime of Mr Duff; and after his death, Mrs Margaret Udney Duff, who survived him, disposed the remainder to Thomas Taylor, in whose favour sasine was taken, and recorded by the town-clerk in 1793, in the same manner as in the case of Mr and Mrs Duff in 1774.

In 1794, Taylor sold these lands to the late Earl of Fife, whose trustees brought the present declarator against the Magistrates of Aberdeen, in which, after narrating the nature and state of the titles, they concluded to have it found and declared, that they

"have now good and undoubted right to the foresaid three lots of the said lands of Forresterhill, with the pertinents, under and by virtue of the several deeds and writs before recited, and are entitled to make up and complete a feudal title thereto in their persons, as trustees foresaid, as vassals therein: That the said three lots of the said lands of Forresterhill, with the pertinents, are held by the pursuers, not of us and our royal successors in free burgage, but of the said Provost, Magistrates, Council, and community of the said burgh of Aberdeen, as immediate lawful superiors thereof, in feu-farm, fee and heritage, for payment of



the yearly feu-duty, and other duties and services specified in the before-mentioned charter of resignation: And that the instruments of sasine to be expedite on all charters of the said lands and others granted by the said superiors thereof, and upon all dispositions of the same granted by their vassals, ought to be recorded in the general register of sasines, or in the particular register of sasines for the said county of Aberdeen, and not in the register of sasines kept for the burgh of Aberdeen: That the foresaid instrument of sasine, expedite in favour of the said Alexander Udney Duff, and Mrs Margaret Udney Duff, upon the before-mentioned charter of resignation in their favour, having been only recorded in the protocol or register of sasines of the town-clerk of Aberdeen, kept for the burgh of Aberdeen, was not duly and properly recorded in terms of law, and is therefore null and void; and that the precept of sasine contained in the said charter still remains open and unexhausted: And that the pursuers, as trustees foresaid, having now right thereto by progress as aforesaid, are entitled to take infestment in the said three lots of the said lands of Forresterhill, with the pertinents, by virtue of the precept of sasine contained in the said charter and the foresaid conveyances thereof, whereby they have right to the same, without being obliged to make payment of any composition or casualty whatsoever to the said Provost, Magistrates, Council, and community of the burgh of Aberdeen, as superiors thereof, beyond the yearly feu-duty and other duties and services payable for the same: And it being so found and declared, the said present bailies of the said burgh of Aberdeen, or one or other of them, and their successors for the time being, ought and should be decreed, by decree of our said Lords, to execute the precept of sasine contained in the foresaid charter of resignation, by giving sasine to the pursuers, as trustees foresaid, in the said lands and others, in terms of the said precept, to which they have right as aforesaid, and that whenever the said Bailies shall be required by the pursuers so to do."

The pursuers *pleaded*—1. The charter of Charles I. gives to the Magistrates power to make grants, not merely to burgesses or inhabitants, but to any persons whatever. 2. It does not empower the Magistrates to grant rights to be holden by the grantees in burghage, or, in other words, immediately of the Crown. 3. The direction of the precept to the Magistrates will not make the tenure burghage; and, 4. Neither will the usage of having the sasine taken and recorded by the town-clerk, establish the evidence of the burghal holding.

The defenders *pleaded*—1. The lands in question are situated within the territory, and form an integral part of the burgh of Aberdeen, and were granted under a mixed burghal and feudal tenure, conformably to which the mode of taking and recording the infestments is valid, and the right of the burgh to the composition and casualties is preserved. 2. The mixed burghal and feudal tenure is valid and effectual, inasmuch as the qualities of the burghal tenure are not impaired by superadding payment of feu-duties or ground-annuities to burghal services or equipollent prestations, or by the consequent mode of completing the title, and *à converso*, the existence of those services or equipollents does not derogate from the right to stipulate for and receive feu-duties or similar payments and casualties. 3. Where charters, or other conveyances, embodying the mixed burghal and feudal tenure, are granted, the sasines can only be legally and validly taken by the clerk of the burgh, and legally and validly recorded by him in the register of the burgh. 4. While the enactments of the preceding Statutes thus govern the registration of the sasines in question, the validity of that registration is not controlled nor affected by the Statute 49 Geo. III. c. 42, because registrations of

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such sasines in the record of the burgh do not come under its operation, and even if they did, it could not impair the validity of the registrations at issue, as it has no retrospect. 5. The validity of the charters or other deeds, embodying the mixed burghal and feudal holding, and the right of the clerk of the burgh taking sasine thereon, and of recording the sasine in the register of sasines for the burgh, are in conformity with principle and the ordinary rules of law, and have been recognised and established by a series of decisions. 6. Even although the lands in question could be deemed to have been held in feu, the registration of the sasines would have been valid, because the lands are situated within the burghal territory, and held by the burgh in burghage of the Crown.

The Lord Ordinary pronounced the following interlocutor:

"21st January 1842.—The Lord Ordinary having resumed consideration of the record, together with the revised cases, title-deeds produced, and whole process: In respect that the lands set forth in the libel were granted by the defenders' predecessors, the Magistrates of Aberdeen, to the late Alexander Udney Duff and his wife, the pursuers' predecessors, by a charter to be held *in feu* of and under the said Magistrates, and that in virtue of a special power contained in the title of the Magistrates, empowering them to grant such feus; and in respect that the instruments of sasine expedite thereon in favour of the said Alexander Udney Duff and his wife, and in favour of Thomas Taylor, their disponee, the immediate author of the pursuers' constituent, were not recorded in the general or particular register of sasines for the county, but in the register kept for the burgh of Aberdeen for sasines upon subjects *held burghage*, Finds the said instruments of sasine inept and void in a question between the pursuers and defenders, and that the pursuers, as assignees to the precept of sasine contained in the last charter of resignation granted by the Magistrates, are now entitled to hold the said precept as unexecuted, and to infest themselves thereon, and to record the same in the proper register: Therefore, decerns and declares in terms of the conclusions of the libel: Finds no expenses due to either party, and decerns.

"*Note*.—The Lord Ordinary allowed cases to be lodged in this cause, because the parties concurred in suggesting that their pleas should be stated in that form; and as the question turned on the import of titles, it seemed fair that the parties should have an opportunity of explaining them in a written argument. Now, however, that he has had an opportunity of examining the titles, he is clearly of opinion that the lands are not held in burghage, but under a proper *feudal* holding, according to every characteristic and test by which such a holding can be tried.

"The whole of the later authorities on questions of this sort, from that of Davie, in 1814, to that of Donald's trustees against Yeats, in 1839, are concurrent that sasines on subjects, even within the original burghal territory, when now granted by Magistrates, on rights to be held *in feu*, and not in burghage, must be recorded in the general or in the county register. This was found by the Second Division in the case of Davie, in 1814, expressly laid down as law in the House of Lords in the case of Dawson, in 1830, and again assumed as settled law by Lord Moncreiff and the Second Division, in the case of Donald and Yeats, in 1839. The second case of Dumbarton, decided by the First Division in 1823, is not truly an adverse decision, as the Court considered the holding then to be burghage, and on that footing alone determined that the sasine was properly recorded in the burgh register.

"There is a speciality, however, in the present case which deserves notice, as it does not seem to have formed the subject of express decision in any of the prior cases. Although the holding here is undoubtedly a proper holding *in feu*, it seems equally clear that the subjects libelled on *formed part of the ancient burghal territory*, which was held at least by the Magistrates themselves in free *burghage*; and it is also established

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that instruments of sasine, taken upon the charter libelled on by Taylor, the purchaser, from Mrs Udney Duff, were passed in 1774 and 1793, long prior to the Act of 1809, which is the latest regulating Statute as to burgh registers. In reference to cases falling under this category, it was certainly understood by many practitioners, that till the Act of 1809 was passed, sasines of all subjects within burgh fell to be recorded in the burgh register, in terms of the Act 1681, as the subjects necessarily were held burgage originally, whatever might be the subordinate holding irregularly resorted to in particular cases, and it was considered that this practice was stopped only by means of the Act of 1809, which confined the burgh register to sasines of properties holding burgage; and if so, that might save from nullity instruments of sasine of burgage tenements disposed in feu, if recorded in the burgh register anterior to 1809.

"Now, the Lord Ordinary does not perceive that this distinction has been recognised by any of our authorities, and he is inclined to think that there is not any essential distinction between the Act of 1681 and 1809. The first only authorised the registration in the burgh register of sasines of properties holding burgage, and the last Act saved and reserved the burgh register to that effect. Nevertheless, if the question be not settled by authority, it is possible that cases may occur where sasines of burgage tenements may have been given nominally for payment of annual sums, called feu-duties, and even to be held of the grantor, which might not be so objectionable on the point of registration as of feudal anomaly and irregularity,—the doubt being, whether private parties can in any case, at their own hand, change a proper burgage holding into a feu, and thus derange or confuse the whole registers of sasines through the country. If such a case occurs, it will be dealt with on its proper merits when discussed.

"The present case, however, rests on a specialty which supercedes every argument on the view of the case now indicated. When the particular terms of the title under which the Magistrates hold the superiority of these feus are referred to, it appears that they were specially empowered and authorised to grant feus of the lands specified in the libel. This was tantamount to a permission to the Magistrates to change the holding; and when that is effected by a regular charter of feu, it seems out of the question to hold that the infeftments and transmissions of the feu can be properly or competently recorded in the register of burgage holdings."

The defenders reclaimed. At advising,

Lord President.—There are here two questions. The first, what is the true tenure of the property? and the second, were the sasines taken in it validly registered? As to the first, it is evident that the lands were anciently within burgh; for they are declared to be held "*libero burgagio*." Still it is clear from the charter of 1551 that power was given to the Magistrates to grant the lands in feu, no doubt under restriction as to the persons to whom they were to be feued, and also as to the *reddendo*,—making them partake very much of the nature of a mixed grant—partly feu, partly burgage. The Magistrates accordingly appear to have made grants of this nature; but in course of time their character greatly varied, till at last, as in the case of Udney Duff in 1774, the *reddendo* became just a common feu-duty. Now, whatever may have been the form of the grants made in ancient times, it must be admitted that that in favour of the pursuers' authors was just a grant in feu, and not in burgage. It has all the characteristics of a feu-holding, and the additional stipulations to pay taxation, &c., will not alter its nature. The grant from the Crown authorised the Magistrates to grant such feus. And when I see the great tracts of country attached to certain burghs, as that of Ayr, it would be very extraordinary if, when the exigencies of the burgh required it, they should not have been permitted to exercise the power of making such grants in feu. Here the power was expressly conferred on the Magistrates, and they have legally exercised it by making a grant, *de facto*, feu, and not burgage. In the case of Glasgow, the Court gave effect to the express words of the charter. They did the same in the case of Dumbarton, which has been said, but I think incorrectly, to be contrary to the case of Denny. As to the first question, then, I am clear that the holding is feu.

As to the second question, I am also clear, both from the Statutes and a series of adjudged cases, that the sasine was not validly recorded in the burgh register; and the precept in the original charter is still unexhausted. It is attempted to set up the plea of *communis error*, but I have great doubts if a *communis error*, as to any particular district, can be pleaded against the general principles of law. On this point I would rather adopt the doctrine of Lord Moncreiff in the case of Yeats, and that of Lord Corehouse in that of Perth. But there is another consideration which goes still farther to weaken this plea of *communis error* in the present instance. This is not a case where the right of property is involved, and where there might be a very great hardship in proceeding on technical grounds to deprive the losing party of property which he might have onerously acquired. All that the pursuers wish to have declared is, that the lands are held in feu; that the entry of the sasine in the burgh register must be held *pro non scripto*; and that nothing has yet been done to preclude them from calling for infeftment on the precept in the original charter. I think they are entitled to have these things declared, and that the Lord Ordinary has done right in so finding.

Lord Mackenzie.—I am of the same opinion. The *dominium utile* is evidently held feu, and not burgage; and though the lands were got as part of the common property of the burgh, to be held burgage, it was with an express power to grant feus; and they have used it. The oldest grants are feu, and not of the nature of burgage. Resignation was not made in the hands of the bailies as commissioners for the Crown, but as magistrates acting for themselves. Then the *reddendo* is not burgal services, but a feu-rent accompanied with feudal casualties. It is true certain conditions are added which are not *naturalia* of feus. They are, however, not inconsistent with them, and cannot have the effect of turning the tenure into burgage. In fact, most of them are implied in the jurisdiction of the Magistrates, and their grant of sheriffship. There is a case to which the parties have not referred—the case of Burnet, where it was proposed to expunge conditions like the present, as inconsistent with the nature of a feudal grant. The Court said there could be no harm in keeping them in. Burnet objected to them as personal services. But the opinion of the Lord President (Hay Campbell), was, that they were of no use, and that the best thing which could be made of them would be to found a claim of compensation under the Jurisdiction Act. As to the validity of the registration, this appears to me the clearest of all the cases in which the question has been raised. The defenders have argued ably in favour of its validity,—maintaining, that though the grant in question was in feu, yet as the original grant was in burgage, as part of the common good, all sasines taken in it must or may be registered in the burgh register. This is a point which I might not have thought very clear originally, but it is not now open. For it was decided in the case of Davy, and has been assumed in all cases since that, where lands are held in feu they cannot be recorded in the burgh register, because the superiority is burgage. This was also clearly laid down by the House of Lords in the case of Dawson. I am not, therefore, entitled to listen to any argument on the terms of the Statute in favour of an opposite view. By the decisions all doubt is solved, and the question is exhausted. The defenders have also attempted to set up the plea of *communis error*. I have some difficulty in seeing how it is made to bear. Now that the error has been found out, is the vassal bound to continue satisfied with a bad title? Besides, it is not easy to see how an erroneous practice in the town of Aberdeen can amount to a *communis error*. Is every town to have the privilege of committing mistakes, and then pleading them against the Statute as *communis error*?

Lord Fullerton.—I agree entirely with your Lordships. As to the first point, I have not the slightest doubt. Though the lands were held burgage by the burgh, it is clear that they had the right of granting them in feu, and that they exercised it. It is impossible to read the title without perceiving that the lands are to be held in feu-farm, and nothing else. Many of the appended stipulations are more usual in burgage, but these cannot alter the nature of the grant. The only remaining question is, in what register ought the sasines to have been recorded? Looking merely at the Statute, the question is not free from doubt; and no wonder: for what it refers to are proper burgage sasines

to parties holding burgage; and this is the general case—it not being usual to grant out in feu what is held in burgage. Here, in consequence of the privilege to grant feus, this anomaly has arisen, that the superiority is burgage, and the *dominium utile* feu. At first, there might seem some difficulty in determining how the Statute is to affect such a state of matters. The Statute 1617 is not very clear; but the Statute 1681 evidently means by lands “holding burgage,” not merely lands held by the burgh, but also by the vassals in burgage. It is needless, however, to discuss a question which has been set at rest by a series of decisions.

Lord Gillies absent.

The Court adhered.

Lord Ordinary, Cuninghame.—Act. Dean of Faculty (Wood); Moir, Inglis and Donald, W.S., Agents.—Alt. Hunter; Gordon and Barron, W.S., Agents.—B. Clerk.—[H. B.]

25th May 1842.

SECOND DIVISION.—(G.D.F.)

No. 173.—THE BANK OF SCOTLAND, *Raisers*.
MESSRS LOCKHART, HUNTER and WHITEHEAD, W.S.,
and JOHN KIRKPATRICK, *Claimants*.

Competent and Omitted—Discharge—Personal Bar—Circumstances in which a party, who, as a residuary legatee, was decreed to pay a sum of money nomination to the parties claiming it, against whose title a valid objection was said to exist, and the decree was allowed to go out and be extracted in their name, was held not entitled thereafter to urge the objection, to the effect of compelling them, or those through whom they claimed, to make up a title by confirmation, which, it was alleged, was necessary to cure the defect.

Branch of the previous case *supra*, p. 395. The claimants, Messrs Lockhart, Hunter and Whitehead, had assigned to them the several accounts incurred by the various law-agents who had been engaged from time to time in making good the claim for legitim; and they themselves had also been engaged in that capacity. Towards payment of these claims, which exceeded the sum consigned by the other claimant, in the previous case, they obtained decrees against Mr Minto, and further, became vested in the right of Mr Gavin, for whose behoof the previous case had latterly been insisted in, and thereafter they arrested the sum consigned in the hands of the Bank of Scotland. The bank then (1837) raised the present multiplepointing, in which Messrs Lockhart, Hunter and Whitehead claimed the whole fund.

Kirkpatrick objected to the fund being uplifted until a valid discharge should be granted to him for the legitim, which, he maintained, the other claimants were not in a situation to do; that Messrs Minto and Gavin had no right to any part of Miss Sime's succession, as Mrs Clephane had never confirmed to Miss Sime; and that such discharge could only be granted by Mrs Minto making up a title by confirmation (a procedure which had never been adopted by Mrs Clephane or any one else) to the late Miss Sime. If Mrs Minto made up such a title, Mr Kirkpatrick stated he would then be safe; for that lady, besides having the right to discharge, would be obliged to find caution, in respect of her not being an executor-nominate.

Messrs Lockhart, Hunter and Whitehead *pleaded*, that this objection was untenable, because the right of Messrs Minto and Gavin to the fund was already established by the decrees of the Court: That decree and warrant of payment of the fund *in medio* having

been pronounced, and afterwards extracted in favour of Messrs Minto and Gavin (in whose right the claimants stand), without any reservation as to a discharge of the legitim, and without reservation or objection of any sort, it was now incompetent, and too late for Mr Kirkpatrick to urge any such objection, even supposing that objection had been otherwise in itself well founded: That the matter was truly *res judicata*; and Mr Kirkpatrick's objection was at least of no more avail than a plea competent and omitted.

These claimants, besides, gave in a minute, signed by Mr and Mrs Minto and the several parties interested, consenting to allow the claimants to draw the fund *in medio*; in regard to which it was maintained, that it took away any objection that existed to their uplifting the consigned sum. Kirkpatrick however maintained, that the objection still continued, in respect that there was no confirmation to Miss Sime's estate. Thereafter, the claimants, as in right of certain debts assigned to them, confirmed as executors-creditors of Miss Sime, finding caution in usual form.

The Lord Ordinary, in respect of contingency between this question and the previous case, ordered cases thereon for the Inner-House, who disposed of the question at the same time as the previous question.

The Court, of this date, repelled Mr Kirkpatrick's objections, upon the ground, apparently, that after the interlocutor ordering payment of the consigned money to Messrs Minto and Gavin, it was too late for him to object to the title.

The Court

“Repel the claim for John Kirkpatrick in this multiplepointing, and prefer the claimants, Messrs Lockhart, Hunter and Whitehead, to the fund *in medio* in terms of their claim, and decern; and grant warrant to uplift the consigned money: Find the said Messrs Lockhart, Hunter and Whitehead entitled to the expenses incurred by them; allow an account,” &c.

Lord Ordinary, Cockburn.—Act. Marshall, Macfarlane; Lockhart, Hunter and Whitehead, W.S., Agents.—Alt. H. J. Robertson; Æneas Macbean, W.S., Agent.—F. Clerk.—[G. D. F.]

26th May 1842.

SECOND DIVISION.—(G.D.F.)

No. 174.—LOCKHART and SWAN, and W. PAUL,
Swan's Trustee, Raisers.
NORMAN LOCKHART, CHARLES FERRIER, and JOHN
M'NEILL, *Claimants*.

Compensation—Retention—Concursus debiti et crediti—A copartnership were found liable in a sum of money to X, a creditor, who had previously executed a trust-deed for behoof of creditors. Thereafter, one of the partners, when the firm was dissolved, acquired right by assignation to a debt due by X, and attached the same by arrestment in the hands of the company, and of the individuals who had constituted the firm. In a competition for the company debt between this partner and X's trustee—Circumstances in which held that the partner was preferable to the trustee: the main ground being, that the trust-deed merely conveyed the trustor's heritage as a fund of payment to his creditors.

Messrs Lockhart and Swan, W.S., were the professional agents of Captain Malcolm M'Neill of Gallohill, who, by serving heir, had incurred a universal liability for the debts of his deceased brother Hector; and in the management of his affairs, Messrs Lockhart and Swan had various pecuniary transactions with the

view of extricating M'Neill from his difficulties. It was found necessary, however, for him to execute a trust-deed for behoof of creditors, which he did in August 1829 in favour of the claimant Ferrier as trustee. The nature of this deed was differently stated by the parties,—the one contending that it was the intention of parties, as in fact it operated in law as a disposition *omnium bonorum* to the trustee; while Mr Lockhart maintained, both from the terms of the deed, and the correspondence preceding its execution, that it was only a conveyance, as it was meant at the time to be, of Captain M'Neill's heritage—not of his moveables. This deed undoubtedly conveyed the heritage, but there was no express conveyance of the personal property to the trustee, which Lockhart averred Captain M'Neill always possessed thereafter uncontrolled.

In 1831, an action was brought in name of Captain M'Neill against the firm of Lockhart and Swan, with the view of compelling them to account for their intrusions, either on account of the estate of the deceased brother Hector or the Captain himself, and concluding for payment to the pursuer personally of £5000, more or less, as should be found to be due by them. This action resulted in a submission to accountants, who brought out a balance against the firm, by this time dissolved by reason of the bankruptcy of Swan, of £1186. 19. 9½. Previous to decree being obtained for this sum, considerable discussion took place as to the parties entitled to sist themselves in room of M'Neill, who by this time was settled in America. Mr Ferrier attempted to sist himself, as deriving authority through the trust-deed, but the Court (*ante*, Vol. IV. p. 581), apparently holding that the trust-deed was not a universal conveyance, but only of the heritage, refused to allow Ferrier to be sisted, as not entitled to be so in terms of that deed. But thereafter the instance was taken up by the claimant John M'Neill, who held a general commission and factory from Captain M'Neill, and he appeared in the cause, with Mr Ferrier as his mandatory, and in consequence, on production of a minute to that effect, the Lord Ordinary

"holds John M'Neill, Esquire of Parkmount, Belfast, sisted as the pursuer of this action, in terms of the foregoing minute: Farther, holds Charles Ferrier, Esquire, accountant in Edinburgh, sisted as his mandatory, in terms of the mandate which has this day been lodged for him; and finds that sufficient authority has now been produced for carrying on this cause."

Thereafter decree was pronounced in February 1839 in their favour, for the sum found due against the firm and the individual partners thereof.

Ferrier averred, but it was denied, that he had executed and carried on this action, though in name of M'Neill as his assignee in trust, for behoof of the creditors generally; and it appears he had obtained in February 1839, in order to obviate any objection on the ground of want of title to discharge the above debt and decree, an assignation from the other claimant, John M'Neill, who held the commission and factory.

The balance which was brought out by the accountants was, in the various accounts of Lockhart and Swan, incurred both prior to the trust-deed and subsequently, including the management under the trustee; and it did not appear that the firm of Lockhart and Swan, or Mr Lockhart as a partner, had, in the proceedings before the arbiters, maintained, in regard

to the balance to be brought out, that it was subject to be wiped off by compensation for the debt immediately to be referred to.

Mr Campbell of Glensaddell, who had been compelled to pay up a cautionary obligation for Hector M'Neill, for which Captain M'Neill was liable to him in relief, obtained in 1839 a decree in absence against him for £1999, and thereafter he proceeded to adjudge Captain M'Neill's heritage, and to bring the same to judicial sale. But before doing so, his agents, Messrs Lockhart, Hunter and Whitehead, wrote to the agents of Mr Ferrier, that unless Mr Campbell obtained from him, on or before Friday next, a personal obligation that a payment of 5s. or 7s. per pound should be made within four months, he would proceed with a sale of the property. Mr Ferrier, in order to resist the judicial sale, wrote in answer, as follows, to his own agents, which was communicated to Mr Campbell's agents:

"Your favour, annexing me copy of Lockhart and Co.'s letter of 15th, anent the claim of Mr Campbell of Glensaddell against the estate of M'Neill of Gallochilly, has been received. I dislike coming under obligations in the affairs of others, but I have no objection to pay, when it shall be agreeable to Mr Campbell to receive the money, 7s. in the pound upon his debt, as originally constituted by decree, and as the same stands calculated at the date of the trust in my favour,—upon condition of his acceding to the trust-arrangement, and trusting to my management and proceedings. This is putting him upon the footing of the other creditors, and will not exclude him from receiving, along with the rest, all the interest which the funds will yield subsequent to the trust."

Mr Campbell instructed his agents thus:

"You may conclude with Mr Ferrier according to the terms of his letter to Messrs Cunningham and Walker, provided the sum alluded to shall amount to £550, and shall be paid to my account with Sir William Forbes and Co. here, within ten days from this date."

Mr Ferrier accordingly paid into the hands of Sir William Forbes and Company the sum of £550. Thereafter Mr Campbell, in September 1835, assigned his claims and decrees in his favour, on payment of the £550, in favour of the claimant Lockhart, who thereafter (September 1838) used arrestments in the hands of Lockhart and Swan, and in the hands of the individual partners of the dissolved company, viz., in the hands of himself, and of Swan and his trustee, in security of the debt of £1999, under deduction as aforesaid; and these arrestments came to attach the sum due by Lockhart and Swan to Captain M'Neill, in terms of the above decree-arbitral. Ferrier averred in this process, that this assignation was obtained at an undervalue, and after Captain M'Neill was rendered bankrupt; and that he obtained it for the express purpose of a preference over the other creditors. M'Neill's bankruptcy was however denied, as well as the other averments; and it was shown from the letters in process, that Ferrier was aware of the existence of the assignation soon after it was granted, and that Mr Lockhart, in discharging the inhibition and adjudication used by Campbell, expressly had reserved his claims in reference to that assignation.

In the present multiplepoinding, brought by the raisers for restitution of the £1186 found due by Lockhart and Swan, Lockhart claimed the whole fund *in medio*, in terms of his diligence and assignation from Campbell.

The fund was also claimed by Mr Ferrier and Mr

John McNeill, Captain McNeill's commissioner, on the ground of the decerniture against Lockhart in their favour, and they objected to the assignation by Campbell to Lockhart, in respect that Campbell having acceded to the trust, in terms of the arrangement by which the £550 were paid him, neither he nor his assignee were entitled to follow out separate measures against McNeill's estate. But in terms of the trust-conveyance, which, it was maintained, was a disposition *omnium bonorum*, the trustee pleaded—That the fund of £1186, due by Lockhart and Swan, fell to be treated as having been taken up by that conveyance prior to Campbell's assignation, and so vested in the trustee for behoof of the general creditors, and that, accordingly, he was entitled to be preferred for the amount. It was, besides, argued, that as Mr Lockhart had not pleaded compensation before the arbiters in the count and reckoning, at which time the plea was perfectly available to him, he was not now entitled to do so; but it must be held as "competent and omitted." There were other pleas advanced for this party, which were entirely dependent on a great variety of circumstances connected with the case, correspondence, &c., which were founded on as showing the understanding of parties as to the trust-deed being general, and as amounting to personal exception against Mr Lockhart now pleading retention. It was also pleaded, that the arrestments used by Lockhart, particularly those in the hands of Lockhart and Swan, were totally inept,—that company having been dissolved long previously (Ersk. III. 6, 2), in consequence of which there could be no execution against a company which did not exist.

Lockhart maintained that he was precisely in the same situation as his cedent, Mr Campbell; and unless it could be shown that Campbell was precluded from insisting for his claim, he, the claimant, was in no way debarred in the circumstances, but entitled to all the privileges and rights of his cedent; that he was entitled to compensate the debt due by him to Captain McNeill with the debt due to him, Lockhart, by that party; and that the debt in question was not conveyed by the trust-deed to the trustee, since heritage was alone conveyed, as had been settled previously in the case (*ante*, Vol. IV. p. 581), and as it was, besides, apparent from its very terms. And, in consequence, it was explained, that Campbell, by taking payment of the £550, and acceding to the trust, did so only to the extent of reaping payment from the heritage, and did not thereby give up his claims for the balance: nor did he tie up his hands from using separate measures as against the moveable property, which was not conveyed to the trustee. If the assignation to him had been unwarranted, a reduction should have been brought; but as that was not the case, Lockhart had clearly no competitor, but was merely seeking payment out of the funds of the debtor himself. Then, as to the point that the decree obtained by these claimants against Lockhart effectually vested Ferrier, &c., in the sum due by the decree-arbitral, that decree was directed against him as a partner of Lockhart and Swan; but in the present question, Lockhart was insisting—not as a partner of that firm, or for their behoof, but for payment of a debt as due to him in his individual capacity. Ac-

cordingly, the arrestments were perfectly valid, and in no way liable to exception, at least, not so liable on the pleas set forward by the other claimants; and whatever technical difficulties might have been stated to his claim here, had he claimed of or for behoof of the company, was obviated by the fact that he claimed as an individual. And, on the same ground, the plea of competent and omitted, which was now raised, could only operate as against the firm of Lockhart and Swan, or as against Lockhart claiming as a partner; but it could have no effect as pleaded against him in his individual capacity, in which alone he was insisting. Then, again, he was not engaged, in his individual capacity, in the discussion and proceedings before the referees, and, accordingly, could not be compromised, in so far as his individual debt was concerned. On the whole, even supposing that any objection could be stated to the arrestments, he was entitled to retention of the debt due by him, in respect of the competent and complete "*concursus debiti et crediti*."

In regard to the alleged bankruptcy of McNeill, it was explained, that though caption had been issued against him, and an execution of the messenger had been returned that he could not be found, the debt was for a large sum of money not really due; for the House of Lords, on the review of the case in which the sum was claimed, reversed the decision, and McNeill was found liable for only a small part. He was in course of obtaining a review of the judgment when the diligence was used.

Of consent of parties the case was reported by the Lord Ordinary.

At advising,

Lord Moncreiff considered that the whole pleas maintained for Mr Ferrier in his minute of debate were groundless; that it was settled by the Court long ago, that the disposition was a mere conveyance of heritage: not of McNeill's moveable property; and accordingly, that Mr Ferrier could not claim such a personal debt as here in question. His Lordship held that the terms of the deed showed expressly that it only was a conveyance of heritage. The decree against Lockhart was merely a decree against him as a partner of the company—not as an individual; and though the company did not exist actually, and was dissolved, the company might still subsist to wind up. Then Mr Lockhart, as an individual, having obtained right to Campbell's debt, there were the necessary elements to enable him to plead compensation. And he is entitled to do so: for the argument against him proceeds on a steady adherence to this, that the debt was carried by the trust-deed, which, it is clear, it was not. There was here really no competition at all. It was said that McNeill was bankrupt when the debt was acquired; but it is impossible to hold that; and the circumstances were well cleared up by Lockhart. Then, it was said that Campbell was barred, and therefore his assignee, from taking separate measures by acceding to the trust; but that must be understood in so far only as separate measures were not to be directed against the property comprehended in the trust, but not against what was not trust-property, viz., the moveables. The arrestments were perfectly good in the circumstances. As to the assignation being concealed by Mr Lockhart, and also his measures, the assignation was put into Mr Ferrier's hands, and, consequently, he must have been prepared for the plea of compensation; and, accordingly, it was said that the plea of compensation fell as "competent and omitted;" but his Lordship considered that that plea did not apply, in respect Mr Lockhart was here claiming—not as a partner of Lockhart and Swan, but as an individual;—and he was not bound to have stated the plea at the time of the count and reckoning, however open to him. His way was to raise a multiple-

pointing in name of the company, and to claim in it as he has done here.

The other Judges concurred, and the Court pronounced the following interlocutor:

"Repel the claim of Charles Ferrier, and rank and prefer the claimant, Norman Lockhart, in terms of his adjusted concordance and claim, to the whole fund *in medio*, and decern in the preference, and for payment accordingly: Find the claimant, Charles Ferrier, liable in the whole expenses of process; allow an account," &c.

Lord Ordinary Cockburn, for Jeffrey.—Act. Rutherford, Miller; Lockhart, Hunter and Whitehead, W.S., Agents.—Alt. A. Anderson; Cunningham and Walker, W.S., Agents.—F. Clerk.—[G.D.F.]

27th May 1842.

FIRST DIVISION.—(H. B.)

No. 175.—*MRS FORSTER and HUSBAND, Pursuers, v. CHARLES TOD and OTHERS (J. O. Tod's Trustees), Defenders.*

Settlement.—Trust.—Clause—*A testator conveyed his property to trustees, with an injunction to pay over the annual free proceeds to his daughter during her lifetime, or failing her to her children, till they attained majority, when the fee was to be paid over to them, and the trust was to cease, but expressly provided that the accounts of the trustees "shall be annually produced to, and examined by, an accountant of character and experience to be chosen by the said trustees or trustee, and after being examined and passed by him, shall be fitted and docketed by the said trustees or trustee, and which shall operate as a complete exoneration to them or him accordingly, it being hereby provided, that neither the said" daughter, "nor any other party, or person or persons whatsoever, shall have any right or title to inquire into, or interfere with the management, nor to quarrel or impugn the accounts of the said trustees or trustee, or their cashier or manager, or others acting under his or their authority, nor to object to any article for which they or he shall take credit, after the same has been examined and passed by the said accountant, as aforesaid"—Held that the daughter and her husband had no right to see the trustees' accounts and vouchers annually, before being audited and reported on by an accountant, and to have an opportunity of stating objections thereto, if necessary, and of being heard thereon.*

By deed of settlement, the late James Ogilvie Tod of Findrassie conveyed his whole property, heritable and moveable, to trustees, with the power of assuming others, for the following purposes: *inter alia*, sixthly, "My said trustees or trustee, surviving and accepting as aforesaid, shall be entitled, immediately after my death, to uplift and discharge the rents of my heritable property during the subsistence of this present trust as aforesaid, to output and input tenants, prosecute warnings and removings, to grant tacks for such periods as he or they shall think fit, and in general, with full and ample power to manage my estate of Findrassie in every respect, both with regard to improvements and the general management thereof, according to his or their own sound discretion, and particularly, to carry through all improvements that may be in progress at my death, and to defray the expense thereof out of my means. *Seventhly*, I appoint my said trustees or trustee, surviving and accepting as aforesaid, to put my daughter, the said Helen Tod, in possession of the mansion-house of Findrassie, with the garden, lawn, and policies thereof, and to deliver over to her, on inventory, my household furniture, books and plate, all to be bruiked and enjoyed by her during her life; and farther," after deducting certain yearly payments, "and the annual expense of management, and parochial and public duties affecting the property, with the expense from time to time that may be laid out on improvements, to pay over to the said Helen Tod the free yearly proceeds of my heritable and moveable estates during her life; and in the event of her

marrying, and having a child or children of such marriage, and dying before such child or children attain majority, to pay over the same for the use and behoof of such child or children till majority." "Ninth, It is hereby provided and declared that my said trustees or trustee, surviving and accepting as aforesaid, shall have full power and authority to appoint any one of their own number as cashier and manager, or any other person he or they may see fit, and that such person or persons so appointed, as well as the trustees or trustee themselves, in so far as may be necessary, shall keep regular accounts of their intromissions with, and application of, the funds coming into their hands; which accounts shall be annually produced to, and examined by, an accountant of character and experience to be chosen by the said trustees or trustee, and after being examined and passed by him, shall be fitted and docketed by the said trustees or trustee, and which shall operate as a complete exoneration to them or him accordingly, it being hereby provided that neither the said Helen Tod, nor any other party, or person or persons whatsoever, shall have any right or title to inquire into, or interfere with the management, nor to quarrel or impugn the accounts of the said trustees or trustee, or their cashier or manager, or others acting under his or their authority, nor to object to any article for which they or he shall take credit, after the same has been examined and passed by the said accountant as aforesaid."

The trust was to subsist and be effectual during the lifetime of the truster's daughter, Helen Tod; "and in the event of her marrying, and having issue of such marriage, and dying before such issue attain majority, it is in that event hereby further provided that the trust shall subsist till such issue attain the age of majority." Failing Helen Tod and her issue, the whole trust-property was to be divided among his brothers and sisters,—several of the former being trustees under the deed.

Miss Helen Tod (now Mrs Forster) not being satisfied with the management of the trustees, brought the present action of declarator, count and reckoning, &c., in which, after claiming certain buildings as pertinents of the mansion-house, lawn and policies, and alleging that the trustees, by improper management, had caused great losses to the estate, she concluded to have it found and declared, *inter alia*, that she

"is entitled to see the defenders' accounts annually, before being audited and reported on by an accountant, in terms of the said deed of settlement, and to have an opportunity of stating objections thereto if necessary, and of being heard thereon; and that the defenders are not entitled in any one year to expend more of the rents or produce of the means and estate of the pursuer's said father, under their management, than is sufficient for defraying a reasonable expense of management, paying the provisions thereby stipulated, and the public and parochial burdens, and making judicious improvements on the said estate from time to time, so as always to leave a sufficient sum yearly for the suitable support of the pursuer, her family, and establishment, and the proper upholding of the said mansion-house, garden, lawn, and policies, with the pertinents thereof, during her life: And the defenders ought and should be decerned and ordained, by decret *foresaid*, to hold just count and reckoning with the pursuer for their intromissions with the rents, interests, and produce of the whole means and estates of her said father, and exhibit and produce the vouchers of their expenditure, and to make payment to the pursuer of the balance which is or ought to be in their hands, after making all legal and proper deductions as aforesaid, including the deduction of all sums paid by the defenders to the pursuer to account of her income since Whitsunday 1837."

Pleaded by the pursuer—1. The defenders are bound to hold just count and reckoning with the pursuer for their intromissions and management since the commencement of the trust, and in time coming. 2. There

is no declaration in the trust-deed, which, according to a just or sound construction, entitles the defenders to refuse exhibition to one so directly interested in the estate as the pursuer is, of the vouchers of their past or future intrusions and management. 3. The audits by the accountant are not conclusive against, or binding on the pursuer, seeing especially that they proceeded in her absence, and without affording her an opportunity of seeing the vouchers, or being heard for her interest. 4. The defenders are not entitled to charge against the trust-estate the sum of £10,000 lent to the Marquis of Huntly, or other loans or investments made without due inquiry and caution regarding the sufficiency of the securities. 5. The defenders are bound to put the pursuer in possession of the policies of Findrassie, as well as the offices attached to, or near the mansion-house, and a remit should be made to proper persons to examine the premises, and report before answer.

Pleaded by the defenders—1. By the terms of the testator's trust-deed, the pursuer is debarred from interfering with, or questioning the management of, the defenders in the manner proposed in this summons. 2. The pursuer's allegations against the defenders of illiberality, extravagance, and injustice towards her, being unfounded in point of fact, the declaratory conclusions of this summons, which are based upon them, are uncalled for and unnecessary. 3. The defenders having undertaken gratuitously the office of trustees, from respect to the memory of the testator, and from the disinterested desire to promote the pursuer's interest, and having carried on the trust-management in *optima fide*, according to the directions of the testator, to the best of their judgment, are entitled to be assoilzied from the conclusions of this groundless and unnecessary summons.

The Lord Ordinary pronounced the following interlocutor:

"17th July 1841.—The Lord Ordinary having heard the counsel for the parties, and considered the process, Finds, in reference to the two first conclusions of the libel, that the pursuer is entitled, in terms of the trust-deed, to be put into possession of 'the mansion-house, with the garden, lawn, and policies thereof,' but that she is not entitled to the possession of pertinents over and above these; and before further answer as to these conclusions, of consent remits to to inspect the premises, and to report whether the pursuer has been put into possession of the policies, and if not, in what respect this has not been done: Sustains the defences against both parts of the third conclusion, assoilzies the defenders therefrom, and decerns: Finds, in reference to the fourth conclusion, that the defenders are bound to hold count and reckoning with the pursuer, but that in doing so the accounts, as fitted and docketed by them, after being passed by the accountant, must be held conclusive, and that the pursuer is not entitled to quarrel or impugn these accounts, and that the defenders are not bound to exhibit or produce their vouchers: And in respect of the insufficiency and irrelevancy of the pursuer's averments regarding the loan of £10,000 to the Marquis of Huntly, repels her fourth plea, and finds that the estate has been, and may be, properly charged with the loss arising from this transaction: Reserves, *hoc statu*, all claims of expenses.

"*Note*.—The pursuer's father chose to place her in a very peculiar situation, and all her present claims must be determined by reference to the terms of the trust-deed.

"1. Under her two first conclusions she demands not merely the mansion-house, garden, lawn, and policies, but the *pertinents*, which, when explained, means that she wants the offices, particularly a stable. Certain circumstances make it not im-

probable that the truster intended to reserve these entirely for the use of the home farm. But at any rate, he does not give them. All that he permits his trustees to let his daughter have the use of, is the house, garden, lawn, and policies; and the offices, which are not in actual contact with the mansion, cannot be held to be a part of it. It is possible, however, that these may be brought within the meaning of the word 'policies,' in which case she may get them, though not as a pertinent. But it is very difficult to ascertain from a plan, whether she has or has not got possession of what ought to be deemed the policies, and therefore we must wait till the report which has been consented to be obtained.

"2. What she demands under the first part of the third conclusion, viz., inspection of the accounts, in order that she may 'have an opportunity of stating objections thereto, if necessary,' could not be resisted in any ordinary case. But it cannot be granted under this very particular deed. It was plainly the truster's object to put his affairs entirely and absolutely under the charge of his trustees. Accordingly, he first prescribes how they are to proceed. They are to keep accurate accounts. These are to be annually examined by an accountant of character and experience, to be chosen by them, and if he passes the accounts, they are to be fitted and docketed by the trustees, and 'are to operate as a complete exoneration of them.' The pursuer maintains that this result only takes place *after* the final docketing, and that she is entitled to see the accounts and vouchers, and to state objections prior to this conclusive fitting; and if there was nothing in the deed to exclude this, the Lord Ordinary would have been strongly inclined to accede to what is so generally reasonable. But there certainly may be circumstances which may make a truster wish to put those who are first to succeed him *entirely* under the control of trustees whom he allures into that office, chiefly by the belief that they are protected against all interference or annoyance; and the Lord Ordinary is of opinion that this is the import of this deed. The truster does not merely prohibit the pursuer from *quarrelling or impugning* the accounts, and *from objecting to any article* taken credit for after auditing, but he declares generally that she shall have no right or title to inquire into, or interfere with the management. The Lord Ordinary cannot reconcile a decree in terms of the first part of the third conclusion with this clause. Such a decree would totally change the position and the authority given to the trustees by the deed.

"Under the second part of this conclusion, she insists that the defenders shall conduct their expenditure and general management in such a way as always to leave a sufficient sum yearly for the suitable support of the pursuer, her family and establishment, and the proper upholding of the said mansion-house, garden, lawn, and policies, with the pertinents thereof. It might possibly have been very proper in the truster to set his daughter up in this way, but unfortunately he has not done so. He has put every thing he had under the charge of trustees; and though he has directed them to pay over to the said Helen Tod 'the free yearly proceeds of my heritable and moveable estates,' he has made them the sole and ultimate judges of what shall be held to be the free residue. Not satisfied with giving them full and ample power to manage 'my estate of Findrassie' in every respect, both with regard to improvements and the general management thereof, according to his or their sound discretion, he prohibits her from interfering with the management, and from even inquiring into it. But this conclusion not only implies her right to inquire and to object, but greatly extends her privileges under the trust. The deed says nothing about the suitable support of her family and establishment, the upholding of the house or pertinents.

"3. Still, however, they are bound to hold count and reckoning with her as demanded, under the fourth conclusion, for they are her debtors for the free annual profits of the estate. But under this, what the pursuer really wants is, to get hold of the vouchers, with a view to object to the trustees' charge and discharge, and to have it found that they cannot take credit for the sum lost by a loan to the Marquis of Huntly. Now the Lord Ordinary thinks himself called upon to protect the trustees on both of these points.

"If the pursuer be not entitled even to inquire into the management, or to object to any article in the accounts, she has

no interest to see the vouchers; and accordingly, the only interest which she states is, that she may infringe the trust-deed by doing these very things.

"The loan stands in a different position. The trustees are protected from responsibility for loans, provided the borrowers were reputed solvent at the time. The pursuer, therefore, can only deprive them of this protection by averring that the person they lent to was not reputed solvent. But she makes no such averment; and when the Lord Ordinary offered to allow her to put such an express statement on the record, she declined to do so, on the ground that she had already averred sufficiently. He does not think that she has. She only sets forth that in point of fact the borrower was insolvent, and that this might have been discovered; but this is not the criterion of responsibility given by the truster."

When the cause was advised the Court unanimously approved of the findings of the interlocutor, with the exception of that relating to the pursuer's right of inspecting the accounts, as to which, being equally divided, they, with a view to consult the other Judges, ordered minutes of debate "as to the pursuer's alleged right to see the defenders' accounts and vouchers annually, before being audited and reported on by an accountant, and to have an opportunity of stating objections thereto, if necessary, and of being heard thereon."

The following opinions were returned:—
Lord Justice-Clerk (Hope):

"The question put to the Judges by their Lordships of the First Division is much more limited than the findings of the Lord Ordinary as to the conclusions of the summons regarding the pursuer's interest in the accounts of the trustees. The question put to the Judges is simply, 'Whether the pursuer is entitled to require that the defenders' accounts, with the vouchers thereof, be annually exhibited to her before being laid before an accountant to be audited?'

"There is no question put as to the competency of making any case against the propriety of the audit when completed, or the extent to which the declaration in the trust-deed respecting such audit shall exclude charges of fraud practised upon the accountant, or collusion on his part, or as to the character and extent of the protection which the clause of the trust-deed may afford to the trustees against proper malversation, fraud, dishonesty, or gross abuse of discretion, either apparent on the face of the accounts as audited, or relevantly offered to be proved against the audit.

"The broadest clauses of protection may often be held not sufficient to screen dishonesty, or even gross abuse of the trust committed to the trustees, and may be construed to import entire independence and integrity, and the absence of unreasonable precipitancy, on the part of such auditor, as this deed supposes, viz., one nominated by the trustees. But such matters are not involved in the point stated for our consideration.

"The question put to us must therefore be considered apart from the interlocutor of the Lord Ordinary, or from the competency of redress at an after stage of the trust-management, if a case of dishonesty, collusion, or gross abuse of the trust were relevantly averred.

"Taking the limited question actually put to us, that point appears to me to be free from doubt.

"The leading, and, in my opinion, the regulating and important part of the ninth clause in the trust-deed, has not received the attention which is due to it, and is much overlooked in the argument of both parties.

"The deed—which is undoubtedly framed on the principle of investing the trustees with discretionary powers of the broadest character, and intrusts them with powers and duties of management very specially enforced and described—plainly proceeds upon the principle of preferring the management of the trustees to the management of the pursuer. In her no confidence is placed,—she receives none of the ordinary powers of a liferenter, whether of occupation or management. Affec-

tion towards her, and a desire for her welfare and good, were not wanting, for she is to receive the whole free yearly proceeds of the truster's heritable and moveable estates during her life: But with this benefit designed for her on the one hand, the truster (for the directions in the deed must be taken as the deliberate expressions of *his personal will on the subject*) has established, by a very anxious clause, a system of management in which, to say the least of it, the pursuer has no sort of concern, and which is intended to trust every thing to the trustees. In the ninth clause, power is, in the first instance, given to appoint any of the trustees cashier or manager, or any other person; then it is declared that these trustees 'shall keep regular accounts of their intromissions with, and application of the funds coming into their hands.' This is directory—it is explicit. And it is of importance, in reference to what immediately follows:—'For, after directing such accounts to be kept, the clause proceeds—'which accounts shall be annually produced to, and examined by, an accountant of character and experience, to be chosen by the said trustees or trustee; and after being examined and passed by him, shall be fitted and docketed by the said trustees or trustee, and which shall operate as a complete exoneration to them or him accordingly.'

"Into this clause I cannot interpolate any thing.

"This appears to me to be the leading and regulating part of this ninth clause: Not the part which follows,—which, though most argued on by both parties, is not, in my opinion, the material and regulating part of the deed. What follows is a proviso for the purpose of additional and more emphatic exclusion of the pursuer's interference, and as expletive, though perhaps in part unnecessary, of the declaration and provision now quoted.

"Now observe: The plan and system of trust-inquiry and examination here provided for, are complete, and carried out to the extent of exoneration. There is nothing wanting or imperfect in the system thus laid down, so far as I have quoted the clause. Accounts are to be kept by the cashier and the trustees. These accounts are to be annually produced to, and examined by, an accountant of character and experience. That accountant is to be chosen by the trustees. Then he is to examine the accounts, and to pass the same; and when so examined, and passed, and docketed by the trustees, in acknowledgment that they have no more to say, such audited accounts shall operate as a complete exoneration. The system is thus in itself perfect and complete. Whether expedient, was a point for the truster. A special tribunal for examination and inquiry is designated and constituted by the truster—the individual is to be chosen by the trustees. Whether their choice, if improper, might be a ground for challenging or disregarding the proceeding in any case of after-challenge, is not involved in the question put to the Judges. The tribunal being declared, and the individual chosen (the question implies no failure by the trustees in the discharge of that duty), his duty is that of examination and inquiry into the trustees' intromissions with, and application of the trust-funds.

"After such examination, his audit or decision is declared to be a complete exoneration. Such audit, therefore, is the tribunal chosen by the truster, and is at once the inquiry and exoneration which he has prescribed and required. That exoneration the trustees are bound to have—to the benefit and protection of that exoneration they are absolutely entitled.

"This is, in my opinion, the leading part of the whole clause. The remainder is either expletive, or contains an exclusion of the pursuer in matters beyond the above provision.

"In the provision above quoted, there is no allusion to the pursuer or other party interested in the funds. There is no exclusion of her, if she can appear and take a part in the matter. But there is no condition imposed upon the trustees in regard to her. They are to produce their accounts annually to the accountant. It is not said that they are to produce them to the pursuer. I cannot import such a condition and obligation into the trust-deed. There is no mention of her here. There is no duty in regard to her prescribed. There is no preliminary provision directing the accounts to be exhibited to her before production to the accountant as a precedent direction.

"The trust-deed is an utter blank upon such a point. I can-

not see the slightest warrant for interfering with the truster's deed by prescribing such a proceeding to the trustees.

"The reason for such a provision not being introduced (if one ought to inquire into the truster's reasons respecting the matter, which he had the absolute power to regulate according to his own will, judgment, and notions of expediency) is obvious and satisfactory.

"The truster chose his own tribunal. He preferred it to a judicial investigation—*inter alia*, because he meant to protect those in whose judgment and management he had such confidence.

"But he leaves the tribunal so chosen—the accountant—altogether free and unfettered as to the mode in which he is to discharge his duty. The truster chose and desired to leave that matter wholly to the discretion of the accountant to be chosen by the trustees.

"How the accountant is to discharge the duty intrusted to him, depends upon his judgment—on his views of the case and of the accounts presented to him,—upon the aid which his experience may suggest as necessary or expedient: And the extent of the inquiries he may make, or the aid he may require, may vary from time to time with the character of the accounts and vouchers of the transactions embraced in them, and with the estimate which he may be led to form of the prudence and propriety of the management, and of the views and intentions of the trustee.

"When accounts are to be examined by a court, they take such assistance as they find necessary. If they think the aid of any parties as objectors is proper, they give these parties an opportunity of making appearance. In many instances, they direct either general notice or individual notice of the proceeding. Their means of actual and personal examination are more limited than those of an accountant. They depend upon officers of Court, and on accountants. But they execute the duty imposed upon them (if not regulated by special enactment) in the way which they think best for the ends of justice, whether the mode of procedure is adopted for the particular case, or falls under some general rule of judicial procedure.

"Just so with the accountant. He has the same discretion and power of proceeding as to the party interested, which the Court has. The maker of the deed trusted to the accountant, being the tribunal which he chose for examination, audit, and exoneration, and had the absolute power to appoint. That accountant is not fettered as to the course which he should adopt, but neither is he to be interfered with or dictated to by the Court, in the course of executing his duty.

"If he thinks fit to call for the aid of the pursuer, as a party interested, or to allow her to appear, he will do so. But whether he should do so or not, is clearly left to him as the tribunal chosen by the truster. The pursuer has it in her power to apply to the accountant for leave to see the accounts and vouchers, and to have time and opportunity to object. To him she must apply as the party appointed to examine, audit, and exoner. He may grant or refuse the application as he pleases. Whether such a case of refusal could be stated as would found a ground of challenge, is not the point stated for opinion; and I give no indication even of opinion on that point.

"There may be many reasons for calling in the aid of the pursuer to assist in the inquiry, and the accountant, when he finds cause for that, may direct the accounts to be furnished to her, and may give her any latitude of objection and inquiry he chooses, if he finds that course either necessary, or a source of satisfaction to his own mind, or expedient.

"The character of the accounts may influence him. What is fitting or necessary one year (say, near the commencement of the trust-management, or of the accountant's knowledge of the trust-affairs), he may deem not to be so in another year. The existence of disputes with the trustees may, at one period, and according to the character of the dispute, be a reason with the accountant for calling in the aid of the pursuer to the examination, and for giving her the utmost latitude of objection. But at another period, and according to the character of the disputes and the conduct of the pursuer, the existence of disputes with the trustees may most properly and reasonably form, on the other hand, in the opinion of the accountant, an ample and satisfactory ground for not giving her a right to appear. On all these matters the accountant must decide for himself.

"This view appears to me to be a full and satisfactory answer to the pleas urged by the pursuer, that she ought to be found entitled to see the accounts, and to state her objections. The tribunal for examination and exoneration pre-eminently preferred by the truster, is designated and established by the deed. The accountant is trusted to and left unfettered as to the manner in which he is to perform his duty. The truster has relied upon his discretion, judgment, and impartiality; and has left to him to regulate the whole matter of inquiry and examination. To that accountant the pursuer must apply, and in his judgment the truster has reposed confidence. The accountant is to say, whether she shall see the accounts and take part in the examination.

"Whether, if he shall refuse, there may be ground of challenge against his proceedings in giving exoneration, may depend upon the special nature of the case for which redress is claimed, but is not the point put to the Judges, and might depend upon the *precise averments* made as raising a case for redress. There seems, however, to be no warrant for prescribing preliminary examinations of the accounts by the pursuer as a condition preceding their production to the accountant.

"I apprehend the whole subject of the examination of the trust-accounts, and of the exoneration of the trustees, is a matter peculiarly within the will, power, and discretion of the truster. There is no ground for interfering with his deed upon this point. He may have reasons perfectly conclusive to his own mind for an arrangement such as that established by this deed. The nature of the duties expected of the trustees,—his knowledge of the individuals, and in particular of the party primarily interested in the trust-deed;—many considerations may influence him in adopting a resolution to exclude legal inquiry, and to establish a mode of examination and exoneration for himself. No party benefited by that deed is entitled to complain, or to ask for any other mode of investigation. Had any other mode of examination been proposed, the truster might not have left such party any benefit whatever. When fraud, or collusion, or plain malfeasance in the exercise of the duty, shall be properly established as an objection to the exoneration, the law will, as in other cases, hold that the truster's own object is promoted by giving a remedy against such abuses, but further interference is, I think, unwarranted, for the truster had unlimited power of regulating the matter as he thought fit.

"There are many instances in which a particular mode of ascertaining certain facts, whether introduced in mutual contracts or in deeds emanating solely from an individual's own will and power over his property, is held to exclude the interference of a court of law.

"One of the strongest cases occurred as to a lease of coal in Mr Campbell of Islay's estate of Woodhall. The tenant was to be relieved from the burden of a lease in the event of its being ascertained, by the report of two persons mutually chosen, that the coal was unworkable with profit. The fact was, in the particular case, really indisputable; but the individuals named did not agree in opinion, and the parties could not agree in their selection of other individuals. The tenant applied to the Court by an action, to establish the failure of the coal, but it was held that one mode of inquiry alone having been agreed to, relief could not be obtained of the burden of the lease, ruinous as it might be, by any other species of investigation.—See *Dixon v. Campbell*, June 25, 1830. A stronger case could not well occur. The parties respectively chosen had differed in opinion. The lease did not provide for an oversman, and the mode of inquiry had, it might be said, failed to produce any result; but the only mode of ascertaining the fact, was the opinion of persons mutually chosen, and that opinion not having been obtained, the Court held that the contract of parties excluded every other mode of inquiry.

"Much more, surely, must the examination directed by an individual as to the right annual management of his own property, be allowed to remain without any interference through the medium of a court of law, by those taking benefit under that deed.

"Again, the trustees accepted on the faith of a distinct provision in the trust-deed, which contained no such direction as that stated in the question. I think they are entitled to rely on the trust-deed being acted on as framed. Like all other

trustees, they must, and ought to be exposed to the consequences, whatever they may be, of challenge, if a case shall be stated which, as between them and the truster, cannot be held to fall within the protections afforded by the latter's deed. But that is a very different matter from a direct addition to the duty prescribed by the deed, and which, under the question put to us, must be annually imposed on the trustees, over and above doing what the trust-deed directs.

"The remainder of the clause is in part expletive—in part it may be unnecessary, but in other parts, it goes into matters not provided for in the preceding part of the clause, and excludes interference by the pursuer in a way not previously directed,—It being hereby provided, that neither the said Helen Tod, nor any other party, or person or persons whatsoever, shall have any right or title to inquire into, or interfere with the management, nor to quarrel or impugn the accounts of the said trustees or trustee, or their cashier or manager, nor to object to any article for which they or he shall take credit, after the same has been examined and passed by the said accountant, as aforesaid."

"This section of the clause begins in a way which shows that it was in no degree intended to render the former less complete as a system of inquiry and exoneration, nor to detract from what was previously settled. The first provision declares, that neither the pursuer nor any other party shall have any right or title to inquire into, or interfere with the management. Now this is beyond the prior section as to the mode of exoneration. But it is very important. It takes away from the pursuer any right or title to inquire. Hence the pursuer has no title to ask for that which she now demands, whatever might have been the terms of the preceding clause as to examination.

"Further, this provision, it will be observed, excludes any right or title to *interfere with the management*. This plainly relates to, or at least includes, any attempt to alter, stop, or challenge the management *while it is going on, and before the acts are over*. This is of importance as to the attempt, in point of construction, to make the latter words, 'after the same has been examined and passed by the said accountant, as aforesaid,' bear back upon, and limit the exclusion of any right or title to *inquire into the management*, to an exclusion after the accounts are examined. The words '*interfere with the management*' plainly proves, that the first provision is more extensive, and comprehends an exclusion of any right or title to complain while the management is going on.

"But the closing words of the section cannot, in point of meaning, or in fair grammatical construction, draw back to, and control and limit the first provision, excluding the right or title to inquire into, or interfere with the management. This first provision is in object and substance different from that to which the closing words have reference. And these closing words appear clearly to me to apply only to the impugning of the accounts.

"But whatever opinion might be entertained as to the construction of this last section of the ninth clause, I could not hold that it interferes in any degree with the preceding section. Supposing that the whole of the section last quoted, is a provision applicable to the relative state of parties *after* the accounts have been examined, and is only *following up* and explanatory of the terms 'which shall operate as a complete exoneration to them' (terms in themselves requiring no explanation), still that mode of construing the last section, making it applicable exclusively to matters after the examination of the trust-accounts, leaves the view already stated as to the mode of inquiry and exoneration established by the first section of the clause, perfectly untouched: And with that mode of investigation, I do not think a court can interfere, without introducing and interpolating into the trust-deed a direction not contained therein, viz., that the accounts of the trustees, with the vouchers, shall be annually submitted to the pursuer before being produced to the accountant. This humbly appears to me to be a *manifest addition to the trust-deed*, and to resolve into an attempt by the Court to make what they may think a better deed than the truster has done.

"Whatever the truster has held to be satisfactory, must be taken by a court of law to be satisfactory. He was entitled to deliver to us the law upon this subject, as between the trustees—that is, *himself* (if no case of abuse is alleged) and the par-

ties interested. He was entitled to exclude any general principle of law if he chose. He was entitled to regulate all matters in which a court of equity might produce different results from that which he desired.

"The pursuer has a protection under the deed, to the extent to which the truster chose to give her any, viz., in the judgment of the accountant. To him she may apply: she may ask to be allowed to take part in the inquiry, in order to aid him. He has the power to allow that, though she has no title or right to demand it.

"What shall be such malversation and failure of duty on the part of the accountant as to establish a case of interference, in order to effectuate the object of the truster himself, is not now the point, and our opinion cannot be influenced on the specific question put to us by any judgment pronounced or to be pronounced on matters not before us.

"The general principle is, that the protection of the deed does not cover fraud or collusion, upon the very ground that such a case cannot be within the meaning of the truster upon any view or construction of the clauses. I must presume that the Division consulting us will guard that principle, if the averments on the record in this case are such as, in their opinion, to require that being done. With the aid of that general principle, in the event of a relevant case being established, and with the security of that mode of investigation and exoneration to which the maker himself trusted, the pursuer has all the protection which he thought was necessary, and further the Court cannot go."

Lord Murray:

"I agree with the opinion of the Lord Justice-Clerk."

Lord Moncreiff:

"I concur in the opinion of the Lord Justice-Clerk. I only beg leave to add, that it is very clear to me, that the last words of the clause of the trust-deed, on which the whole argument of the pursuer is founded, relate only to the member of the sentence immediately preceding them, and do not at all qualify, or afford an implication to qualify, the express exclusion of any right or title in the pursuer to inquire into or interfere with the management, or to impugn the accounts of the trustees or their cashier; and farther, that the real meaning and effect of those words is, to confirm or repeat in another form the previous provision, that the accounts, when examined, fitted, and docketed by the accountant, shall operate as a complete exoneration of them or him. But, by no construction, can they affect that leading provision."

Lord Cockburn:

"I remain of the opinion I have already expressed, when I disposed of the case as Lord Ordinary."

Lord Medwyn:

"The question on which our opinion is asked, is, whether the pursuer is entitled to require that the defenders' accounts, with the vouchers thereof, be annually exhibited to her before being laid before an accountant to be audited? Looking at the peculiar terms of this trust, I must answer this question in the negative. The pursuer is not the truster's heir-at-law; she is his donee, and has no other character. In claiming under this settlement, she must take under every condition and qualification Mr Tod chose to impose, not being contrary to law. He was providing, not for a perpetual trust, nor even for the management of his property, for a long and unseen course of time, where he could not foresee the characters and circumstances of the heirs who might succeed under his trust-deed, nor of the trustees who might be assumed to manage it. He was providing for the interests of one individual known to him, and regulating the conduct of trustees, with whose character he was also fully acquainted. In them he unquestionably reposed most exuberant trust, and in the same degree restricted the rights of his donee. I have no right to inquire into his motives for making this disposition of his fortune. I am bound to hold that he had sufficient reasons for doing so, and I must give full effect to the provisions of the trust-deed, which is the title and the measure of the right the pursuer has to Mr Tod's succession. Now, she has not the ordinary privileges of a liferenter. She

is to occupy the house, garden, and policy; but the entire management of the estate, and the improvements upon it, are to be by the trustees, according to their sound discretion. They may appoint one of their number cashier or manager. They are 'to keep regular accounts of their intrusions with, and application of the funds coming into their hands, which accounts shall be annually produced to, and examined by an accountant of character and experience, to be chosen by the said trustees; and after being examined and passed by him, shall be fitted and docketed by the said trustees, and which shall operate as a complete exoneration to them accordingly. It being hereby provided, that neither the said Helen Tod nor any other party, shall have any right or title to inquire into, or interfere with the management, nor to quarrel nor impugn the accounts of the said trustees, nor to object to any article for which they shall take credit, after the same has been examined and passed by the said accountant, as aforesaid.'

"Now, it is impossible for me to believe that Mr Tod intended that the accounts of the trustees, with the vouchers, should be exhibited to the pursuer before being laid before the accountant. I think the plain meaning and direction of the clause is, that this is not to be the case,—that she has no right to require them to do so, just as little as she has to require them to consult her before they propose to make an improvement upon the property. All that the trustees are directed to do is, to produce their accounts annually to the accountant, being a man of character and experience; and when he has examined and passed any article, the pursuer cannot object to it; and when the account so examined and passed is fitted and docketed by the trustees, it operates as a complete exoneration to them. In all this, there is not only no notice of the interference of the pursuer, but she is expressly excluded, as the whole progress of the accounts from the time of their being kept, their being produced to an accountant and examined by him, their return to the trustees to be fitted and docketed by them, is distinctly provided for by the trust; and the effect which this examination and docketing is to operate is declared, and the pursuer is only mentioned to exclude any objection from her. That the exclusion of any objection after the accounts have been examined and passed, does not imply that it is competent for her to object before, and that for this purpose she must be furnished with the accounts and vouchers; because it is distinctly provided to whom alone the trustees are to produce their accounts; and therefore, in order to exclude the pursuer from objecting to the accounts, it was sufficient to express this exclusion after they were examined and passed, before which there is no provision for her as to seeing them—excluding her from this interference with the trustees as to their accounts, just as she is excluded as to their management of the property.

"The pursuer has the protection of the accountant of character and experience, against any malversation of the trustees in application of the proceeds of the trust-estate. This is all which Mr Tod gave, or intended to give her. The accountant may no doubt apply to her for explanation as to any item in these accounts, if he chooses. She may also ask him to be allowed to take part in the examination of the accounts; but she has no right to insist on this. He may admit or refuse this request, as he sees fit.

"There may be cases of failure of duty, both on the part of the trustees in their management and expenditure, and of the accountant in checking their accounts, which would authorise the pursuer to call upon the Court to interfere, in order to fulfil the real purposes of the trust as to the disposal of his property. The pursuer's right to object to fraud or collusion between the trustees and accountant, is not, and cannot be excluded—on this plain ground, that no such case could be in the contemplation of the trust when he introduced this clause, which could be intended to apply only to the *bona fide* discharge of the respective duties of both parties, in the management and expenditure, and settlement of the accounts of the expenditure."

Lords Cuninghame and Ivory:

"The question on which our opinion is required by the First Division of the Court, is thus expressed in the interlocutor of their Lordships, of 22d January 1842, 'Whether the pursuer is entitled to require that the defenders' accounts, with the

vouchers thereof, be annually exhibited to her, before being laid before an accountant to be audited?'

"We are humbly of opinion that the pursuer is entitled to make the demand on the defenders, which is the subject of this question; and that the defenders are not entitled, either by the terms of the trust-deed, or in a right and *bona fide* administration of their trust, to oppose the request.

"In considering this question, we have attended particularly to the terms of the trust-deed, under which the defenders act; and the peculiarities which strike us in this trust, as deserving of attention, are these:—

"In the first place, it is manifest on the face of the deed, that the pursuer, Mrs Forster, is at present the *only party beneficially interested* in this trust, and in the management of the defenders. She is entitled to the whole free annual proceeds of the trust, if there be any. And from the circumstances of her birth, as mentioned in the papers, it is probable that this formed her *sole* provision and means of subsistence, at the commencement of the trust. She had, therefore, the deepest interest in the propriety of the defenders' charges, and in the accuracy of their accounts.

"In the second place, it appears from the trust-deed, that this is a trust to last for the *whole life* of the pursuer, and till her issue attain the years of *majority*. It is explained in the pleadings, that the lady is at present under thirty years of age; so that without any violation of probability, this trust may endure for forty or fifty years.

"In the third place, while this trust-deed is granted in favour of individuals selected by the truster, in whom he had high confidence, it is manifest, both from its contemplated duration, and from the very broad and unlimited terms in which the deed is framed in favour of surviving and *assumed* trustees, that the trust may ere long pass into the hands of parties *unknown to the truster*. Under the first head of the trust, power is given as usual to the majority, as a quorum; and then the following particular provision occurs: 'And when the said trustees are reduced to *one* in number, the said one shall have the same rights, powers, and authority hereby vested in him as are granted by these presents to the said whole trustees or quorum foresaid; and further, with power to a majority of the said accepting trustees above named, and the survivors or *survivor* of them, to name and assume, after my death, such person or persons as they shall think proper to be trustees, for the purposes herein mentioned, along with them, or after their or his decease, as they or he shall think proper and expedient; declaring that the person or persons to be so assumed, *shall have the same powers of acting in every part of this trust*, as my trustees herein named have, or as if the person or persons to be assumed were herein named and designed trustees by myself.'

"In the fourth place, while we are bound to hold that the trust-deed, which is here the subject of interpretation, is the deed of the truster, we must notice it as a circumstance not to be thrown out of view by a court of equity called to construe it,—that this deed was framed, and bears to have been written by *one of these trustees themselves*. We assume that the gentleman referred to is a man of business, of high character and respectability; and we make no remark in the present case, which it would not be our duty to make, if the deed had been framed by the first conveyancer in the kingdom;—but we conceive it to be a rule to be constantly and sacredly enforced in law,—that when a deed conferring large powers on grantees (even though trustees) has been framed by one of their own number, it ought rather to be subjected to a strict, than to a liberal construction. In the present instance, we shall take that interpretation of the deed which we conceive that its terms reasonably import.

"This being a trust, then, which may last for half a century,—which confers large powers on the trustees,—and which may in a few years come to be executed by parties personally unknown to the truster,—the question which arises is, whether the party or parties beneficially interested in the trust be entitled to ask for inspection of the annual accounts and vouchers of the trustees, *before* they are finally and for ever audited by an accountant selected by these trustees themselves; under the powers specially conferred on them by the trust?'

"Now, we apprehend it to be a rule in the law of trusts,

which it would require the most positive and unmistakable provision to exclude,—that the parties *beneficially* interested in them, shall at all times have full and unrestrained access to the accounts and vouchers of the trust-estate. In substance and reality the estate is *their* estate; *they* have the natural interest to check mistakes, and even to give suggestions and aid to the trustees, presuming the latter have right views and intentions,—and as it would instantly excite the most grave suspicion in the mind of any Judge if trustees refused, of their own accord, to show their accounts and vouchers to those entitled to the balance;—so it is a construction the very last which a court of equity ought to put on a trust-deed, that it was contemplated by the trustor to exclude the parties interested for the time, even from seeing, before the final audit, the accounts and vouchers which they alone have any interest to check. But we do not think that the trust-deed, in the present instance, bears this construction.

“The clause of the deed founded on by the defenders in support of this plea, is the 9th, which provides, that ‘my said trustees or trustee, surviving and accepting as aforesaid, shall have full power and authority to appoint any one of their own number as cashier and manager, or any other person he or they may see fit, and that such person or persons so appointed, as well as the trustees or trustee themselves, in so far as may be necessary, shall keep regular accounts of their intrusions with, and application of, the funds coming into their hands; which accounts shall be annually produced to, and examined by, an accountant of character and experience, to be chosen by the said trustees or trustee, and after being examined and passed by him, shall be fitted and docketed by the said trustees or trustee, which shall operate as a complete exoneration to them or him accordingly; it being hereby provided, that neither the said Helen Tod, nor any other party, or person or persons whatsoever, shall have any right or title to inquire into or interfere with the management, nor to quarrel or impugn the accounts of the said trustees or trustee, or their cashier or manager, or others acting under his or their authority, nor to object to any article for which they or he shall take credit, after the same has been examined and passed by the said accountant, as aforesaid.’

“This clause certainly confers very extensive powers on the trustees, when it gives them (and even a sole survivor of their number) power to name one of themselves to be cashier and manager of the trust, and to name their own auditor, whose *passing and examination* of the accounts shall be to them a final *exoneration*. Unquestionably, also, there is an exclusion to a certain extent of the said Helen Tod, when it is provided, that neither she nor any other parties should have right to ‘*inquire into*’ (a very unusual expression), ‘or interfere with the management, nor to quarrel or impugn the accounts of the said trustees or trustee, or their cashier or manager, or others acting under his or their authority, nor to object to any article for which they or he shall take credit, *after the same has been examined and passed by the said accountant, as aforesaid.*’

“We apprehend, however, that the clause, instead of aiding the defenders in their present opposition, is conclusive in favour of the pursuer’s demand. When it is expressly provided, that accounts shall not be impeached *after* they have been examined and passed by a particular accountant, it is necessarily implied, that *before* that approval, the parties shall not be excluded from objection. Indeed, unless it be maintained that those interested in the trust were specially debarred from seeing the trust-accounts at every period of their possession, (and that is not seriously contended for by the defenders), it must be presumed that the trustor, and every man who understood what he was about, meant, that these accounts and vouchers were to be exhibited to his heir, *before the chequer was shut* by the accountant’s docket, and not *after* that period, when the accounting was final, and when it was quite useless and unavailing to point out any objection or error in the accounts.

“It appears to us, that the argument of the trustees on this point proceeds on a critical construction of the clause before quoted, neither just in itself, nor decisive of the question, if it were better founded than it is. They allege (revised minute, p. 11), that the pursuers ask for inspection of the accounts and vouchers merely as a pretext for enabling them to *inquire* into the trustees’ *management*, from which, it is said, that the pur-

suer and her successors are peremptorily, and in all events, excluded, *after* as well as *before* the accountant’s audit. We doubt extremely if that view of the clause be correct. We rather think that the explanatory words at the end of the 9th clause apply and override the whole provision, and that the trustor’s true meaning was, that no party should interfere with the trustees’ *management*, or quarrel with the accounts,—*after* they had been approved by the accountant. A fair and proper explication of accounts necessarily implies a certain investigation as to *management*, which it was very safe for the trustees to leave to the accountant;—and we can neither listen to, nor do we even understand the extreme anxiety manifested by these trustees to prevent their management from being made the subject even of the least collateral reference.

“But really that is a point into which we think it quite unnecessary at present to enter. The import of the clause as to *management*, is not properly the subject of the present discussion. If any inquiry as to it is ever proposed in a competent shape, it must be discussed. The question put to us relates solely to the competency of the pursuer demanding annually an inspection of her trustees’ *accounts* and vouchers before they are laid before the accountant,—of course, with the view of her being heard before him as to these, if she shall think that necessary; and while the trust-deed, as already observed, only declares, that the trustees shall be exonerated *after* the accounts are passed,—her right to have inspection *prior* thereto, rests on principles of common law and equity which appear to us to be incontestable.

“A contrary opinion would indeed leave the important word ‘*after*’ altogether inoperative and without meaning. It would have been easy for the trustor, had he so intended, to say, that the pursuer was not to object to the trustees’ accounts, either *before* or *after* their being examined and passed by the accountant. But he does not say so. He contents himself with declaring, that she shall not do so ‘*after*’ such examination. Now, we cannot here read the word *after*, thus put by itself, as at all identical in meaning with the phrase ‘*both before and after.*’ It is, on the contrary, expressly to distinguish what was to be excluded *after*, from what was not intended to be excluded *before*, that the clause appears to have been constructed as it is. Nor does it matter, in this view, whether the concluding words are to be held as overriding the whole clause, or only the last branch of it. It is quite enough that there was *something* which the pursuer was only to be prohibited from doing *after*,—and which, therefore, by unavoidable implication, she was to be entitled to do *before* the accounts were finally examined and passed by the accountant. The question, even in this its most limited form, necessarily arises,—What was it that the pursuer was to be excluded from *after* the final audit? And whatever this was, we are most clearly of opinion, that the trustor’s meaning was not to exclude the pursuer from it at the *earlier* stage,—that is to say, *before* the audit had closed all. In any view, it is impossible to separate the *closing part* of the proviso, viz., that the pursuer was ‘*not to object to any article (in the accounts) for which they or he (the trustees) shall take credit,*’ from the connecting words, ‘*after the same has been examined and passed by the accountant.*’ Now, we desire no more, to be satisfied, that the trustor’s true meaning and intention was,—that the pursuer might ‘*object to any article in the accounts before the same had been examined and passed.*’ Yet how could she possibly do so, if she was to be permitted to see *neither the accounts nor vouchers*, on which alone any objection could arise?

“Neither are we moved by a consideration which is repeatedly urged on the part of the trustees,—that it is open for the pursuer to apply to the accountant to see the accounts and vouchers in each year as these are laid before him,—and that it will be for him to allow the pursuer access to them, if he see cause. No doubt the pursuer might have applied to the accountant; yet we cannot hold that she was precluded from having her right, on this important and constantly recurring question, tried between her and the trustees by the action of *declarator* now before the Court. This has been the form sanctioned from time immemorial in our practice for judicially ascertaining the rights and obligations of trustees.

“We are of opinion that it was the more necessary to raise

the present question, in this suit, as the accountant himself might have been misled as to his power and duties, by the pleas of these trustees. Thus, it seems to be argued by the defenders, that the accountant would have a *discretionary* power either to allow the pursuer inspection of these accounts and vouchers, or refuse it, as he saw fit, when the documents were laid before him; but we totally dissent from that doctrine. We consider that the accountant here is placed by the trustees substantially in the position of an arbiter, whom the trustees are allowed, by the exuberant confidence reposed in them by the truster, themselves to select for the audit of their accounts. Their proper opponent and contradictor in that investigation, is the party *beneficially interested in the trust*; and we hold that it is not competent for any arbiter to refuse to hear that party before giving his final decision—nor to withhold from him the accounts and vouchers which form the proper subject of the reference. Nay, we should hold ourselves bound judicially to presume something not far short of *collusion* between the accountant and the trustees who appointed him, if we found the latter insisting, and the former agreeing with them, that the accounts and vouchers submitted for his judgment were to be withheld from the very party whose interests were most materially to be affected by that judgment, and the judgment thus necessarily to be pronounced *parte inaudita*.

"No point is better fixed in the law of arbitration, even where the referee is named by the parties mutually, than that he must hear both before deciding; and the emphatic dictum of Lord Eldon has been often quoted, when, on an appeal from this Court, he set aside a decree-arbital, pronounced on a partial hearing:—'*By the great principle of eternal justice*,' said his Lordship, 'which was prior to all these Acts of Sederunt, regulations and proceedings of the Court, it was impossible that an award could stand, when the arbitrator heard one party, and refused to hear the other.'—*Sharpe and Mackenzie v. Bickerdyke*, 3 Dow, p. 107. This is a self-evident rule of justice and common sense, which it may now appear trite to refer to; but if it receives effect in all ordinary references, it is obviously still more the duty of an arbiter named on *one side* only, to exhibit the utmost caution in his proceedings, and to give the opposite party interested in the matter, the *most full access* to the whole accounts, vouchers, and productions made by the party who has named him, before finally passing his award. A decree or finding, therefore, to the effect asked by the pursuer in the present action, seems to be necessary, in consequence of the pleas maintained by the defenders, to guard the accountant from a fatal mistake in the execution of his duty, as to which the pleas and pretensions of those trustees might mislead him. His audit, in our view, would be null, but it would be exposing a party in moderate circumstances to a monstrous hardship, to compel her to resort to a process of reduction each year to set incompetent audits aside.

"The defenders have pleaded in justification, that a full copy of their accounts hitherto, has been furnished to the pursuer *after the audit*,—and that she has not averred that the charges are contrary to the powers of the trust, or in any respect objectionable. But in the *first* place, it does not seem to be denied that the accounts were furnished *without the vouchers*, which have been *refused*; and that of itself is sufficient to create a strong presumption against the accuracy and *bona fides* of the charges. An exhibition of accounts, with a *denial of the vouchers* necessary to check them, is substantially a refusal to account, in the only manner in which an accounting can be availably taken at the hands of any party. And in the *next* place, the defenders, on their own showing, have deferred furnishing the pursuer with such accounts as they did send, until *after the audit*, when it was too late for her to get redress without ruinous proceedings at law. We cannot think that the truster intended this. He, to all appearance, meant that his heirs interested in the trust, as well as the trustees, should have an opportunity of appealing to the accountant, and of stating every objection to him which would be competent before any other referee. This is a very humble satisfaction, and it may be a very unavailing privilege to urge any objection before a judge *chosen by the parties whose accounts are to be investigated*; but it would be a downright mockery of every thing like accounting, if the trustees could withhold their accounts and vouchers

from the heirs, till they were *passed* by the accountant—when he was of course *functus*,—and when the parties chiefly interested had no means (short of an appeal to a court of equity) of correcting any error, intentional or accidental, however clearly it might be established.

"The case has been too much treated on the part of the defenders, as if the demand of the pursuer was urged solely with a hostile view to them, and to involve them in a perpetual litigation and annoyance, from which it is assumed that it was the main object of the truster to exempt them. We see nothing on the face of the trust-deed or record to warrant these surmises. This was a trust constituted by a man for behoof of a young woman likely to be married—and of her *issue* at her death, and of his other relatives, in case of their failure. It is not to be presumed that the truster could anticipate that not merely his daughter, but her *husband*, and the curators for the infant children whom she might have, would all be disposed to act so vexatiously as to render it expedient to exclude them *even from being heard* before any respectable accountant, in the annual examination of the trust-accounts. These apprehensions we conceive to be quite extravagant in themselves, and unwarranted by the trust-deed. It is equally inadmissible to presume, that the parties interested in the trust would always be disposed to state groundless and captious objections: it is just as likely that parties taking an intelligent view of their own interest, would not provoke a discussion upon trifling objections, which would involve their own trust in unprofitable expense, but would confine themselves to errors or mistakes in the charges of the trustees, which the good sense and candour of the latter, aided by the opinion of the accountant, would enable them to correct in future.

"Finally, it is stated by the defenders that they accepted of this trust on the faith that their own interpretation of the trust-deed would be adopted, and that they 'would be protected from harrassing interference on the part of the pursuer;' but it is thought that the settlement itself of the truster affords good ground for treating that as a pretence unworthy of regard. That deed proves that the whole trust-property, failing the single female and her issue, who are primarily called, is destined in *favour of the major part of the trustees themselves and their families*. They had the most direct interest, therefore, in its subsistence. Nay more,—with obvious and most important reference to the very question now under consideration, they had an interest—at the sacrifice of the first party, so to exercise their very broad powers of expenditure upon improvements, &c.,—as to make them anything but impartial and judicious managers for the pursuer. In such circumstances, it is monstrous, even were it within the strict letter of the deed, to see such parties straining to shut out every check at a proper period of their accounts and vouchers. When such parties, or indeed when any parties, allege that they undertook a trust on the faith that their accounts would not only be audited by an accountant of their own selection,—but that both accounts and vouchers, when under examination, *should be carefully withheld from all the parties interested in the balance*,—it is thought that such a profession cannot be received with too much jealousy and distrust in a court of justice.

"On these grounds, we are of opinion that the pursuer is entitled to insist on exhibition of the defenders' accounts, with the vouchers, *before* they are laid before the accountant for audit, and this for the purpose of making such audit really available for its proper end; it being plain that any audit, where the only party interested to object is kept blindfold, is a futile and empty form, affording no check on the one party, and no satisfaction to the other."

Lord Jeffrey :

"I concur entirely in the opinion of Lords Cuninghame and Ivory; except only that I think the pursuer is excluded, by the peculiar terms of this trust-deed, from what would otherwise have been her right, 'to inquire into, or interfere with,' the actual management of the trustees, as it proceeds; or otherwise than as it may be involved in the subsequent examination of their vouchers and accounts.

"Upon all the other points, and indeed on all the matters properly referred to us, I go completely along with these Judges ;

and hold—1st, that the pursuer is the proper adverse party to the trustees in the whole business of accounting; and (during her survivance) the only party for whose benefit and protection a regular keeping and auditing of accounts is required of them: 2d, That the functions of the accountant, as defined in the trust-deed, are substantially those of an arbitrator between these adverse parties: 3d, That the whole provisions of that deed in favour of the trustees will be satisfied, and all the benefit thereby intended for them secured, by giving them, first, the uncontrolled management of the property; then the sole nomination of the arbitrator; and, finally, the right to exclude all challenge of his award, except upon such grounds as would be available against a common decret-arbitral—beyond question the most favoured and privileged of all documents known to our law: But, 4th, That it would be against justice, and contrary to all legal principle, to exempt it from such grounds of challenge; and that, under these, it would be *per se* sufficient to cut down and set aside any audit or award of the accountant, that it was proved or admitted to have been made up without fully hearing the party for whose exclusive benefit and protection it was enjoined."

Lord Meadowbank :

"The papers in this case were laid before me during the last session, but I was prevented, through indisposition, from giving at the time obedience to the interlocutor of the Lords of the First Division. I have since considered the pleadings, with the aid of the opinions of the other consulted Judges; and having been requested to furnish the parties with the result, I have now to state my entire concurrence in the views of Lords Jeffrey, Cuninghame and Ivory, and have little to add to their opinions.

"The pursuers being the parties beneficially interested in the estate would, except for the very unusual clause in the trust-deed, have been entitled to inquire into the management of the trustees, to examine into, and if necessary, to have quarrelled and impugned their accounts either before or after they had been passed by the accountant. But this right was partially excluded by the terms of the deed; and to this exclusion, in so far as it goes, we are no doubt bound to give effect; but assuredly not to extend it. Now, the deed expressly, and in terms, limits the prohibition of the pursuers' right to impugning after the accounts shall have been passed by the accountant. It is altogether silent as to what the pursuers might do antecedently; and I can discover no principle on which a court of equity could be justified in extending the prohibition in the manner proposed, by any inference or implication whatever.

"As there can be no doubt, however, that the pursuers would be entitled to set aside the award of the accountant upon the ground of fraud either on his part or of that of the trustees, it is but reasonable to presume that although the right of challenge of the management of the trustees and their accounts upon other grounds was excluded, the truster meant, by not excluding previous examination, to enable them to use that ground of challenge with effect, if necessary. But whether he had that in view or not, he did not in the terms employed expressly deprive the beneficiaries of that right of examination, and I can see no principle on which we can be authorised to supply them. All claims of this kind, which are *contra communes regulas juris*, are liable to receive the strictest interpretation; and if that rule is applied to the case under consideration, I cannot see how the claim of the pursuers can be resisted, and the interlocutor of the Lord Ordinary adhered to."

The Court, in respect of the majority of the consulted opinions, *adhered*, and remitted to the Lord Ordinary.

Lord Ordinary, Cockburn.—*Act. Dean of Faculty (Wood), Hector; John Hunter, W.S., Agent.—Alt. H. Robertson; Mackenzie, Innes and Logan, W.S., Agents.—N. Clerk.*—[H. B.]

27th May 1842.

FIRST DIVISION.—(H. B.)

No. 176.—THE REVEREND DAVID WILSON, *Suspender*, v. THE PRESBYTERY OF STRANRAER, *Respondents*.

Church.—Quoad Sacra Ministers.—Jurisdiction.—Interdict.—A Presbytery having resolved to serve one of their members with a libel—Interdict, prohibiting the Presbytery from proceeding in the matter, granted, on the ground that one of the alleged members was a quoad sacra minister.

The Presbytery of Stranraer having resolved to serve the Rev. David Wilson, minister of Stranraer, with a libel, that gentleman presented a note of suspension and interdict, in which, after alleging, *inter alia*, that the whole proceedings of the Presbytery "were vitiated by the participation in them of a quoad sacra minister," he prayed the Court to "prohibit, interdict and discharge the Presbytery, or any of its members, individually or presbyterially, from proceeding on, or taking cognisance of the pretended libel against him." Lord Cuninghame, Ordinary, ordered the note to be intimated and answered within fourteen days; "meantime sists execution, and grants the interdict till the case comes to be advised upon the note and answers."

No answers were lodged; and the note having come to be advised by Lord Ivory, his Lordship reported the cause, stating it as his opinion, that the interdict which, from the terms of Lord Cuninghame's interlocutor, must now be granted anew, if it was to be continued, ought to be refused.

Lord President—From the terms of Lord Cuninghame's interlocutor, I believe Lord Ivory is correct in stating, that as the note has come to be advised, the interdict, if we approve of it, must now be granted anew; and I therefore think his Lordship has done right in reporting the cause. I am clear, however, that the interdict ought to be renewed. No answers have been lodged; and as it is alleged that there is a quoad sacra minister sitting within the body of this Presbytery, I cannot see any reason for taking a different course from that taken in the case of Stewarton, in which a similar interdict has been granted on the very same ground.

Lord Mackenzie.—Considering the former precedents, I do not see how we can be warranted in refusing the present interdict. While the question as to the right of the quoad sacra ministers is *sub judice*, it is properly a question of expediency, whether or not the interdict should be granted; and this resolves into the other question, whether greater evils will result from granting or from refusing it. Here the one party has appeared, and the other has not; and it would seem somewhat strange to decide in favour of the party who has refused to appear. In this way he might gain by absenting himself, when he would have lost by entering into fair discussion. In these circumstances, I cannot refuse to renew the interdict.

Lord Fullerton.—I feel obliged to differ from your Lordships, and agree with the Lord Ordinary who has reported the cause. In point of form, the question, as it now comes before us, is in the same situation as if the interdict had not been granted before; and we were now asked to grant it in the first instance. Now, it is of importance to observe, that the question of jurisdiction as to this very matter has been raised in another case, and has been deemed of so much importance that a hearing in presence has been ordered. Considering the great delicacy there is in granting interdict, when the question of jurisdiction is open, I am inclined to think, that in the present instance, if we are to proceed on grounds of expediency, there is more danger of mischief in granting than in refusing the interdict.

Lord Gillics absent.

The Court pronounced the following interlocutor :

" The Lords, upon the report of Lord Ivory, Ordinary, and having heard counsel for the suspender, remit to his Lordship to pass the note of suspension, and continue the interdict."

Lords Ordinary, Cuninghame and Ivory.—Act. Pyper; A. Peterkin, S.S.C., Agent.—[H.B.]

27th May 1842.

FIRST DIVISION.—(H.B.)

No. 177.—MAJORITY OF PRESBYTERY OF STRATHBOGIE, *Suspenders*, v. MINORITY OF PRESBYTERY, *Respondents*.

Church.—Jurisdiction.—On the application of the majority of a Presbytery deposed by the General Assembly, but reponed by the Court of Session—Interdict granted to prohibit the members chosen by the minority of the Presbytery from sitting in the General Assembly.

The majority of the Presbytery of Strathbogie having elected one set of members, and the minority another, to sit in the General Assembly, the majority presented a note of suspension and interdict, supplementary to that formerly granted in their favour, praying the Court to interdict those of the minority from taking their seats.

Lord Ivory, as Ordinary, reported the cause, and gave it as his opinion, that the interdict prayed for went farther than any previous one, and ought not to be granted.

Lord President.—I did not sit here when the original interdict was granted; but I have no hesitation in saying, that unless we are to stultify ourselves, we must grant this interdict.

Lord Mackenzie.—I am of the same opinion. The interdict now asked is merely a corollary from that formerly granted.

Lord Fullerton.—It appears to me that this is the most important interdict which has yet been applied for, and that we are no more entitled to grant it, than we would be to interdict a member of the House of Commons from taking his seat in that assembly. Can any thing be a matter more purely ecclesiastical than the right of the General Assembly to determine who are to have seats in it? If, in consequence of improper individuals being permitted to sit, civil interests come to be affected, we may then interfere. But here the only question is, which of a certain number of individuals are to be entitled to sit? I am afraid we are getting step by step into difficulties, which strikingly illustrate the danger of our once going beyond our jurisdiction. The present appears to me a question of the greatest constitutional importance; and I think, before deciding it, it would be well to consult the other Judges.

Lord Gillies absent.

The Court remitted to the Lord Ordinary to grant the interdict.

Lord Ordinary, Ivory.—Act. Pyper; A. Peterkin, S.S.C., Agent.—[H.B.]

27th May 1842.

FIRST DIVISION.—(H. B.)

No. 178.—THE EARL OF BUCHAN, *Petitioner*, v. LADY CARDROSS, *Respondent*.

Process.—Nobile Officium.—Bill-Chamber.—Competency.—A petition for the removal of children from a mother's custody, on the ground of misconduct, accompanied with an allegation that she intended to remove them beyond the jurisdiction of the Court, having been presented during vacation to the Lord Ordinary on the bills—Held competent for his Lordship to entertain the petition, so far as to interdict the removal of the children, and after it had taken place, to grant warrant for bringing them back.

The Earl of Buchan, during vacation, presented a petition to Lord Cuninghame, Ordinary on the bills, in which, complaining that his daughter-in-law, Lady Cardross, had been guilty of misconduct, which rendered it necessary that his grandchildren (the children of her ladyship to the late Lord Cardross) should be removed from her charge, and that he had reason to suspect she was preparing to remove with them from Scotland, he prayed his Lordship to direct

" that the said children shall remain under the care and custody of the petitioner until the farther orders of Court; or to place them under the interim care and custody of such other person or persons as your Lordship may think proper to appoint; and, in the meantime, to prohibit and interdict the said Jane Torry or Erskine (Lady Cardross), and all others, from withdrawing or attempting to withdraw the said children from Scotland, or from the jurisdiction of this Court."

The Lord Ordinary pronounced the following interlocutor :

" 8th April 1842.—The Lord Ordinary officiating on the bills, appoints this petition to be served on Lady Cardross, and answers lodged thereto within six days after service, both as to the competency of the present application, in point of form, and as to the merits; and, in the meantime, grants the interdict as craved, till the petition and answers are advised.

" *Note.*—When the answers are lodged, the parties will probably, in a case of this importance, apply to be heard by counsel. Inquiry may be made as to the form of application adopted in the somewhat analogous case of Borthwick, which occurred during one of the vacations of the Court last year, or in the year preceding."

The day on which this petition was served, Lady Cardross carried off the children from Scotland, and took up her residence with her father in London. Thereupon the Earl of Buchan presented a second complaint, setting forth the breach of interdict thus committed, and praying the Lord Ordinary to grant warrant to officers of the law to take possession of the children, wherever found, and deliver them to the petitioner, or the interim custody of any other person whom his Lordship might approve.

Lord Cardross had left a deed of nomination, in which he appointed, along with Lady Cardross as *sine qua non*, and his father the petitioner, Messrs William Home, W.S., and Archibald Gibson, accountant, to be tutors and curators to his children. The Lord Ordinary ordered the papers to be communicated to these two gentlemen, who gave in a statement disclaiming all knowledge of, and concurrence in, Lady Cardross's proceedings.

In the answers which had been given in to the original petition, Lady Cardross, besides denying the allegations of misconduct, pleaded specially, that the petition was altogether incompetent, inasmuch as the Court only, and not the Lord Ordinary on the bills, had power to entertain and grant its prayer.

The Lord Ordinary having delayed the case for some time, with the consent of parties, in the hope the children might be brought back under an extrajudicial arrangement, at length pronounced the following interlocutor :

" 4th May 1842.—The Lord Ordinary having considered this petition, answers, and documents produced, and heard counsel thereon, in respect of the objection stated to the competency of the petition, as addressed to the Lord Ordinary on the bills, makes a *visandum* with the case to the First Division of the Court, and appoints the petition and answers, and state-

ment of the tutors, to be printed and boxed *quam primum*, that the question may be reported.

"*Note.*—The Lord Ordinary has taken this case to report, as involving a question relative to the powers of the Judges officiating in the Bill-Chamber in vacation, which it is of great importance to the community to have authoritatively settled. This course also is the more appropriate, as the cause on its proper merits is one which can only be conducted before the Inner-House, if it is brought into Court during session.

"Lord Cardross, the eldest son of the Earl of Buchan, died in 1836, leaving his widow, Lady Cardross, and a son and two daughters in infancy. The eldest child, a daughter, was then only about four years of age, and the boy was not more than two years old, so that he is at present only about seven years old. The father left a deed of nomination, whereby he appointed his wife Lady Cardross, his father the Earl of Buchan, and Messrs William Home, W.S., and Archibald Gibson, accountant in Edinburgh, to be tutors and curators to his children, her ladyship being declared a *sine qua non*.

"The present petition, addressed to the Lord Ordinary on the bills, was given in early in vacation (8th April 1842) by the Earl of Buchan. It set forth various gross improprieties in the conduct of Lady Cardross, which, if true, unfitted her for the guardianship of these children. It was stated that a petition for the removal of these children from her house had actually been prepared in name of the tutors, and boxed to the Court, towards the close of last session, but that it was *withdrawn* by one of the tutors, in the expectation that she would give up the infants without judicial proceedings, and that she had failed to do so; that the children were thus exposed to great hazard of contamination, from being kept under the charge of so unworthy a parent; and as there was a strong suspicion that she had some intention of carrying them abroad beyond the jurisdiction of this Court, the noble petitioner prayed the Lord Ordinary to grant an immediate warrant to take the children out of the custody of her ladyship, and to place them under the interim care and custody of a suitable person until further orders of Court. The petition, moreover, prayed for an interim and immediate *interdict* against the respondent removing the children from the jurisdiction of this Court pending the discussion.

"Assuming the allegation in the petition to be correct, the Lord Ordinary was disposed to think that it was competent for the Judge in the Bill-Chamber, agreeably to the more recent practice in analogous cases, to entertain it, as an emerging case of *urgency* and *necessity* in a class of cases in which this Court has *peculiar* and *exclusive* jurisdiction. But without prejudging any point of the case, the Lord Ordinary appointed the petition to be *served*, and answers lodged, within six days after service, both as to the *competency* of the present application in point of *form* and as to the *merits*; and as it was obvious, that whatever might be the result of the ultimate consideration of the case, it was indispensably necessary to take every judicial precaution to prevent the children from being carried out of the jurisdiction of the Court in the mean time. The Lord Ordinary accompanied his deliverance with an *interdict* in the following terms:—'And in the mean time *grants the interdict as craved*, till the petition and answers are advised.'

"The preceding interlocutor and *interdict* were served on Lady Cardross on Saturday the 9th of April, as instructed by the execution of a messenger produced; but instead of giving effect thereto, it appears that Lady Cardross, on the evening of that very day, *made her escape from Scotland* with the children, and it has since been discovered that she has carried them to the house of her father in *London*. This unwarrantable step on the part of the respondent was immediately made the subject of a *second* and incidental complaint at the instance of the Earl of Buchan, setting forth the contempt of Court, and *breach of interdict*, and praying the Lord Ordinary to grant warrant to officers of the law to take possession of the infants wherever they could be found, and to deliver them to the petitioner, or to any other person who might be appointed by the Court to take interim charge of them, agreeably to the precedents in the case of Robb, M'Intosh and others, in which warrants to the preceding effect were granted by the Court.

"Although Lady Cardross had left the country, answers were lodged in her name to both of the applications, to which

of course the attention of the Court will be particularly directed. When these papers were first sent to *avizandum*, the Lord Ordinary directed them to be communicated to the other *tutors*, and appointed them to state, under their hand, if the children had been carried off with their knowledge or concurrence, or if they knew where they were. They gave in a statement disclaiming all knowledge of, and concurrence in Lady Cardross's proceedings, and stating that they did not know where the children were, which, if possible, aggravates her ladyship's misdemeanour in carrying off these pupils in violation of the *interdict*. Nevertheless, the Lord Ordinary was averse to proceed to extremities against the respondent, if there was any reasonable prospect of her being brought to see the impropriety of her conduct, by a moderate delay. He therefore had sundry conferences with the learned and respectable counsel who act for both parties, and at the request of her ladyship's counsel, and with consent of the Earl of Buchan's counsel, he delayed the case from week to week, in hopes that the children would be brought back and placed at the disposal of the Court. It afterwards turned out, however, that Lady Cardross was not to be persuaded so to act.

"In these circumstances, the Lord Ordinary had no alternative but to proceed to advise the cases. With regard to the *first* petition, founded on the specific charges against Lady Cardross therein narrated, it must first be determined whether the preliminary objection taken to the competency of such an application to the Lord Ordinary on the bills in vacation (though only intended for the *interim* protection and safety of the infants *till the Court meets*), be maintainable? From the great importance of that question, if it should be thought subject to any serious doubt, it is proper that it should be settled as soon as possible by the judgment of the Court; and, therefore, the Lord Ordinary has taken it to report by the prefixed interlocutor.

"On the incidental petition, which is in substance a complaint not merely for *breach of interdict*, but for a grave offence in reference to infants peculiarly under the protection of the Court, the Lord Ordinary could not hesitate as to the course he was bound to take. On the same date with the preceding interlocutor (4th May), he granted a warrant of search to all officers of the law to discover and bring back the children to the jurisdiction of this Court; and he gave the usual recommendation to magistrates in England and abroad to give their aid, if necessary, to carry that warrant into effect. On the part of Lady Cardross a *reclaiming note* was lodged against that warrant; but the Lord Ordinary holding that a party might as well hang up a process-caption, or a search-warrant for documents *abstracted* from process or for *stolen goods*, as the warrant now granted; and therefore, when it was judicially stated in a note (on 9th May) that the children had been discovered in London, the Lord Ordinary renewed the warrant, and added a note, recommending strongly to the magistrates in England to indorse it, as authorised by the Act 54 Geo. III. cap. 186. That question will of course be reviewed by the Court in considering the *reclaiming note* lodged by Lady Cardross against the warrant.

"In the original application which gave rise to these proceedings, and which is now reported to the Court, the chief and prejudicial question to be determined at present is, whether such an application for the protection of the infants *ad interim*, and till the meeting of the Court, was competent in the *Bill-Chamber*? With deference, had it been necessary for the Lord Ordinary to give his own decision on this objection, he would have held that the objection to the competency is not well founded.

"It is not known whether any case precisely in point has occurred before in the Bill-Chamber; and it is not very easy to trace the practice of this office at a remote period, as, from the very short and temporary nature of the jurisdiction, few points contested in it seem to have been thought worth reporting. But in later times, it has been uniformly understood, that in all cases of urgent emergency in which this Court, as the Supreme Court of Equity in Scotland, would be bound to provide an extraordinary remedy, if the case occurred during session, the *Lord Ordinary* is entitled and required to authorise a similar remedy during vacation, so as to protect parties, and provide against mischief, *till the sitting down of the Court*.

"This is very distinctly explained by Mr Beveridge in his *Forms of Process*, Vol. I. p. 228-29; in which, after observing that this Court has, almost since the very date of its institution in 1532, possessed the power of providing for the surcease of justice in the inferior judicatories, he proceeds to state, that the 'Lord Ordinary on the bills, as possessing the delegated powers of the Court in time of vacation, grants similar commissions *ad interim*.' He then gives the cases of an interim Judge-Admiral named by Lord Meadowbank officiating on the bills in 1810; of an interim Sheriff-depute named by another Lord Ordinary in the same year, and of an interim Commissary-Clerk named by Lord Alloway in 1814. During this very vacation the present Lord Ordinary named an interim keeper of the register of entails in the room of the late Mr Ferguson.

"On the same principle, when the *property* of infants or lunatics is exposed to immediate loss or dilapidation during vacation, the Lord Ordinary on the bills may appoint a factor *loco tutoris* to act till the Court meets. There are several recent instances of this on record.—See, in particular, the case of Ellis, in December 1836; 15 Shaw, 236;—and of Mrs Elizabeth Allan, 16th May 1838; 16 Shaw, p. 1008.

"If, however, the Lord Ordinary on the bills can make an interim appointment to secure the *property* of infants, and other unprotected parties, it is thought that he must, *a fortiori*, be entitled and bound to protect their *persons* from injury or abduction, and direct them to be placed in safe custody, if the guardians with whom they are placed turn out to be grossly unfit for the charge. The Lord Ordinary gives no opinion on the truth of the charges against the respondent, as there has been as yet no opportunity for any proof with respect to them. But in order to test the competency of the application, the facts set forth in its narrative must be assumed; and if these shall be substantiated, it is thought that the infants should not be allowed to remain one day longer under the roof of the respondent.

"In the meantime, the unhappy step which she has taken, of flying from the country with the children, without the consent or knowledge of the other tutors, is of itself a high delinquency, and such a proceeding, in a well-known case, formed the chief ground for removing a tutor altogether from his office. See the case of Robb, (Fac. Coll., 14th November 1817.) In every view, the respondent, by withdrawing from the country, has forfeited all title to that strong presumption of innocence extended in general to accused parties, and deprive her of all right to the custody of these children pending the discussion, when she has shown that she can, with so little scruple, set the authority of the law at defiance.

"With regard to the *title* of the noble petitioner, it would obviously be premature to enter on this till the jurisdiction of the Lord Ordinary is ascertained. He may add, however, that if it be found that the Judge in the Bill-Chamber has jurisdiction, he conceives that Lord Buchan has a good title to insist in the present application. Indeed, it is supposed that, in a case of this sort, the Court will readily listen to a complaint at the instance of *any* relative of the pupils, to induce them to do what is manifestly necessary for the benefit and relief of the children. No doubt a complaint at the instance of the other tutors would also have been sustained,—but if they decline or delay to do what is necessary to reclaim the infants, from any doubt as to their power to act, without the co-tutor, who is a *sine qua non*, or from any peculiar views as to their duty, under the circumstances admitted in their own statement, the grandfather is the more called upon to interfere to have the pupils placed immediately with a respectable person qualified to take charge of them."

Of the same date with the above interlocutor, the Lord Ordinary granted warrant, as craved, in the second petition.

Against this warrant the respondent lodged a reclaiming note, which being advised with the interlocutor making *avizandum*, the Court resolved to consult with the Judges of the Second Division.

Thereafter, the cause being again advised,

Lord President.—Agreeably to our resolution, we have concluded.

sulted with the Judges of the other Division, who agree with us in thinking, that under the extraordinary circumstances, the petition to the Lord Ordinary on the bills was not incompetent, and that the proper form of proceeding was by petition, and not by suspension and interdict.

Lord Mackenzie.—I am clear as to the competency of the proceedings. The general power of the Court, in cases of this nature, is not disputed; and in vacation, the Lord Ordinary on the bills has undoubtedly power to give any order that may be necessary to keep matters entire for the final disposal of the Court. Here nothing more was asked, or has been done. The respondent's counsel argues, that all which the Lord Ordinary could do, was to order matters to be restored to the state in which they were before, and that this would have been accomplished by ordering the children to be brought to Scotland, but still leaving them in the custody of the mother as before. I cannot think so. The object was to put them in safe custody; but how can it be said that they would have been in safe custody, if left with a party who had shown such a lawless inclination as to run away with them in direct defiance of the authority of the Court?

Lord Fullerton.—I am of the same opinion. There is a delegation of power to the Lord Ordinary on the bills entitling him to take any step that may be necessary to keep matters entire till the Court have an opportunity to decide. The petition is clearly put on this ground, and I see no reason to doubt of its competency.

The Court adhered.

Lord Ordinary, Cuninghame.—Act. Rutherford, Moir; C. H. Miller, W.S., Agent.—Alt. G. Bell; T. S. Fairley, W.S., Agent.—B. Clerk.—[H.B.]

27th May 1842.

SECOND DIVISION.—(G. D. F.)

No. 179.—WILLIAM LANDELL, *Pursuer*, v. WILLIAM PURVES, *Defender*.

Process.—Relevancy.—Agent and Client.—*A summons at the instance of a client, to render a law-agent liable for certain law expenses and damages arising out of the use of a border warrant, which had been obtained, as alleged, on the proper usual employment of the agent, and which the Court found to be illegal, held relevant, though not averring ignorance, or want of professional skill, or gross neglect in the proceedings.*

Landell having employed the defender in regard to a debt alleged to be due to him by a Mrs Brodie or Landell, who was resident generally at Berwick-on-Tweed, but at the time of the employment, was living at the village of Ayton, in Berwickshire, raised a summons, which averred that the pursuer being desirous of obtaining a settlement of the debt through the Courts in Scotland, applied to Purves,

"in order that the latter, as his professional agent, might advise, and might adopt what legal measures were necessary for making the said Mrs Margaret Brodie or Landell amenable to the Scotch Courts: That the said William Purves accordingly advised the pursuer to apply for a border warrant to apprehend the person of the said Mrs Margaret Brodie or Landell, until she should find sufficient caution acted in the Sheriff-court books of Berwickshire, that the debt due to the pursuer should be made forthcoming as accords, and a domicile appointed within the said county of Berwick at which she might be cited, and that as well *de judicio sicuti* as *judicatum solvi*: That the said William Purves represented to the pursuer that this mode of procedure was proper and legal, and the said William Purves being a regular licensed agent or procurator before the Sheriff-court of that county, the pursuer relied, and was entitled to rely on the accuracy and correctness of these representations: That the said William Purves accordingly, as the professional agent and adviser of the pursuer, with the view of obtaining said warrant, did lodge with James Bell, Esq., Sheriff-clerk of Berwickshire (the official person with whom applications of this kind, in the

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county of Berwick, fall to be lodged), the information to be produced in the course of the process to follow hereon, relative to the debt due to him by the said Mrs Margaret Brodie or Landell, and that nearly in the terms above narrated; and in addition to said information, the pursuer, at the desire of the said William Purves, emitted an oath in presence of the said James Bell, to the following effect:—*Dunse, 6th July 1836.*—The before-designed William Landell being solemnly sworn and examined, depones, That what is contained on this and the preceding pages, is a just and true statement: That no part of the sums therein mentioned has been paid. All which is truth, as he shall answer to God.' (Signed) 'W. LANDELL.—JAMES BELL.' That the pursuer himself was ignorant of the correct mode of legal procedure in cases of this kind; but the said William Purves obtained a warrant in favour of the pursuer from, and signed by the said James Bell in the following terms:—'These are granting warrant to messengers-at-arms, Sheriff-officers and their assistants, to pass, search for, seek, take, apprehend, and arrest the person, goods and gear of Mrs Margaret Brodie or Landell, of the burgh of Berwick-upon-Tweed, widow of the deceased Mark Landell in Coldingham Hill, and incarcerate her in the jail of Greenlaw, at the instance of the said William Landell, tenant in Swinton Greenriggs, in the county of Berwick, whose claim or demand upon the said Mrs Margaret Brodie or Landell is £720 Sterling, and also £360 Sterling, subject to the liferent of the said £360 Sterling to the said Mrs Margaret Brodie or Landell, during all the days of her life, therein to remain aye and until she shall find sufficient caution acted in the Sheriff-court books of Berwickshire that the same shall be made forthcoming as accords, and appoints a domicile within the said county of Berwick, at which she may be cited, and that as well *de judicio sicut as judicatum solvi*. Given at Greenlaw, the sixth day of July eighteen hundred and thirty-six years.' (Signed) 'JAMES BELL.'"

The summons then stated that the pursuer, by the directions of Purves, paid the fees for this warrant, which was thereafter executed by an officer in the employment of the defender, and that, in consequence, Mrs Landell was incarcerated in the jail of Greenlaw, from which she had been liberated on bond granted by a party for her appearance in Court to answer any action, and likewise for payment of the debt,—all of which proceedings, it was alleged, the said defender conducted. An action, it was stated, was then raised in this Court by the pursuer against the debtor, who pleaded as a preliminary defence, that neither being domiciled in Scotland, nor having any property or effects in it, she was not within the jurisdiction of the Court of Session, and that the irregular and illegal proceedings which were adopted to force her within the jurisdiction of the Scotch courts, were altogether ineffectual for that purpose.

The summons then proceeded to set forth, that copies of the defences were delivered to the defender, who,

"as agent foressaid, during the dependence of the said action, applied to the said James Bell and others for information as to the practice of granting border warrants, and in general for all information necessary for conducting the said process at the instance of the pursuer, which the said William Purves transmitted to the pursuer's Edinburgh agents; and the said William Purves was thus fully aware of the said process, and of the pleas maintained by the said Mrs Margaret Brodie or Landell."

The result of the case was then set forth, which was, that the Second Division of the Court, 28th January 1838 (*ante*, Vol. X. p. 231), on the report of Lord Jeffrey, dismissed the action; and it was stated that this judgment, and the Lord Ordinary's opinion against "the gross irregularity and nullity" of the warrant, was at the time communicated to the defender.

It was then set forth that Mrs Landell brought an action against the pursuer, and also against the Sheriff-clerk, to recover damages for wrongous imprisonment, in which she succeeded in obtaining a verdict of £500 damages against the former, and £300 damages as against the latter;—the expenses connected with these proceedings, and also the damages, had all, it was subsumed, been incurred in consequence of the illegal warrant, and the defender was hence liable to him in relief. The summons then contained the necessary conclusions for payment and relief.

The defender *pleaded* that the action was not relevantly laid. The plea was as follows:—Because, even on the supposition that the pursuer's statement was in all respects correct, the summons does not set forth any facts relevant to subject the defender in liability in terms of its conclusions. It is not alleged that he exhibited gross ignorance and want of professional skill, or that he was guilty of gross neglect in the conduct of the judicial proceedings adopted by the pursuer against Mrs Landell, or that he violated any law or regulation of the Court before which he is said to have acted in the matter as the pursuer's professional agent. The summons contains no such allegations. On the contrary, the damage of which the pursuer seeks reparation and relief resulted from no act over which the agent had any control, but from an inveterate practice of the Court before which he was a licensed practitioner being, in the matter of border warrants, found to be illegal. The duty of the agent would, in such a case, be to lodge the 'information for the warrant,' while its validity or legal effect would rest with those by whom, according to the practice of the Court, the warrant was issued.

The Lord Ordinary pronounced the following interlocutor:

"19th March 1842.—The Lord Ordinary having heard parties, and considered the process, sustains the defence of irrelevancy, and assoilzies the defender, and decerns: Finds the defender entitled to expenses; appoints an account thereof to be lodged, and remitted to the auditor to tax and report.

"*Note.*—The Lord Ordinary sent this case to the Issue Chamber, because he thought that any unavoidable question of law that might arise would be disposed of most satisfactorily at a trial. But it having been brought back without an issue, and both parties preferring to have the relevancy settled now, he gives his judgment on it.

"If all the matter in the condescendence and answers, and still more in the defences, could be competently taken into view, a trial of the facts could not be avoided; but, correctly speaking, the sole point is, does the summons present a relevant case for the relief sought?

"The Lord Ordinary thinks it does not, and this simply because it neither sets forth negligence nor ignorance, nor any other ground for making a law-agent responsible to his employer for a legal error. The responsibility of one party to another party is a different affair, and depends on different principles; but all that an employer has a right to expect from his agent is due skill and care. This principle was distinctly recognised in the two important and well-considered recent cases of Rowand and of Lang, particularly in the House of Lords, where it was laid down that a solicitor is not answerable for every mistake in point of law, when he does not take it upon himself to 'depart from the ordinary and beaten course.' Not only is nothing of the kind alleged here, but at the bar every thing of the kind was expressly disclaimed, and the action was maintained merely on the fact that the warrant, said in the summons to have been recommended, obtained and executed by the defender, has been found to be 'illegal and irregular.' So it has. But its having been so

is not, of itself, inconsistent with the defender's having the best possible reason for believing that it was regular and lawful. Now the pursuer does not say that the defender acted unskillfully or negligently. He says the reverse. In this situation, though it be hard on the pursuer to have to pay such a sum to the party he was the cause of injuring, it would be much harder that this misfortune should be laid on the agent from whom he purchased nothing but adequate skill and care, both of which he does not deny that he had.

"The pursuer endeavoured to distinguish the case of an *infringement of personal liberty by a warrant*, from other cases. In so far as the agent's responsibility is concerned, the Lord Ordinary sees no ground for any such distinction. Can an agent be required to do more, even in cases of warrants and of personal liberty, than to give his client due intelligence and due caution?"

The pursuer having reclaimed, the Court, at advising, pronounced the following interlocutor:

"Alter the interlocutor complained of; find the summons relevant, and remit to the Lord Ordinary to proceed further in the cause, reserving all questions of expenses."

Lord Ordinary, Cockburn.—*Act.* J. S. More; Greig and Morton, W.S., *Agents.*—*Alt.* Whigham; Ainslie, Macallan and Graham, W.S., *Agents.*—[G. D. F.]

28th May 1842.

FIRST DIVISION.—(H. B.)

No. 180.—REV. ALEXANDER CUMMING and OTHERS (*Hector Swanson's Trustees*), and WILLIAM SWANSON, *Pursuers*, v. WILLIAM WILLIAMSON, *Defender*.

Landlord and Tenant—Rent, Consignation of.—*Process.*—*Circumstances in which, after defences were lodged, but before the record was closed, consignation was ordered, to a modified amount, of arrears of rent alleged to be due.*

The Rev. Alexander Cumming and others (*Hector Swanson's trustees*), and William Swanson, *pro indiviso* proprietors of the lands of Leithhead and others, brought an action against William Williamson, the tenant in the lands, in which, on the statement that the rent was £70 per annum; that of this rent no more had been received, during the four years from Martinmas 1836 to Martinmas 1840, than £55. 12. 10.; and that the lands were impoverished and injured by improper cultivation,—they concluded for payment of the sum of £280, with interest, under deduction of the partial payments, and also of the sum of £300, more or less, as compensation for the loss and damage sustained through improper cultivation.

The defender stated in his defences, that he had signed a missive of lease agreeing to pay £70 of rent, but that the proprietors had engaged to repair the mansion-house and other buildings, and the fences upon the farm; and though he had repeatedly called upon them to fulfil this part of their engagement, they had failed so to do. The loss thus sustained by him annually was not less than £30; and William Swanson, one of the *pro indiviso* proprietors, was so conscious of this, that he had offered to make a deduction of £20 for each of the four years on which arrears were said to be due, making a deduction in all of £80. The defender altogether denied the allegation of improper management. After the defences were lodged, but before the record was closed, the pursuers moved for consignation of the rents sued for; and the Lord Ordinary pronounced an interlocutor ordering consignation to the amount of £144. 7. 2., being at the rate of £50 for each year in arrear, under deduction of the partial payments.

The defender reclaimed, and *pleaded*—That as the record was not closed, and the leading averments of the pursuers were denied, the order for consignation was incompetent, or, if not altogether incompetent, ought, in the circumstances, to be restricted to a much smaller sum.

At advising,

Lord President.—The novelty here is, that consignation is ordered, when nothing more has been done than to lodge defences. I am not prepared to say that this may not be done in circumstances where great delay has taken place. Here nearly four years' rent are due, and action has been brought for £280, under deduction for a partial payment, reducing it to about £230. The defender's answer is, that the proprietors have not fulfilled their part in the contract, and that, in the circumstances, consignation is incompetent. I cannot see the least incompetency; but the only question which occurs to me is, whether the amount of the sum ordered should not be diminished?

Lord Mackenzie.—I admit that there is no absolute rule as to consignation before the record is closed. Indeed the Judicature Act does not allow any absolute rule. When there is an admission in the defences that a sum is due, there can be no objection to an order for consignation; and the only question is, if the Lord Ordinary has correctly interpreted the statement in the defences as amounting to a substantial admission.

Lord Fullerton.—In that part of the defences where the defender estimates his annual loss at £30, there is something very like an admission that the lands are worth £40.

The Court pronounced the following interlocutor:

"Adhere to the interlocutor of the Lord Ordinary ordering consignation, but restrict the sum to be consigned to £100 Sterling, and allow fourteen days from this date for compliance with the order of consignation; of new decern for the expense of extract, if necessary."

Lord Ordinary, Murray.—*Act.* Patton; Wm. Saunders, S.S.C., *Agent.*—*Alt.* Pattison; David Wight, W.S., *Agent.*—B. Clerk.—[H.B.]

28th May 1842.

SECOND DIVISION.—(G.D.F.)

No. 181.—MESSRS HALDANE and ABBOT, *Pursuers and Advocators*, v. ALEXANDER FRASER, and ANGUS GRAY, *his Trustee, Defenders and Respondents*.

Agreement—Construction—Jury Cause.—*In regard to a written agreement, by which a party was bound to supply certain commission-agents "with one puncheon of whisky per week," "the same to be delivered free at D., in puncheons, hogsheads and half-hogsheads: it being understood that not more than one half-hogshead per week shall be required"—Held that the true construction was, that the obligant was bound to deliver the whisky at the rate of one puncheon per week.*

Excise Laws.—5 Geo. IV. c. 74; 5 and 6 Gul. IV. c. 63.—*Agreement.—Where a party agreed to supply another with one puncheon of whisky per week, the same to be delivered in puncheons, hogsheads, and half-hogsheads, and it was pleaded, that the agreement was null under the Excise laws, in respect the agreement should have been made by the imperial gallon, or by some multiple or aliquot part thereof.—Held that the plea was not applicable.*

The respondent addressed the following letter to the advocates:

"Dundee, 25th Dec. 1835.

"Messrs HALDANE & ABBOT.

"Gentlemen—I hereby agree to supply you from our distillery, Pitcarmick, with one puncheon whisky per week, until the 10th October 1836, commencing at the 8th of January 1836. The same to be delivered free at Dundee, in puncheons, bhd., and half-bhds.: it being understood that not more than one half-bhd. per week shall be required, price 7s. 5d. per gallon."

(Signed) "ALEX. FRASER."

"The amount from time to time to be drawn for at from 10 to 12 days from date of sending out."

(Signed) "A. FRASER."

The respondent thereafter delivered a supply of whisky to the advocates, according to the quantities specified in orders transmitted by them to the respondent, amounting to about 1353 gallons, between 18th January 1836 and 21st June thereafter; and the same was settled for by drafts on the advocates. This aqua was sent by the respondent to the dealers who were indicated in the orders of the advocates.

Thereafter the advocates raised a summons in the Sheriff-court of Perth against the respondent, averring that the respondent had failed to implement the bargain, in respect the proper quantity of whisky had not been sent weekly as agreed on; that twenty-eight puncheons were undelivered; and therefore concluding for damages for the non-implementation.

In defence, the respondent stated that the fault lay with the advocates, who, as commission-agents, having no spirit-license, ought to have continued sending instructions to the respondent as to the quantity required, and in regard to the parties to whom it was to be delivered by the respondent; but as they had failed in this, there was no ground for damages. The more especially were these orders necessary, as the advocates had no spirit-license themselves; and it was essential to the respondent to know, by a specific order, the quantity wanted, and the party to whom it was to be addressed, with the view of taking out the proper permit to allow the goods to be taken into the dealer's stock. As these orders had never arrived, he concluded that the advocates were not desirous for a further supply, and *pleaded*—1. That by the laws of Excise, and the usage of trade, the pursuers were bound, in order to enable the defender to perform his part of the agreement libelled, to furnish him with regular orders for each quantity of spirits, specifying the name of the person to whom they were to be transmitted: 2. That having failed to do so, the defender was not bound, or indeed entitled to transmit the spirits; and the pursuers having delayed for a length of time to send him any such orders, the defender was entitled to conclude that they did not mean to abide by the agreement libelled, and was accordingly entitled otherwise to dispose of the produce of his distillery: 3. That the pursuers are not now entitled, after such negligence and breach of obligation on their part, to insist on performance from the defender, or to claim damages from him for non-performance.

After a record had been made up, and a proof *hinc inde* led, the respondent put on record the following plea:—1. The contract libelled on did not afford any competent or relevant ground of action, the same not having been made by the imperial gallon, or by any multiple or aliquot part thereof, and being therefore null and void under the Acts 5 Geo. IV. c. 74, and 5 and 6 William IV. c. 63.

The advocates *pleaded*—That a party agreeing to supply another with a specified commodity, is bound either to give delivery, or pay the damage occasioned by his non-fulfilment of the agreement, and the buyer is entitled to insist for either alternative.

The Sheriff-substitute pronounced the following interlocutor:

"Perth, 28th August 1840.—Having advised the process, repels the plea of the defender, urged now for the first time on the Statutes providing for uniformity in weights and measures, but finds that the missive libelled on is not sufficient to support an action of damages founded on non-implementation of the contract therein expressed, in respect that the terms thereof are not sufficiently clear and consistent, as to the extent of the obligation thereby imposed on the defender, Fraser, and finds that the nature of the transactions following on the said missive do not sufficiently explain the meaning thereof, or support the pursuers' claim under the same; therefore absolves the said defender from the conclusion of the action; finds the pursuers liable in expenses, of which allows an account to be lodged, and taxed, and decerns. (Signed) "HUGH BARCLAY."

"Note.—Perhaps, under the Act of Sederunt applicable to inferior courts, the defenders are not excluded from their plea in law founded on the Statutes as to weights and measures, only they behoved to have been subjected to costs for the delay in stating their plea; but the plea appears bad. The Statutes are intended to abolish local standards. The first Statute in date, allowed sales by local denomination where the rate of conversion was stated. The latest Statute wisely took away this liberty, and required that contracts be made according to imperial standard, and by no other. But there is a provision not previously so essential, exempting sales by any vessel 'not represented as containing any amount of imperial measure, or of any fixed local or customary measure.' In this way, it is thought that not merely sales by the slump where the article is seen, but sales by the slump, such as a cart load, a ship load, a puncheon or barrel, are good sales, where the price is either fixed by the slump, or as (in the present case) by the number of imperial measures the vessel may be found to contain. There no doubt may exist questions as to what such vessels should contain, when the price is not otherwise fixed, but as such vessels appear not to fall under the denomination of local weights or measures, it is not thought that the Statutes can be held to reach them.

"The contract is one very peculiar, and may be held as one of sale. But it is clearly liable to the obvious ambiguity, or rather contradiction, as to whether the obligation on the defender was to furnish one puncheon or one half-hogshead in each week. It is very clear that the defender was not, steadily each week, and within its number of days, to furnish any precise quantity. The specification of the different vessels, and consequent quantities in which it was to be furnished, proves this on the face of the missive, and the practice of the parties following on that missive, confirms this meaning. Had the defender, without demand, furnished each week a certain quantity, which the pursuers as regularly received without complaint on either side, this would have afforded the best interpretation of the contract. The defender, however, appears never to have sent whisky unless ordered, and that at times and in quantities varying so much as to prove that there were no fixed terms of agreement as to time and quantity. The meaning, therefore, appears to have been, that the defender should furnish the supplies when demanded, not to exceed a certain rate in the week, or per week, as it is expressed. Then arises the question, what is that rate? There are two rates stated, one four times the quantity comprehended by the other. The pursuers have an explanation of this; but it is not permissible to go out of the contract to get it explained, the more especially that the explanation attempted by them was matter of easy expression, when they had the framing of the contract. The defender for some time continued to implement the pursuers' orders, until they gave them to be fulfilled in a mode not recognised by the missive, and not according to all previous practice following thereon. The pursuers state, that such was part of the original agreement; but if it were, it ought to have been in the missive, which must be held to comprehend the whole terms of bargain. It is not very clear, whether the defender could, consistently with the revenue laws, do what was required of him; but suppose he could, it does not appear, under the missive, he was bound to comply with a demand so couched. Supposing that all the difficulties were cleared away, and that under the missive the pursuers were held entitled to have had delivery in any way they choosed to ask it, and at any periods, and in any

quantities not exceeding the rate of one puncheon in the week, there still is much in the defender's argument as to the recovery of damage for the non-delivery of the quantity necessary to complete the aggregate at that rate. The proof rather goes to show an interest in the defender to have implemented the contract if asked, according to the terms as construed by him. There is, on the one hand, no proof of direct damage sustained by the pursuers, through their inability to supply their customers, by reason of the defender's failure to implement his part of the contract; and, on the other hand, there is no proof that the defender did, or could make profit by his violation of the pursuers' contract. Even admitting the pursuers' right to consequential damage arising from loss of profit, it would not be very easy to determine the scale by which the amount was to be ascertained; and the pursuers' estimate, in every point of view, is far above what the proof would warrant."

The Sheriff having adhered to this interlocutor, Messrs Haldane and Abbot presented a note of advocacy on caution.

The Lord Ordinary pronounced the following interlocutor:

"1st February 1842.—The Lord Ordinary having heard parties, and considered the process, advocates the cause, recalls the interlocutors complained of, repels the defences founded on the Statutes for promoting uniformity in weights and measures, and also the defence founded on the alleged obscurity of the agreement: Finds that the proof already led is not sufficient to enable the Court to dispose either of the claim for damages, or of their amount, if any be due; therefore, remits the cause to the issue clerks, leaving it to be determined hereafter, on application to the Lord Ordinary, or to the Judge who is to try the cause, whether the existing proof is to be cancelled, or to be used before the jury; and reserves all questions of expenses.

"Note.—Even if the writing were supposed to be obscure, the question, whether it did or did not constitute an agreement capable of execution, would form a proper subject of deliberation for a jury. To determine the fact whether a contract was formed or not, is surely one of the duties of a jury, although the performance of this task may require them to read, and to put its true meaning on a writing said to contain a mercantile bargain. But the Lord Ordinary sees no obscurity in this paper. It is an offer, which was practically accepted, for the delivery of a puncheon of whisky weekly, which, however, could be demanded either in whole puncheons, hogsheads, or half-hogsheads; but, in order to save frequent transmissions, the purchaser's option of ordering half-hogsheads should not be exercised beyond one-half hogshead a-week, he being obliged to take the rest in a larger quantity.

"The Statute is inapplicable, because the vessel was not 'represented as containing any amount of imperial measure, or of any fixed local or customary measure.' It was not a purchase by any fixed measure at all, whether imperial or local. A person who buys a puncheon full of spirits, may have an opinion as to what quantity he will get, as he may when he buys a bottle full; but these are not fixed measures, and were not represented as containing any amount of any measure.

"These obstacles being cleared away, it is a proper jury case of damages, as to which the proof taken is nearly useless."

On a reclaiming note by the respondents, the Court

"Adhere to the interlocutor, in so far as it advocates the cause, but *quoad ultra* alter the same, and find, that according to the true construction of the agreement between Messrs Haldane and Abbot, the pursuers, and the said Alexander Fraser, defender, dated 25th December 1835, was bound to supply the pursuers with whisky at the rate of one puncheon per week, for the period, and at the price mentioned in the said agreement, and direct an issue to be prepared for trying the question, whether the defender failed to implement the said agreement, to the loss, injury, and damage of the pursuers: Reserving all questions of expenses."

Lord Ordinary, Cockburn.—Act. D. M. Adamson, S.S.C., Agent.—Alt. A. McNeill; James Brodie, S.S.C., Agent.—F. Clerk.—[G.D.F.]

28th May 1842.

SECOND DIVISION.—(G.D.F.)

No. 182.—WILLIAM CLEMENT, *Suspender*, v. ROBERT and JAMES GREIG, *Respondents*.

Bill of Exchange.—Suspension.—Cessio.—A suspension was presented, without caution or consignment, of a charge on a bill by an obligant therein, *inter alia*, on the ground that until the funds and effects conveyed to the trustee under a decree of cessio obtained by him after the date of the bill and the period of payment, were exhausted, to which process the chargers were parties, they were not entitled to use diligence to attach any funds and effects now belonging to him.—The Court, remitted to the Lord Ordinary to refuse the note, on the ground, principally, that the chargers disclaimed any intention of using personal diligence, and explained, that it was with the view to sequestration of the suspender under the Bankrupt Statute.

The suspender having been charged on a bill for £50, dated 16th August 1838, and payable at four months' date, at the instance of the respondents, presented a note of suspension, without caution or consignment, in the following circumstances, as set forth in his statement of facts:—He admitted having granted the bill charged on, and it appeared, that in relief of the various claims the respondents had against him, he had indorsed and assigned to them various bills and other securities, which, he averred, were of greater amount than the sum in the charge. While in jail on diligence used by the respondents on one of the bills so indorsed, he applied to the Sheriff for *cessio*, in which process the respondents entered appearance, but decree of *cessio* was nevertheless pronounced in favour of the suspender (June 1839), considerably subsequent to the date of the bill charged on, or the period of payment. Besides this process, he had previously raised an action against the respondents, in order to obtain a count and reckoning with them for their intromissions with the securities assigned to them, but the trustee in his disposition *omnium bonorum*, had neglected to follow it out, though it was averred that a considerable balance would be found due to the suspender.

In these circumstances he, *inter alia*, pleaded—1. The complainer, in virtue of the decree of *cessio bonorum*, above mentioned, pronounced in a process to which the chargers were parties, is protected from all execution of diligence for debt contracted prior to said decree. 2. The chargers are not entitled to use diligence for such debt against the complainer, even to the effect of attaching any funds or effects now belonging to him, until the funds conveyed to, or vested in their trustee under the *cessio* are exhausted. 3. The complainer is not debtor to the chargers, but, on the contrary, they are his debtors.

The respondents admitted that they had received certain securities, but they stated, that, deducting the £50 bill, he was still their debtor in a sum of £1029. 13s. 11d., due on a variety of bills, &c., of which an account was lodged in process; and they averred that the securities, even if liquidated, would still leave them considerably his creditors beyond the amount of the bill. The decree of *cessio*, it appeared, had been brought under reduction, but the suspender, though applied to to defend that process and decree, had refused to do so, and he had likewise refused to grant a disposition *omnium bonorum* to the trustee in the *cessio*,—in par-

ticular, of certain heritable property, which was said to be the only source from which any thing was expected to be recovered towards payment of the creditors. The respondents further averred, that, since 1839, the suspender had carried on business as a merchant in Crieff, in partnership with another person, under the firm of William Clement and Company, and that he had acquired funds and effects since the date of the decree in the *cessio*. They also repeated an intimation made to the suspender in the presence of the Lord Ordinary, and before the record was ordered to be prepared, that they had no intention of proceeding to apprehend or incarcerate him in virtue of the diligence sought to be suspended, and that the charge was only given in order to render him notour bankrupt, by connecting it with diligence against his estates and effects. Further, they averred that the present suspension was carried on at the instigation of Drummond, with the view of preventing the notour bankruptcy of the suspender, and the sequestration of his estates, and that Drummond was the *verus dominus litis*. They pleaded—1. That the debt being properly vouched, and no sum having been paid to account of it, they were entitled to insist for payment: 2. That the suspender having refused to defend the reduction of the decreet of *cessio*, or to execute a disposition *omnium bonorum* in favour of his trustee, as required by the Statute 6 and 7 Will. IV. c. 56, was barred, *personali exceptione*, from founding upon the decree of *cessio*, at all events, from founding upon it to the effect of objecting to diligence used by the chargers, not against his person, but against his estate, and with a view to a sequestration of his estates; and that the chargers were not precluded from using diligence against his estate and effects. But, in consequence of his said refusal, the chargers were entitled to attach by diligence his estate and effects, even in so far as the same may have belonged to him prior to the date of the decreet of *cessio*.

The Lord Ordinary pronounced the following interlocutor:

" 31st March 1842.—The Lord Ordinary having resumed consideration of this cause, and heard parties' procurators, and having since also considered the proceedings in the process of count and reckoning referred to, and more especially the state of accounts lodged therein by the present chargers,—Passes the note.

" Note.—It is clear there must be farther investigation before this diligence can be allowed to proceed.

" 1. Were there nothing but the decree of *cessio* obtained posterior to the date of the bill charged on, the cases of *Lamb*, 16th May 1798, *D.* 6576, and *M'Kessock*, 10th February 1814, *Fec. Col.* (cited 2 *Bell Com.*, 597), and *Do. Commy. on present Bankrupt Act*, p. 33, seem of themselves sufficient warrant for holding that the chargers are not entitled, *de plano*, and as mere matter of course (without accounting in any respect for what has been done under the *cessio*), to proceed with summary diligence upon a bill which formed part of the alleged debt in their persons, while they were actually parties to the process of *cessio*. The decree in the *cessio* is now, so far as the moveable estate of the bankrupt is concerned, equivalent to a conveyance. The refusal to execute such conveyance, in addition, does not therefore seem to make the chargers' situation better, at least in a question as to mere diligence against the moveable estate; and there is nothing else here.

" 2. But the Lord Ordinary rests chiefly upon the state of accounts founded on by the chargers themselves in the process of count and reckoning. The bill charged on is there put to the

suspender's credit, as on 24th August 1838. In other words, it was discounted by the chargers for their own behoof, and the proceeds retained by them; the bill thus constituting, for the time, an *advance* *et*, not to the suspender. The bill, however, on maturity, was not retired by the suspender; and hence, the chargers having to retire it, the advance previously made by the suspender, and carried to his credit in account with the chargers, was neutralized; and a *cross entry* accordingly appears at the debit of the account, under date 2d January 1839, which replaced both parties *in statu quo*, as if the bill had never been granted. In this way, there would seem, in the result, *no value* to have been given by the chargers for this bill; indeed, prior to 24th August 1838, there is no entry on the debit-side of the account, in respect of which such value could have arisen. It appears, indeed, that there were certain other bills then in the circle, which the chargers had afterwards to retire; and it may be that the bill in question was put into their hands for the purpose of enabling them to raise the means of retiring those others. But the bills here referred to are themselves charged to the suspender's debit; and to allow the bill charged on, therefore, also to be dealt with as a substantive debt, would be to allow the chargers *double benefit*, under the two sets of bills, for one and the same liability.

" Besides, in another view, the same conclusion may be arrived at. The sum total of balance at their credit is stated at £987 19 6

" But among the entries at debit are the following:—

1838.		
Aug. 29.	Bill on F. L. O'Beirne,	£100 12 0
1839.		
Jan. 3.	Do. do.,	301 14 2
May 10.	Do., John Drummond and James M'Laren,	100 8 6½
July 9.	Share of Commercial Bank cash-account,	216 3 6
1840.		
May 26.	Open account for goods,	297 9 0
		<hr/> 1016 7 2½

" Of themselves exceeding the total balance by £28 7 8½. And there are other entries of a like kind to a considerable farther amount. Now, unless it could be shown that the bill here charged on was granted to *express account* of these liabilities, which the respective dates of the several transactions would seem in a great measure to exclude, there is nothing which, by possibility, could constitute *value* in this account for the bill now in dispute.

" At all events, it is plain the question between the parties involves a very complicated accounting, even if the chargers shall be able in the end to show that the sum contained in this bill is due.

" And therefore, on the whole matter, the Lord Ordinary has thought it safest to pass the note. In so doing, he trenches nothing upon the chargers' right to execute diligence against the suspender's person. For that they expressly waive, in respect of the *cessio*. Neither does he touch any remedy they may have against the debtor's estate, such as it existed down to the date of the *cessio*. For that stands already surrendered, so far as the moveables are concerned; and if there be *heritage* unconveyed, the chargers have their remedy *aliunde*. There only remains such estate as the suspender may have acquired subsequently to the *cessio*. And it seems but reasonable, in every view, that the chargers should proceed in a less summary form to constitute their claims against this, which, accordingly, the discussion upon the passed note will allow them every proper opportunity to do."

On a reclaiming note for the respondents, the Court altered, and remitted to the Lord Ordinary to refuse the bill, and to find the suspender liable in expenses.

Lord Ordinary, Ivory.—Act. James Adam, W.S., Agent.—Alt. E. S. Gordon; Ritchie and Hill, W.S., Agents.—F. Clerk.—[G. D. F.]

28th May 1842.

SECOND DIVISION.—(G.D.F.)

No. 183.—JAMES AITKEN, *Pursuer*, v. THE MAGISTRATES and TOWN-COUNCIL of LANARK, *Defenders*.

Process—Citation—Burgh—Magistrates—Where a summons, directed not against the provost, magistrates and councillors of a burgh generally, but framed on the principle of enumerating the members of council, omitted the name of one of the constitutional members, and citation was effected by executions against the parties named in the summons, and not by service on the council when convened at a meeting—Preliminary defence of no process, in respect the parties representing the burgh were neither lawfully called nor cited to the action, was sustained by the Lord Ordinary;—but the Court, in the event of a supplementary action being brought, remitted to his Lordship to recal his interlocutor.

The pursuer brought this action to reduce and set aside a petition for sequestration, and procedure following thereon, as also a summons and relative procedure, which the defenders, as representing the common good of the burgh of Lanark, had insisted in before the Sheriff of Lanark, for payment of certain rents due by the pursuer as their tenant, and in consequence of which the pursuer had been obliged to cede possession of the subjects. The summons was directed against “John Gibson, of Saint Patricks, surgeon in Lanark, provost of the royal burgh of Lanark, David Fordyce and John Aikman, magistrates of the said burgh, A. T. Waterson, John Laurie, Robert Smith, Thomas Watson, Robert Harvey, James Wood, Daniel Walker, William Smillie, John Smith, William Watson, James Thomson, and Andrew Hislop, councillors, and John Marr, treasurer of the said burgh, as representing the community of the said burgh, defenders, for and in behalf of the said burgh, and of themselves personally.” And the conclusions were—

“And the said Provost, Magistrates and Town-Council, for the said burgh and themselves, defenders, ought and should be decerned and ordained, by decree of our said Lords, to reinstate the pursuer in his possession of the said farm and houses, from which they wrongfully and illegally ejected him, and to grant him a regular and formal lease for the stipulated period, at the rent, and under the conditions and provisions of the said articles of roup: As also to make payment to the pursuer of £500 Sterling, or such other sum, more or less, as shall be ascertained to have been the worth of his property wrongfully sold or appropriated by them, after deducting the sum of rent for which sequestration was used, and any expenses which may be found chargeable: And farther, to make payment to the pursuer of £500, or such other sum, more or less, as shall be ascertained to be the amount of the loss and damage sustained by him through their said wrongful and illegal proceedings in selling or appropriating to themselves the said property, and ejecting him from his possession of the said farm and houses, and which he has already sustained, or may yet sustain, from want of possession thereof: Or otherwise, the said Provost, Magistrates and Town-Council, for the said burgh and themselves, defenders, ought and should be decerned and ordained, by decree of our said Lords of Council and Session, to make payment to the pursuer of the sum of £1000 Sterling, or such other sum, more or less, as shall be ascertained to be due to him, in name of reparation and damages, and as a solatium for the said injuries and the loss which he has sustained, and may still sustain, from want of a regular and formal lease, and of the possession of the said farm and houses: And the said defenders ought and should also be decerned and ordained, by decree of our said Lords, to make payment to the pursuer of

the sum of £200, or such other sum, more or less, as our said Lords shall modify as the expenses of the process.”

The defenders gave in preliminary defences, in which they stated, that the whole municipal administrators of the burgh were neither enumerated nor called in the action. The Council consisted, by its constitution, of seventeen members. Only sixteen were set forth or cited, and the omission consisted in not citing Alexander Buchanan, the Judge of the Guild Court, and a constituent member. It was also objected, that as the summons was executed not by service on the Council when convened at a meeting, but by the individual citation of the defenders, who are only a part of the Council, there had been no legal execution against the parties representing the burgh; and they accordingly pleaded no process,—the parties representing the community or burgh of Lanark, against whom the action purports to be directed, having not been lawfully called or cited.

The Lord Ordinary pronounced the following interlocutor:

“16th March 1842.—Having heard the counsel for the parties, sustains the preliminary defences, dismisses the action, and decerns: Finds the pursuer liable in expenses, and remits the account thereof, when lodged, to the auditor to tax and report.”

The pursuer reclaimed, when the Court, without dismissing the action, considered it was competent to cure it by a supplementary action; and accordingly,

“in the event of a proper supplementary action at the reclaimer's instance being brought into Court, remit to the Lord Ordinary, with power to recal the interlocutor now complained of, and to proceed further thereon as to his Lordship shall seem just: Find the reclaimer liable in the expenses of the present discussion on the preliminary defence, and also remit to the Lord Ordinary to give decree accordingly.”

Lord Ordinary, Cockburn.—*Act*. Turnbull; Wotherspoon and Mack, W.S., *Agents*.—*Alt*. Neaves; Menzies and Macnochie, W.S., *Agents*.—*T. Clerk*.—[G.D.F.]

TEIND COURT.

1st June 1842.

No. 184.

The following augmentation was awarded:

Kirkmichael and Garrell—Presbytery of Lochmaben—Old stipend, 5th December 1821, 15 chalders, and £8. 6. 8. for communion elements.—Stipend modified of this date, 16 chalders, and £8. 6. 8. for communion elements,—being an augmentation of 1 chalders.

1st June 1842.

FIRST DIVISION.—(H. B.)

No. 185.—ALEXANDER MACRAE, *Pursuer*, v. COLONEL JOHN GORDON, *Defender*.

Landlord and Tenant—Compensation—Claim, Liquid and Illiquid—A landlord, who, on the expiry of the lease, took delivery of his tenant's stock at a price fixed by mutual valuers, held not entitled to withhold payment, on the allegation that the tenant was liable to him in certain illiquid claims.

Alexander Macrae held the farm of Askernish from the trustees of Ranald George Macdonald of Clanranald, under a lease, which stipulated, *inter alia*, “that

the proprietor should be bound and obliged to take the whole stock of cattle and others which might be on the farm at the time of the pursuer's removal therefrom, at a price to be fixed by two men mutually chosen by the parties." The lease expired in 1840; but in 1838 and 1839, Colonel Gordon acquired, by purchase, Clanranald's estate of Boisdale, in South Uist, including the farm of Askernish. Accordingly, when the lease was about to expire, valuers were appointed by Colonel Gordon and the tenant, in terms of the above stipulation; and an award having been pronounced fixing the price, delivery was given on the following acknowledgment:

"Askernish, 5th June 1840.

"SIR—The above stock upon this farm, amounting by valuation to three thousand one hundred and seven pounds 2s. 1d. Sterling, I acknowledge to have received from you, on account of Colonel Gordon of Cluny." (Signed) "J. M'MILLAN."

"To Alex. Macrae, Esq."

When delivery was thus taken, no intimation was given to Macrae that Colonel Gordon had any claims against him; but afterwards, on the allegation that Macrae, who had been judicial factor on the estate of Boisdale, had in that capacity drawn rents for the former proprietors, which truly belonged to the new purchaser, Colonel Gordon refused to pay the price of the cattle. Macrae thereupon brought an action against him, concluding for payment of the price as fixed by the valuers, and also of £50 as the alleged value of certain out-gatherings which belonged to the stock, and had been afterwards collected and delivered to the defender.

The Lord Ordinary pronounced the following interlocutor:

"4th March 1842.—The Lord Ordinary having heard parties, and considered the process, repels the defences, and decerns in terms of the conclusion for payment of the principal sum of £3107. 2. 1., with interest from and after the 5th day of June 1840: Finds the pursuer entitled to expenses; appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same and to report; and as to the conclusion for the price of the after-gatherings of sheep, appoints the cause to be enrolled, that the parties may say how they propose to proceed.

"Note.—This is the most violent attempt to extinguish a liquid debt by illiquid claims that can well be imagined. The defender took delivery of the pursuer's sheep at the price which he does not dispute, and he still retains them. But when asked to pay the price, as fixed by a written document and by his judicial admission, his answer is, that he has certain counter claims, many, if not all of which existed prior to his taking delivery; but no intimation was then given that it was in this way he was to pay; and if such intimation had been made, it is not probable that possession of the sheep would have been given. These demands are not attempted to be enforced by any action, and when stated as compensating the pursuer's demand, it is enough to say that they are all denied, and all so utterly illiquid that no sum was pretended to be put upon one of them even at the bar."

The defender reclaimed. At advising,

Lord President.—It is impossible that the Court can allow Colonel Gordon to keep the whole £3000 on an allegation of this vague description. I cannot help being of the opinion which the Lord Ordinary has expressed in his note, "that this is the most violent attempt to extinguish a liquid debt by illiquid claims that can well be imagined." The transfer of stock took place two years ago, the delivery is acknowledged, and yet at this time of day no payment at all has been made. That debt

is perfectly liquid, but in Colonel Gordon's claims there is nothing like liquidation. Besides, they are made against Macrae only in his capacity as judicial factor. It seems he has drawn certain rents, as to which there was a doubt whether they belonged to the sellers of the estate or the purchasers. Colonel Gordon says they belong to him, but that is a question which he ought to try with the common agent in the ranking and sale, and not with this unfortunate tacksman, who, after having delivered up his stock in terms of the lease, cannot get a farthing of payment. This mode of dealing, on the part of the defender, it is impossible for a court of justice to sanction. I am clear for adhering to the Lord Ordinary's interlocutor.

Lord Mackenzie.—I am of the same opinion. The debt due to the tenant was instantly payable. The cattle were delivered and carried away. The price was fixed by a regular writing; and there was no stipulation for delay in the payment of it. Then the defender's claims are in the highest degree doubtful in every respect. They are all denied by the pursuer. They are made against him in his capacity as judicial factor; and though he is said to have drawn rents which did not fall under his factory, there is no allegation of his having done so *in mala fide*. It is impossible to allow such claims to be set off against a debt of this sort.

Lord Fullerton concurred.

Lord Gillies absent.

The Court adhered.

Lord Ordinary, Cockburn.—Act. Buchanan, Ross; Sang and Adam, S.S.C., Agents.—Alt. Hector; John Hunter, W.S., Agent.—N. Clerk.—[H.B.]

1st June 1842.

FIRST DIVISION.—(H. B.)

No. 186.—MRS ISABELLA CAMPBELL and WILLIAM CAMPBELL (*Peter Campbell's Trustees*), Pursuers, v. JOHN CAMPBELL RALSTON, Defender.

Landlord and Tenant.—Lease.—Missive.—A tenant entered into possession on a letter, which gave him liberty "to alter the buildings on the ground at his own expense, to suit his own convenience, but bound him," at the expiry of the lease, "either to leave the subjects as altered, or restore them to the state in which they were when his possession commenced"—Held that the tenant was not entitled to insist, where a regular lease was drawn out between the parties, that it should contain a clause entitling him to take down and carry away any erection which he has or may put up on the premises, with the option, at the expiry of the lease, of leaving them as altered, or restoring them to their original state.

After a communing as to a lease of certain premises, with the view of establishing a manufactory of hair-cloth, John Campbell Ralston addressed the following letter to Mrs Isabella Campbell:

"MADAM,—I have now made up my mind, and I am willing to give you £15 for the premises, &c., belonging to you at Musselburgh, on the following conditions, viz:—

"1st, On a lease for ten years.

"2d, Having the option of remaining five years longer.

"3d, In the event of your selling the property, having a refusal of it at the price you will sell for.

"4th, Having a break at Whitsunday 1839. But, in the event of my taking advantage (which is very improbable) of said break, I am bound, over and above my rent, to have laid out £5 upon the interior of the dwelling-house for its improvement, and the proprietor's benefit.

"5th, Having the power to alter the premises to suit my purposes."

"6th, Being entitled to take down and take away any erections I put up.

"If these terms suit, I will prepare and send an offer in terms thereof, and presume acceptance is all that will be necessary by the parties entitled to give a lease.

"To whom am I to make the offer?—I am," &c.

Mr John Young, S.S.C., Mrs Campbell's agent, answered :

" Your letter, not dated, addressed to Mrs Campbell, has been handed by her to me.

" Mrs Campbell has full power to grant such a lease as you desire, and will let to you the house, consisting of four rooms and kitchen, with the gig-house, stable, and garden, No. 1, Mill Hill, Musselburgh, at the annual rent of £15, payable in equal proportions, at the terms of Martinmas and Whitsunday, and that for a period of fifteen years, giving you a break at Whitsunday 1839, and another at Whitsunday 1848, upon three months' previous notice in writing.

" You shall be at liberty to alter the buildings at your own expense to suit your own convenience ; but at the expiry of the lease you must either leave the subjects as altered, or restore them to their present state.

" If Mrs Campbell should feel disposed to sell the property while in your occupation, you shall have the first offer of it.

" I request the favour of your answer to this proposal on or before Friday first, that the matter may be then finally settled, as Mrs Campbell must let the subjects to another person if she does not conclude with you."

Mr Ralston wrote the following letter of acceptance :

" I am favoured with your communication, of the 5th instant, in reference to Mrs Campbell's premises at Musselburgh, and I will take them on the terms you mention ; and you can draft any missive of lease or otherwise you may judge necessary or proper ;—only I have here to remark, that it is not merely the house and garden I understand you to mean, but of course all the buildings of every kind upon the ground ; and I will require immediate access, by having the premises cleared of the bones lying there, to enable me to repair the house."

Mr Young replied :

" I received your favour of the 8th current, which was immediately communicated to Mrs Campbell, but I could not return a definite answer to the concluding part of your letter until she had seen Mr Gavin, the present tenant, and arranged matters with him.

" Mr Gavin has agreed to give you immediate possession of the stable and coach-house, and is, moreover, to give you possession of the lower flat of the house on the 25th current. This, I suppose, will suit your views.

" You are of course to get the use of all the buildings upon the ground, but you will take care, that any alterations which you make, shall not do injury to the property.

" As I now consider all matters between you and Mrs Campbell to be arranged, I shall prepare a regular missive to be interchanged between you and her, which will answer the purpose equally as well as a formal lease.—I am," &c.

Mr Ralston entered to possession, but a misunderstanding having arisen, and Mr Ralston having objected to pay rent until " furnished with a lease or regular missive, in terms of his bargain," Mrs Campbell and William Campbell, as Peter Campbell's trustees, brought the present action, in which, on the narrative that though the defender had entered to the premises on a lease of fifteen years from Whitsunday 1838, and at a rent of £15, and had continued in them ever since, he had paid only the first half-year's rent, and declined to make any other payment,—they concluded against him for payment of the arrears with interest. The defender, besides objecting to the pursuers' title, and to the letters as improbable, *pleaded* specially, that he " has not received the lease, the granting of which was required in his conditional acceptance of the 8th April, and is therefore to be considered as one of the conditions of his acceptance, and the promise of which, by Mr Young, in his letter agreeing to the other conditions, entitled the defender to a lease of the subjects before he paid his rent."

To obviate this plea, the pursuers agreed to grant a regular lease. The draft, which was accordingly prepared, contained, *inter alia*, the following clause :

" *Second*, That the said John Campbell Ralston shall be at liberty to alter the buildings on the said ground at his own expense, to suit his own convenience ; but, at the expiry of this lease, he must either leave the subjects as altered, or restore them to the state in which they were at the said term of Whitsunday 1838."

The defender objected, that when he " took the premises in question at a rent of £15, their fair value, with the intention of expending several hundred pounds in fitting them for the purpose of manufacturing hair-cloth, he did so with the intention that the valuable erections and machinery which he was to put up, were to belong to him, and not to the landlord ; and he accordingly in his offer, which is contained in one of the letters, in conformity with which the present lease is to be prepared, stipulated for power to alter premises to suit his purposes, and also for power to ' take down and take away' any erections which he might put up," but that in the clause proposed, " this, the most important power of all, is omitted." He therefore proposed that the clause should stand as follows :

" *Second*, That the said John Campbell Ralston shall be at liberty, and is hereby empowered, as from the date of his entry to the premises, to alter the buildings on the said ground at his own expense, to suit his own convenience, and that he shall be entitled to take down, and to carry away any erection which he has, or may put up thereon, but that at the expiry of the lease, he shall be bound, at his own option, either to leave the subjects as altered, or to restore them to the same state as that in which they were at the period of his entry."

The Lord Ordinary pronounced the following interlocutor :

" 5th March 1842.—Approves of the draft lease prepared by the pursuers, and appoints the same to be extended and signed, *quam primum*."

The defender reclaimed :

At advising, the Court held that the clause, as approved by the Lord Ordinary, accurately expressed the agreement contained in the letters founded on, and accordingly *adhered*.

Lord Ordinary Murray, for Cuninghame.—*Act* Rutherford, Deas ; John Young, S.S.C., *Agent*.—*Alt.* Anderson, A. Wood, jun. ; D. M. Black, W.S., *Agent*.—*B. Clerk*.—[H.B.]

1st June 1842.

SECOND DIVISION.—(G. D. F.)

No. 187.—THE RIGHT HON. VISCOUNT MELVILLE, *Suspender*, v. JOHN PATERSON (*Plummer's Trustee*), *Respondent*.

Bankrupt—Statute 2 and 3 Vict. c. 41.—*Clause*—*Construction*.—*Found* that the estates to which a deceased debtor had right, were sufficiently vested in a trustee under the *Bankrupt Statute*, by the act and warrant of confirmation, to enable him to grant a disposition to a purchaser.

John Plummer having died, his estates, with concurrence of his successors, were sequestrated under the *Bankrupt Statute*. John Paterson was appointed trustee, and obtained an act and warrant transferring to, and vesting in the said trustees the whole heritable estates belonging to the bankrupt. By the trustee, the lands of Gallowshall, the property of the deceased, were exposed to sale, and were purchased by Viscount Melville at £3215, payable in April 1842. The trus-

tee became bound, on payment of the price, to grant to the purchaser a formal disposition of the lands containing all usual clauses. Upon a threatened charge for payment of the price, the purchaser presented a note of suspension. He *pleaded*—That the trustee had no title to grant a disposition, because no proper title was completed in his person to the lands sold *vi statuti*, inasmuch as the 79th, 80th, 81st, 82d and 87th sections of the Bankrupt Statute refer to the sequestrated estates of bankrupts which have been sequestrated in their lifetime, and not to the sequestrated estates of *deceased debtors*. The trustee, admitting the facts, *answered*—That upon a fair construction of the Statute, it did apply to the case of a deceased debtor, and that a contrary supposition would render the Act totally defective and inextricable, and inconsistent with itself.

The Lord Ordinary pronounced the following interlocutor:

"20th May 1842.—The Lord Ordinary having resumed consideration of this case, and heard parties' procurators, refuses the note, but, in the circumstances, finds no expenses due to either party.

"*Note*.—The Lord Ordinary cannot adopt the suspender's limited construction of the word '*bankrupt*,' as it is employed in the statutory enactments in question. On the contrary, while he is satisfied that *there*, as throughout the Statute, it must be held to comprehend, not less the case of a '*deceased debtor*' whose estates have been subjected to sequestration, than that of a debtor who has been sequestrated *in his lifetime*, he cannot help thinking, that the opposite construction would introduce such difficulties and contradictions in the practical working of this class of sequestrations, as to be incompatible with the express direction of the Legislature (§ 3), that the Act 'be construed in the most beneficial manner for promoting the ends hereby intended.'

"Many of the difficulties raised by the suspender, *e. g.*, that the Statute (§ 87) contemplates an *existing* bankrupt, who may be '*required*' to grant deed, or in *whose person*, rather than his own, the trustee may elect to complete titles,—or with or without *whose concurrence* certain other steps may be taken, &c. &c.—would equally apply to the case of a *bankrupt* sequestrated in his lifetime, but who had happened to die before the stage at which such a question as the present had happened to occur.

"So, on the other hand, the word '*bankrupt*,' even in its strictest sense, may, in many instances, nowise be inapplicable to this very case of a '*deceased debtor*.' For the Statute expressly provides for the more summary granting of sequestration in the case of a debtor who '*was at the time of his death a notour bankrupt*.'

"But it is on the plain meaning and obvious intendment of the Statute, in its whole scope and structure, that the Lord Ordinary rests his opinion.

"The suspender himself is compelled to concede, that so far as regards the general machinery of the Statute, and the technical orders and proceedings which it sanctions and directs, there can be no distinction made between the case of one sequestrated estate and another. But the matter lies deeper than this. For,

"1. While it is enacted (§ 13), that in the case of a *living bankrupt*, the award of sequestration shall declare '*the estates to belong to the creditors*,' it is equally ordered (§ 14), in the case of a *debtor deceased*, that '*the Lord Ordinary shall award sequestration, and issue the other orders, as herein above provided in the case of any other debtor, in so far as circumstances will permit*;'—and, that the creditors in this latter case may be more effectually secured, it is further provided, that where '*any successor (of the deceased) has made up a title to, or is in possession of the estate*,' the same deliverance shall include an order upon such successor '*to transfer such estate to the trustee*;'—and, if *no such title* has been made, it is finally de-

clared '*incompetent for any creditor, after the date of the first deliverance, to be confirmed executor-creditor, or to raise or insist in any adjudication or diligence against the estate of the debtor*.'

"2. The interest thus vested at the outset *in the creditors*, is afterwards renewed and confirmed in the person of the *trustee*,—the act and warrant which confirms his election being made (§ 49 and schedule F) to declare, that '*the whole of the estates and effects, heritable and moveable, and real and personal, wherever situated, of the said C D, are transferred and belong to A B as trustee, for behoof of the creditors*.' There is no distinction made between the estates of a *living and deceased debtor*. And, as regards the word '*bankrupt*,' it appears to be indiscriminately applied to both—the enactment declaring, in general terms, that the trustee may, by force of this title, '*recover any debt due to the bankrupt, and maintain actions, in the same way as the bankrupt might have done if his estates had not been sequestrated*.'

"3. Then, in prescribing the duties of the trustee's office, it is enacted (§ 61), that he '*shall manage, realise and recover the estate belonging to the bankrupt*,'—still plainly comprehending within that description the case of a '*deceased debtor*.' And without needlessly multiplying illustrations to the like effect, there may just farther be noticed—section 93, which regulates *judicial sale* 'without any other proof of *bankruptcy* than the act of sequestration';—section 100, which directs the whole estate, when reduced into money, to '*be divided among those who were creditors of the bankrupt at the date of the sequestration*';—section 136, which provides that '*any surplus of the bankrupt's estate and effects, &c., shall be paid to the bankrupt, or to his successors or assignees*';—section 145, which exempts the conveyance, sale, discharge, &c., of the '*estate belonging to any bankrupt against whom sequestration has been or may be awarded, &c., from all stamp duties, or other Government duty, and, specially, from all rates or duties exigible* 'upon the sale of estates or effects by auction,' &c. &c.—every one of which provisions would, according to the suspender's arguments, on the limited application of the word '*bankrupt*,' not less exclude the case of a '*deceased debtor*' from their beneficial operation, than those enactments which have more immediately given rise to the present question.

"4. There is, however, before coming to these last, one other branch of the statutory enactments to which it may be proper to advert, *viz.*, the provisions regarding the vesting of the *moveable estate*. Now, by these it is enacted (§ 78), '*that the moveable estate and effects of the bankrupt shall, by virtue of the act and warrant of confirmation in favour of the trustee, be transferred to, and vested in him for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title and interest, to the same effect as if actual delivery or possession had been obtained*.' Without going farther, it would seem, *prima fronte*, difficult to deny that this enactment must, under the generic term '*bankrupt*,' be held to cover the case of a '*deceased debtor*.' But, could any room for doubt remain, there follows section 84, which enacts, that where the sequestration of the estates of a *deceased debtor* is dated within seven months after his death, '*all legal diligence by creditors within a certain period, and, inter alia, any confirmation as executor-creditor after the debtor's death, shall be of no effect in competition with the trustee*:'—that is to say, shall be of no effect in competition with the trustee's right, which had been previously declared to be vested generally, over the whole moveable estate and effects, as the estate and effects of '*the bankrupt*.' In the like spirit are the separate enactments already adverted to (§ 14), that '*confirmation as executor-creditor shall not be competent after the first deliverance*;' and that, where any *successor of the deceased* has made up a title, he must make over and transfer the estate to the trustee.

"5. The provisions as to the vesting of the *heritable estate* are, in all respects, analogous. 1. It is declared (§ 79), '*that the whole heritable estates belonging to the bankrupt in Scotland shall, by virtue of the said act and warrant (confirming the trustee), be transferred to, and vested in the trustee*;' and this is extended (§ 80) to all '*lands, tenements and hereditaments in England, &c., to which the bankrupt is entitled*.'

Now, if this do not reach the estate of a 'deceased debtor,' where, it is asked, is the vesting clause applicable to such a case? And would it be consistent with 'construing the Statute in the most beneficial manner for promoting the ends thereby intended,' so to interpret the word 'bankrupt,' as of necessity to negative the existence of any vesting clause applicable to a deceased debtor's estate? But, 2. Here, just as in the case of the moveable estate, section 84 comes in, and—assuming that the above clause does, in the case of a 'deceased debtor,' vest right in the trustee—declares, that any preference obtained over the heritable estate 'by legal diligence,—on or after the sixtieth day before his death, or subsequent to his death,'—shall be 'of no effect in competition with the trustee':—as section 14 had in the like spirit declared, that no adjudication, or other diligence against the real estate, should be competent subsequent to the date of the first deliverance. And then, finally, there follows section 88, which declares, that where 'the deceased's successor had made up a title to his heritable estate,' such estate shall be *de plano* declared 'transferred to, and vested in the trustee as at the date of the sequestration, to the same effect as is hereinbefore provided (§ 79) in regard to THE ACT AND WARRANT OF CONFIRMATION.'

"The reference made in this last-mentioned clause to the effect of the 'act and warrant of confirmation,' seems, in truth, to be of itself conclusive of the whole present question. For it necessarily implies, that the trustee's right to such estate of the 'deceased' as his successor had made up no title to, is completely and to all intents vested, by the mere force of such act and warrant, *per se*—and this, notwithstanding the clause authorising such act and warrant, contains no express mention, *eo nomine*, of the case of a 'deceased debtor,' nor indeed any word of broader efficacy than that of 'bankrupt,' which the suspender argues to be insufficient. Nay, it actually takes the right so vested in that case, as the rule and measure of the right also to be vested in the trustee, where, in consequence of the successor's having made up titles, certain ulterior proceedings, such as those suggested in section 88, are required to that effect.

"On the whole, the Lord Ordinary cannot entertain a doubt that the case of a 'deceased debtor,' whose estates have been sequestrated under the Bankrupt Statute, is to be held as sufficiently comprehended under the generic term 'bankrupt,' not only as it is used in all the various clauses which have just been commented on, but likewise as it is employed in section 87, on which, more especially, it is that the suspender relies. It was plainly not the object of this latter enactment to draw any distinction between the sequestration of a dead, and of a living debtor. It applies universally; unless, indeed, to the single case of a deceased debtor whose heir has made up titles, which, again, is provided for in the section immediately succeeding. And its effect, equally where the debtor is alive,—and where he is dead without his heir having made up titles,—is, that 'the trustee may,' without making up a feudal title in his person' (which, indeed, section 88 does not require him to do, even where the deceased's successor has himself completed such a title), grant conveyances of the heritable estate, and that such conveyances 'shall be as effectual to the purchaser as if they had been granted by the bankrupt with concurrence of the trustee.'

"No doubt, the right thus declared to be vested in the trustee will be no more than a right *tantum et tale* with what actually belonged to the bankrupt at the date of sequestration; and where the bankrupt, therefore, has previously granted a prior personal right, in the shape of a conveyance or security, to an individual creditor or other third party, upon which it would be in the power of such a party to run a race against the trustee, it may be necessary for the latter, with a view to exclude the completion of this *inchoate* adverse right, to obtain his own title first completed according to all the feudal forms, and so entered upon the records. Cases of this kind are commented on by Professor Bell in his Observations (p. 170,) on this branch of the Statute. But these, *ex concessis* of the suspender himself, are none of them cases which would entitle a purchaser to insist, in the case of a living 'bankrupt,' on the trustee technically feudalising his right. Nay, they are none of them cases in which the trustee, after divesting the heir of a 'deceased debtor' under the operation of section 88; could, in any such sense, be compelled to make up a feudal title. But if not, see-

ing any dangers to be apprehended from the race of possible competing rights, are common to all the three cases,—why should a purchaser be more entitled to insist in a case like the present, that the trustee should adopt a course which he would not be compellable to adopt under either of the other two.

"After all, it will be found in truth, that the suspender's argument, if good for any thing, does not stop at any incompleteness in the mere feudal title of the respondent. It must go the length of denying in toto, that there is here any vested right whatever in the trustee, as regards either the moveable or heritable estate of the deceased. For the vesting clauses of the Statute, as has been seen, are all, no less than this 87th section, conceived with direct reference to the estates of a 'bankrupt,'—no other word being in fact there used. So that, if that word is not to be so construed as that it may comprehend the case of a 'deceased debtor,' there are really no vesting clauses applicable to, or operative in, the case of such a debtor at all. And the Statute therefore would, in this class of sequestrations, become inextricable and nugatory.

"The point being a new one, the Lord Ordinary, however clear and decided his own opinion, has not thought it right to give expenses."

Lord Melville reclaimed, but the Court adhered.

Lord Ordinary, Ivory.—Act. A. Anderson, W. P. Dundas; Mackenzie and Sharpe, W.S., Agents.—Alt. A. Paterson, W.S., Agent.—T. Clerk.—[G.D.F.]

4th May 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 188.—JOHN HUTCHINSON FERGUSSON, Appellant, v. DAVID FYFFE and OTHERS, Respondents.

Loan—Interest—Foreign—Accumulations—A party, who was insane, died in India in 1810, leaving a sum of money in rupees in the hands of a house of agency there. His relations in this country, who were aware of the insanity, had, about the time of the death, of which they were not aware till long after, some correspondence with one of the partners of the company when in this country, in consequence of which, in 1812, they were put in possession of an account or doquet, signed by the firm, ascertaining the balance in their hands, as in April 1810, to amount to a certain sum, and it specified "to bear interest at 9 per cent. per annum,"—the figure "9" being written on an erasure. This doquet was admitted to be a valid probative document—Held (affirming the judgment of the Court of Session), 1. That the defender was bound by the account so rendered in 1812, and was liable for the sums therein charged; and 2. That interest was due on these sums from 30th April 1810, at the rate of 9 per cent. to the date of final decree; but 3. (reversing the judgment of the Court of Session), That in calculating interest on the said amount, compound interest or annual rests ought not to be allowed.

The late Dr Fyffe had an account in India with the company of Fergusson and Fairlie, which had existed previous to May 1790, and with another firm, Fairlie, Reid and Company, by which the other firm was succeeded; and both these houses had been employed by him as his agents until June 1792. It appeared at the next balance in April 1793, that the balance in favour of Dr Fyffe, in the hands of his agents, amounted to rupees 4207. 3. 10. In 1793, Dr Fyffe became insane, and continued in that state down to the period of his death in India in 1810. Considerable changes took place upon these firms; and in regard to these changes it was averred that every succeeding firm became bound in the debts of their predecessors.

In 1795, the firm of Fairlie, Gilmore and Company was formed; and in that firm there was a gentleman of the name of Allan Gilmore, who had previously been a partner of the houses which acted as the agents of Dr

Fyffe; and it appeared that this latter firm adopted the account which Dr Fyffe had had with the two previous houses, and that they had charged themselves annually with accumulations of interest. On the dissolution of this house in 1810, the firm of Fairlie, Fergusson and Company was formed, and of this house the defender became a partner at its formation, but Gilmore had retired on the dissolution of Fairlie, Gilmore and Company. Fairlie, Fergusson and Company undertook, on acquiring right to the assets of Fairlie, Gilmore and Company, to relieve it of its debts, *inter alia*, of the debts due to Dr Fyffe, but it did not appear that the new company had undertaken to pay compound interest at an Indian rate on that debt.

The pursuers were aware that Dr Fyffe had fallen into a state of insanity in India, but were ignorant, till long subsequently, of the fact of his death. In 1812, Mr William Fairlie, one of the partners of Fairlie, Fergusson and Company, and who had been a partner of Fergusson and Fairlie, Fairlie, Reid and Company, and Fairlie, Gilmore and Company, the predecessors, as alleged of the late company of Fairlie, Fergusson and Company, which commenced in May 1810, and was dissolved in 1818, was in England, at which time Mr James Fyffe of Glasgow had had some communications with Fairlie as to Dr Fyffe's affairs. In consequence of these communications, Fairlie procured from India, from his house, the account in favour of the late Dr Fyffe, bringing out a balance, as at 30th April 1810, of 17,346. 5 sicca rupees, the previous balance, as at April 1793, (4207. 3. 10) having, by accumulations of interest, amounted to that sum. The account, which commenced in April 1787, and terminated in April 1810, was in these terms:

" Charles Fyffe, Esq., in account-current with Fairlie, Gilmore and Company. To balance in his favour with Fairlie, Fergusson and Company, to bear interest at 9 per cent. per annum (S. R. 17,346. 5.)

The account, which was signed by the social firm of Fairlie, Fergusson and Company, contained an erasure in the figure "9," and was sent by Fairlie in 1812 to Mr James Fyffe.

In 1833, the pursuers, as beneficially interested in the settlements of the late Dr Fyffe, brought an action against the defender, as a partner of the late firm of Fairlie, Fergusson and Company, for payment of the sum stated in the above account, with interest at 5 per cent.; but by a relative supplementary action, they concluded for yearly accumulations of interest on the balance, according to the Indian rate of interest stated in the account, viz., 9 per cent. In the course of the action, several doubts were raised in reference to English law,—among others, whether the firm of Fairlie, Fergusson and Company were truly debtors in the balance alleged to be due to Dr Fyffe. (See case as previously reported, Vol. X. p. 168). On the answers by English counsel to the queries submitted to them, the Court held that the firm was liable in the debt, but minutes of debate were ordered on the points remaining, viz., the rate of interest and the accumulations, which, as claimed, increased the debt to about £18,000.

It was stated by the pursuers, that the practice of Indian houses was to accumulate annually the interests of sums lodged with them, and that by the accounts in process, it appeared that the agency houses in ques-

tion for twenty-three years from 1787 downwards, had annually balanced the account of Dr Fyffe, and accumulated the interest, which fluctuated at times more or less, but the change of the firms made no difference in the way of stating the accounts,—1 per cent. being debited as commission. It was therefore *pleaded*, that as they retained that balance, they must be presumed to have retained it on the condition of accounting on the same principle; and the defender was bound for accumulations not only subsequent to 1810, but to 1818, even when the firm was dissolved, because the obligation against him to account on the same footing, and for Indian interest, still subsisted. (Palmer and Co.'s Assignees v. Glas, and Keble v. Graham.) The pursuers denied that the erasure founded on by the defenders had been made *ex post facto*; and if it were held to be *pro non scripto*, the ordinary rate of interest in India, viz., 10 per cent., must be substituted for 9 per cent., and not any fluctuating rate. The insanity of Dr Fyffe was known to the legatees in this country, but the fact of the death was not known till a long time afterwards.

The defender *pleaded*—That Dr Fyffe's legatees ought to have called up the money during the subsistence of the firm of Fairlie, Fergusson and Company. It was dissolved in 1818, and was succeeded and represented by Fergusson, Clerk and Company, and subsequently by the subsisting house of Fergusson and Company, and no intimation was ever made to them that they were to be held liable on any such principle of accounting. The defender had left India for this country in 1816, and, from the dissolution of Fairlie, Fergusson and Company, had never any connection with the Indian houses. He maintained, that as, according to the opinion of English counsel, the subsequent firms, as modified after Dr Fyffe's death, were liable to pay up the balance due, the action should have been brought, not solely against him individually as a partner, as the debt was not constituted against the company, but that the other parties should have been called: A v. B, 26th February 1741, Mor. 14,560, and Reid v. McCall, 11th July 1814. Geddes, 2d June 1827. Dewar, 23d February 1821. In regard to the question of interest, it was stated that the account in question, handed to Mr James Fyffe, contained an erasure in the figure 9, as the rate of interest, and that no explanation had been given of the reason for such erasure. Accordingly, he pleaded that the rate must be held *pro non scripto*, and consequently, that as interest had fluctuated very materially in India subsequent to the date of the account, the rate should not be fixed so high as 9 per cent., but according to the rate allowed on the company's loans, which, during the period in question, was at 8, 6, and 5 per cent., and at one time 4 per cent. In no view ought more than 7 per cent. to be allowed, because, in 1812, when the account was delivered to James Fyffe, he had been made aware that the Indian rate of interest was just 7 per cent. Moreover, it was pleaded, that as the pursuers, in consequence of the erasure, could not competently show the rate of interest which had been agreed on by the company, it should be no more than legal interest,—the rate which, before the supplementary action was brought, was all that was sued for. But whatever the rate, the defender could not be charged with accumulations, because

any such claim was completely guarded against by the express terms of what was called the undertaking of this debt by Fairlie, Fergusson and Company, viz., the concluding entry in Dr Fyffe's account with Fairlie, Gilmore and Company, whereby it was stipulated that the balance should bear interest at a certain fixed and permanent rate. In that entry there was not the slightest allusion to compound interest, and the Court could not be asked to make such a serious addition to that stipulation, beyond what the parties made for themselves. In illustration of this it was stated, that Fairlie, Fergusson and Company's account contained no accumulation subsequent to 1810; and it was maintained, that as the pursuers had failed to ask for accumulations, and to bring their action for twenty-one years, they must be held to have acquiesced, in not demanding such accumulations. Further, acquiescence ought to be presumed, in respect that when the action was brought, legal interest was alone charged, though in the supplementary action compound interest was afterwards concluded for. The practice was denied of accumulating interest in India, or that the doctrine laid down in the case of Palmer's assignees could influence the present one, as there the circumstances were materially different; and in particular, the account was current up to a few months of bringing the action. But, supposing the practice to exist, Dr Fyffe was never a customer of the house of Fairlie, Fergusson and Company, for he died a few days only before that company was formed. It was contended, likewise, that no proof had been brought as to the practice of accumulating, and the account sued on did not show such practice; at all events, if it did, as against the previous house of Fairlie, Gilmore and Company, it did not do so as against the house of Fairlie, Fergusson and Company; and even if it could be supposed as against them, it must be held to have ceased at the dissolution of that Company in 1818. The legatees were to blame for not calling up the money in 1812, when they must have known of Dr Fyffe's death, as at that time Mr James Fyffe received the account in question from India, and had communicated in regard to the testator's affairs; and as they were to blame in that respect, they could not be entitled to compound interest.

At advising on 29th May 1838, the Court pronounced the following interlocutor:

"Find that the pursuers are entitled to the sum of 17,346 5. sicca rupees, being the balance due on the docketed account, converted at the rate of exchange current in Calcutta by the latest accounts, together with interest on the said sum so converted, at the rate of 9 per cent. per annum, and accumulated annually at the same rate from the 30th day of April 1810 to the date of citation in this action, and with interest on the accumulated balance at the foresaid rate, from the date of citation to the date of final decree, and interest on the accumulated balance from the date of final decree until payment, at the legal rate of interest: Find that the defender is entitled to deduction from the annual accumulations of interest of 1 per cent. for commission, and that he is further entitled to deduction of the necessary expense of remitting the money from India to this country: Find neither party entitled to expenses in this process: Alter the Lord Ordinary's interlocutors of 26th November and 16th December 1835, and repel the whole defences, so far as at variance or inconsistent with the above findings, and decern: Appoint the pursuers, *quam primum*, to prepare and lodge a state of their claims against the defender, in terms of the findings contained in this interlocutor."

The defender appealed, *pleading*—I. That the cause of action having accrued within six years anterior to the institution of the present action, it is cut off by the English Statute of Limitations. This plea is not obviated (1.) by Mr Fairlie's letter of 5th July 1812; for, besides its inefficacy in other respects, it was written twenty-one years previous to the present action; nor, (2.) by Dr Fyffe's insanity, as he was confessedly dead more than twenty-three years before this action; nor, (3.) by the exception in favour of plaintiffs, when defendants are beyond seas, in respect the time of limitation has at least been running since 1812, when one of the partners came to England to reside; and the present defender has been in this country nearly twenty years.—II. Neither the appellant, nor the company of Fairlie, Fergusson and Company, as a partner of which he is now sued, incurred an obligation, *ex contractu* or otherwise, to Dr Fyffe or his representatives, to pay the debt in question. The arrangement between Fairlie, Fergusson and Company, and Fairlie, Gilmore and Company, in July 1810, was *res inter alios acta*, and the letter of Mr Fairlie, in July 1812, contains no obligation by Fairlie, Fergusson and Company to undertake an obligation to pay a debt for which they were not otherways liable.—III. This action ought to have been dismissed, in respect it was instituted against the defender individually, as having been a partner of Fairlie, Fergusson and Company, without either the company, or partners of that firm having been made parties to the action. The fallacy of the pursuers' argument on this point, consists in their assuming that the subscribed account above mentioned, operates of itself a final constitution of a right against the company in the pursuers' favour; whereas, in the most favourable view, it is only one article of evidence in the question of constitution; and even its effect, as an article of evidence, can only be properly true with the company, and not with an individual partner.—IV. The appellant is, at all events, not legally chargeable, in the circumstances, with so high a rate of interest, nor with compound interest.

The respondents maintained the pleas which were successful in the Court below.

Lord Chancellor.—My Lords, in this case, Dr Fyffe, who resided in Calcutta in the year 1786, opened an account with the then firm of Fergusson and Fairlie, and continued it with the firm of Fairlie, Reid and Company, which was adopted by the house upon a change of partners in 1790. On the 1st of May 1790, the appellant, Mr Fergusson, was admitted a partner into the firm of Fairlie, Reid and Company, and continued a partner in the business from that time till 1820, when he retired,—the house having, in 1795, assumed the style of Fairlie, Gilmore and Company, and in 1810, that of Fairlie, Fergusson and Company, and in 1818, that of Fergusson, Clerk and Company. Mr Fairlie, who was a partner when the appellant was admitted in 1793, continued to be so till 1818. Throughout all the changes of partnership, the account of Dr Fyffe was carried on in the books of the new firm, and it was a debt appearing upon the books of the several firms, of which the appellant was a partner during the whole period of his continuing in the house. It seems to have been assumed by both sides, that, in 1793, Dr Fyffe became *non compos mentis*, and that he so continued till the 9th of May 1810, but as to the precise time at which it commenced, or of any circumstances connected with it, I find no other evidence. It does not appear that any proceedings were adopted for appointing others to act in the affairs of Dr Fyffe on account of his lunacy, and he was during all this time in India, and the house at Calcutta continued to deal with his funds as they had before

the period of his alleged insanity. It would therefore be extremely difficult, under any circumstances, for the house to support a case for withdrawing from their customer any benefit to which their mode of keeping the account would have entitled him, if there had not been any question as to his sanity. In the present case, I think the house are at all events precluded from so doing. In 1812, one of the then partners in the house, in which the appellant was also at the time a partner, in answer to an inquiry made by a person claiming to be interested in the estate of Dr Fyffe, communicated the statement of account made up in the books of the firm, up to the 30th of April 1810, by which a balance of 17,346. 5. sicca rupees was made to be due to him, and to which was appended this note,—"To bear interest at 9 per cent. per annum." The letter which inclosed it, bore date the 15th of February 1812, and was in these words:—"I now inclose you Mr Charles Fyffe's account from its commencement, which I received some time ago from Calcutta. The balance at 30th of April 1810 was rupees 17,346. 5; chiefly arising, you will observe, from the high rate of interest allowed upon it." Administration to Mr Charles Fyffe was not obtained till 1835, but nothing was done in the meantime to affect the relative situation of the firm and of the estate; and by their bill, the administrator assumes the account so stated by the firm; and no error or mistake in that account is now established. It is, therefore, much too late for the house to say that they allowed too high a rate of interest up to the 30th of April 1810, or computed it in a manner too favourable to their customer. I think, therefore, that the amounts of debt due by the firm to the estate of Charles Fyffe, has been correctly assumed to be 17,346. 5. on the 30th of April 1810. At what rate interest ought to be computed from that date, and whether, with accumulations or not, remains to be considered. It was said that William Fairlie wrote a prior letter to the same person on the 23d of March 1812, stating that the interest of money had fallen greatly in Bengal, and that 7 per cent. was then the highest rate allowed, but that letter is not admitted, and has not been produced or proved; and if it had, it could hardly supersede the memorandum at the foot of the account sent on the 15th of July following. But then it was said that the figure "9" in the memorandum was written on an erasure. The account to which that memorandum is appended, purports to be an account-current signed by the firm; and if the paper produced has been altered in this figure since it was delivered, it was competent for the defender to have stated and proved the fact, and that it did not as it now appears, correspond with the books of the firm; but no such proof has been made. It must, therefore, be considered as the superscription of the firm on the 15th of July 1812, when the account was delivered by William Fairlie, one of the firm, that 9 per cent. would be in future the rate of interest which the balance, then admitted to be due, would bear in future. The question of accumulation stands upon a very different footing. Upon that subject the memorandum contains no agreement for the future;—indeed, it may be considered as excluding all that it does not provide; and what it does provide for, is only payment of interest at a certain rate. It is true, that practically the account had ceased to be an account-current from the year 1793; but up to that time it had been, in the most correct sense, an account-current, and it ceased to be so, not by any act or agreement of the parties, but by the cessation of all transactions arising probably from the situation of Charles Fyffe. The account, however, continued to be carried on in the same manner as before, until the 30th of April 1810; and when that account was made up, Charles Fyffe was dead, he having died on the 9th of May 1810. From that time there was no party with whom any account-current could be carried on,—there not having been any representative of Charles Fyffe for many years afterwards. The accounting parties made up their account to the death of Charles Fyffe, stating their intention to pay 9 per cent. upon the balance; and from such mode of making up the account, and such promise to pay 9 per cent. upon the balance, the firm are not at liberty to withdraw. But then the question is, whether the accounting parties are to be liable beyond what they have so undertaken, and are to be charged with compound interest? The first question which occurs is, can there be a title to compound interest, without a contract expressed or implied, from the mode of dealing with former accounts or custom; and if not, the

absence of any party with whom any such contract can have been made, must be fatal to the claim. Generally, a contract or promise for compound interest is not available in England, as was decided in *ex parte* Bacon, 9 Vesey, 224, except, perhaps, as to mercantile accounts-current for mutual transactions—a character which this account had lost from at least the death of Charles Fyffe. How then can compound interest be chargeable upon an account closed? The Court of Session appears to have taken a very correct view of the international law upon this subject, and considering the law of the country where the debt is contracted as furnishing the rule by which the nature and extent of the obligation was to be tried; but to carry out that principle to its proper extent, the same rule must be applied to the question of interest, as constituting part of the contract expressed or implied, and therefore, as affecting the nature and extent of the obligation; and the law of Scotland can be referred to only as to questions concerning the remedy, as the country in which the action is brought,—in which must be included the question raised as to the length of time. No Scotch prescription applying to the case, the English Statute of Limitation is irrelevant; but if it had been material, it would not have afforded any bar, as the time now began to run. The distinction between the applicability of the *lex loci contractus* and the *lex fori*, with reference to the nature and character of the debt and the right to the remedy, is well exemplified in the case of the British Linen Company v. Drummond, in 10 Barnwell and Cresswell, 911, in the Queen's Bench, and in Don v. Lippman, in the House of Lords, in 2 Shaw and M'Lean, 723. In inquiring, therefore, into the title to compound interest, Scotch cases are not those which ought to be primarily consulted; and it would not be possible, upon English authorities, to support the claim. It happens that there is a decision of the House of Lords upon this subject which is conclusive against the claim—I mean the case of Boddam v. Ryley, reported in 1 Brown's Chancery Cases, p. 239; 2 Brown's Chancery Cases, p. 2; and 4 Brown's Chancery Cases, p. 561. In that case there were partnership accounts and a private account, and in the books the account had been made up with Indian interest and compound interest. At the hearing, Lord Thurlow said, "Spencer's representative claims 9 per cent. from year to year, upon the ground that the books were so made up, but I think no such interest can be allowed; for although, where there are cross-accounts, interest is as fair to the one as to the other; yet it is not fair after closing the account." From this decision of Lord Thurlow's there was an appeal to the House of Lords, raising distinctly the claim to compound interest, but the decree was affirmed. The present is a much stronger case against the claim than that of Boddam v. Ryley, because there does not appear to have been in that case such an absence of any party to consent to the mode of stating their accounts as there is in this. On the other hand, and in favour of the claim to compound interest, several cases were cited as decisions of the Court of Session, of which *Keble v. Graham*, 6 Shaw and Dunlop, p. 119, was one; but I do not find that in that case, as there reported, there was any question raised as to compound interest. In *Cruickshank v. The British Linen Company*, 13 Shaw and Dunlop, p. 91, there was a bond which, it was said, amounted to a contract for compound interest, as to the legality of which no question appears to have been raised. *Palmer and Company v. Glas*, 13 Shaw and Dunlop, p. 308, is the only case in which the point was expressly raised, and in that case the Court of Session certainly decided that compound interest was to be calculated upon the annual balances after the death of the debtor. The Court, however, very correctly considered that question as one to be decided by the law of the country where the debt was contracted, and not by the law of Scotland where the action was brought. The decision, therefore, is not a Scotch judgment upon a question of Scotch law, but a judgment of a Scotch Court upon English law, or an Indian custom, and seems to have been founded upon very imperfect information, which the accountant is stated to have received from some gentleman acquainted with the course of business in India, but how far applicable to the circumstances of the case, or what such information was, does not appear. The Lord Ordinary is represented as having thought it doubtful whether there should be any accumulation after the death of the debtor; and Lord Medwyn said that he

felt a little more difficulty as to the accumulation. It is not possible, I think, to put this decision in competition with the others to which I have before referred. It appears to me, therefore, that the proper course will be to vary the interlocutor appealed from, by declaring that interest at 9 per cent. ought to be calculated upon the balance of 17,346. 5. sicca rupees, from the 30th of April 1810, up to the time of the decree, but without any compound interest or annual rests; and that the cause be remitted to the Court of Session with this declaration.

Interlocutor varied, and cause remitted with a declaration.

First Division.—Lord Fullerton, *Ordinary*.—Oliverson, Denby and Lavie, *Appellant's Solicitors*.—Simpson and Cobb, *Respondents' Solicitors*.—[W.H.D.]

4th May 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 189.—ANDREW BELL, *Appellant*, v. DR ANDREW MYLNE AND OTHERS, *Respondents*.

Public Officer.—Schoolmaster.—Trustees.—Powers and Liability.—*A testator left in trust a sum of money to certain parties "for the benefit of a charity or school for the poor" of the testator's native parish, but no conditions were inserted in the deed of bequest as to the way and manner in which these trustees were to execute the bequest. The trustees founded an institution for teaching, and appointed masters to continue at pleasure.—Held, in an action of damages brought by one of the masters who had been dismissed (affirming the judgment of the Court of Session), that there was no obligation in law on the trustees to appoint ad vitam aut culpam only—that the pursuer's appointment was not ad vitam aut culpam, and action therefore dismissed.*

Process.—A. S., 11th July 1828.—*In an action of damages by a schoolmaster for alleged illegal dismissal, the cause, after being sent to the jury roll, was retransmitted, previously to trial, to the Court of Session, for the determination of certain points of law, and the Lord Ordinary having, in terms of the 65th section of the Act of Sederunt 1828, reported the cause on cases, the record being unclosed.—Held competent for the Court, at that stage of the cause, to dismiss the action de plano, as groundless.*

The late John M'Nab, who was a native of the parish of Dollar, died leaving a large fortune. By his will, dated in 1800, written with his own hand a short time before his death, he gave a moiety of his property to his cousin; and in regard to the other moiety, he provided:

"The other moiety or share I would have laid in the public funds, or some such security, on purpose to bring one annual income or interest, for the benefit of a charity or school for the poor of the parish of Dollar, and shire of Clackmannan, whither I was born, in North Britain or Scotland. That I give and bequeath to the minister and church-wardens of that parish for ever, say to the minister and church officers for the time being, and no other person shall have pour to receive the foresaid annuity but the aforesaid officers for the time being, or their agent appointed for the time by them. This I beg my executors to put in a state to be executed."

The Lord Chancellor of England ordered the Accountant-General to pay over the moiety in his hands applicable to this purpose, "to the minister and church officers of the parish of Dollar, pursuant to the will of the testator, John M'Nab." The testator died without leaving any specific regulations as to the way in which the bequest was to be managed, other than the terms of the bequest expressed.

The defender, Dr Mylne, was the minister of the parish, and he and the kirk-session appeared to have acted under the advice of counsel, and of several emi-

nent individuals, and of parties who were assumed into the trust, as to the management of the charitable bequest. Under the regulations which were adopted, Dr Mylne was appointed president of the institution, at an annual salary. An establishment was erected for teaching, and a mode and style of instruction were adopted, with the consent of the trustees and others, but no rules were enacted by the trustees as to appointing teachers *ad vitam aut culpam*; and it appeared to have been the practice, at least since 1818, for Dr Mylne, acting under the advice of the trustees, to appoint the masters of the various branches at pleasure only. In 1821, on the occasion of a vacancy in the mathematical class, Dr Mylne addressed a letter to the pursuer in the following terms:

"Dollar Manse, 5th October 1821.

"DEAR SIR,—I have not yet seen or heard again from Principal Haldane, but I am determined to delay the election no longer. I have received another certificate in your favour from Mr Liston. It is now obvious that it lies between you and Mr Wallace. I have not yet spoken to the other trustees on the subject, but we must make up our minds this week. I believe I mentioned to you at Dollar the outline of the duty required, the salary, &c. I beg again to state to you, that though at first you, if elected, may not have above two, or at most three hours of teaching, yet the trustees reserve to themselves the right of enlarging the hours according to circumstances. The salary is £120, with a house, or £35 for the rent of a house, at the option of the trustees. The appointment is only during pleasure, but this need not stagger you; all the other masters are in the same predicament; and the reason of our making the appointment in these terms is, that we may not be embarrassed with the claims about right by any of the masters, in getting an Act of Parliament to regulate the whole. I mention these things, that there may be no complaint afterwards, in the event of your being elected. My chief purpose, however, in writing to you, is to ask how soon it would be in your power to come here and enter upon duty, if you were immediately elected. This is an important point, as we have delayed, perhaps, too long in making up our minds on the subject. May I ask the favour of you to write regarding the matter by return of post. I am, dear Sir, yours," &c.

(Signed) "ANDW. MYLNE."

Thereafter Dr Mylne addressed the pursuer as follows:

"Edinburgh, 15th November 1821.

"DEAR SIR,—I waited anxiously several days for your letter, being under the necessity of coming here to assist at the sacrament. On Friday last, before setting out, I held a meeting of the trustees, and sounded them on the subject of appointing you to the mathematical department of our Institution, when they left it entirely to myself. As I had not heard from you, no minute was made at the time, but from what I have mentioned, you may consider the appointment as made. I am extremely anxious that you should lose no time in coming to Dollar, and I shall then hand you a regular letter. I hope this will reach you without any further delay. Your letter, after lying some days at Dollar, only reached me yesterday. In haste, yours faithfully."

(Signed) "ANDREW MYLNE."

On 21st November 1821, the minute of meeting of the trustees bear:

"Dr Mylne then laid before the meeting a number of certificates for candidates for the mathematical class, and the trustees having examined the same, agree to appoint Mr Bell from Perth to the office, upon the same terms and limitations as the other teachers."

The pursuer went to the Dollar Institution, making no objection as to the nature of his appointment, and he continued teaching down to 1828, when the trustees relieved him of his duties as teacher from and after

May 1828, paying him his salary up to the following October.

In 1836, the pursuer brought this action against the defenders for reparation, by way of damages, for alleged injury, in respect of having been dismissed without cause shown, *pleading*—(1.) A teacher regularly elected by the trustees or managers of a public educational institution, cannot be dismissed from his situation except upon cause shown. (2.) Even if it were legal to make such election to be held only during pleasure, there was no such stipulation in the present instance, or at least it was expressly understood that the exercise of such a power was to be limited to the occurrence of a specific event, which event never took place.

The event contemplated, alluded to in the second plea, was said to be the procuring of an Act of Parliament; and in reference to the letter of Dr Mylne, in which the expression is contained, the pursuer attempted to show, by a critical analysis of the letter, that he could only be dismissed in respect of *culpa*; and that though apparently the appointment was at pleasure, it was so qualified by the terms of the first letter, that if no Act of Parliament were applied for, the appointment should be absolute.

The defenders *pleaded*—That there could be no doubt that the appointment was merely at pleasure, and that they had undoubted right to dismiss if they saw fit. They also pleaded, that, in the circumstances, they were warranted in dismissing the pursuer.

It seems unnecessary to advert to the cause of dismissal, as the action came to depend entirely on the law raised by the pursuer, and the circumstances were differently stated by the parties.

The case was sent to the jury roll, but the issue clerks refused to give an issue till the questions of law were disposed of. Thereafter, the Lord Ordinary ordered cases to report to the Court, in terms of the 65th section of the Act of Sederunt.

At advising on 5th June 1838, the Court sustained the defences, and assolvied the defenders.

The pursuer appealed *pleading*—That the Court of Session had no right or power to assolvie the defenders without a trial by jury. The interlocutors of the Lord Ordinary remitting the cause to the jury roll, to be tried by jury, was final and conclusive. This is expressly provided by the 15th section of the 59th Geo. III. cap. 35. The 12th section of this Act, which authorises cases to be remitted back, before trial, to the Court of Session, for the decision of questions of law or relevancy, regards only interlocutory judgments. It does not warrant the retransmission of the cause, in order to be dealt with by the Court of Session as *not* a jury cause, in order that the Court of Session may *judge in it without* trial by jury. The appellant might even maintain, that since the abolition of the Jury Court as a separate tribunal, the provision in the Act as to the retransmission of causes from the jury roll to the Court of Session, cannot be in operation. This was the purport of the Lord Chancellor's opinion in the case of *Montgomery v. Boswell*, April 1839.

Answered—The appellant has, in the correspondence produced, which is the foundation of his case, shown the groundlessness of his action. It was therefore clearly competent and right for the Court to dismiss the action, and it has been lately held in the House

of Lords, in the case of *Duncan*, that when, before directing an issue, the case is in such a state as to enable the Court to disapprove of it, judgment ought to be given.

Lord Chancellor.—My Lords, I certainly regret that your Lordships' time should have been occupied in hearing more than the opening of this case. It is a question raised as to the course of practice in the Court of Session, arising out of the provisions of several Acts of Parliament, which have been made the subject of discussion. Upon the merits, there is scarcely anything which I can see in the case upon which any argument can be urged. The appellant was appointed assistant instructor and master in a certain department in a school established under the provisions of a gift of John M'Nab, in which he says,—"The other moiety or share I would have laid in the public funds, or some such security, on purpose to bring an annual income or interest for the benefit of a charity or school for the poor of the parish of Dollar, where I was born. That I give and bequeath to the minister and church of that parish for ever—say to the minister and church officers for the time being, and no other person shall have power to receive the annuity." No appointment is made by the author of the gift—no direction that there shall be a master, and that he shall have a certain income for his support and maintenance, but the property is given to the trustees, with as large a discretion as can be intrusted to any body of individuals,—the only direction being, that it shall be applied in the establishment of a school for the poor of a particular parish. In execution of the trust, the trustees established a school; and among the letters written to the appellant, there were three from Dr Mylne, who was negotiating with the appellant upon the subject of being appointed an instructor in the school, by one of which it is stated, that "the salary is £120, with a house, or £35 for the rent of a house, at the option of the trustees. The appointment is only during pleasure, but this need not stagger you; all the other masters are in the same predicament; and the reason of our making the appointment in these terms is, that we may not be embarrassed with the claims about right by any of the masters, in getting an Act of Parliament to regulate the whole." Subsequently to that, another letter was written, and the appellant accepts the office. But among other letters which he states in his summons, he does not state the part of the letter which is important, which states it to be an appointment only during pleasure, but states it thus: That, in a subsequent letter addressed by Dr Mylne to the pursuer, of date 5th October 1821, the salary is stated to be "£120, with a house, or £35 for the rent of a house, at the option of the trustees." He states so much of the letter as provides him with a salary, but omits that part of the letter containing the statement, that the office is only to be held during pleasure,—a mode of proceeding not much approved of in this country, and one which is wholly useless; because, suppressing a document can answer no useful purpose, although it may occasion additional expense and delay. Where a document contains the substance of a contract, it is useless to set it out partially. However, the pursuer was bound to set out that part which stated the salary, and which constituted a part of the contract; and we have the letter of the 5th of October alluded to. Then he says,—"that in a third letter from Dr Mylne, his appointment was announced to him in the following terms:—'*Edinburgh, 15th November 1821.*—DEAR SIR,—I waited anxiously several days for your letter, being under the necessity of coming here to assist at the sacrament. On Friday last, before setting out, I held a meeting of the trustees, and sounded them on the subject of appointing you to the mathematical department of our institution, when they left it entirely to myself. As I had not heard from you, no minute was made at the time; but from what I have mentioned, you may consider the appointment as made. I am extremely anxious that you should lose no time in coming to Dollar, and I shall then hand you a regular letter.' Now, that letter neither specifies the duration of the office nor the salary: that letter of itself constitutes no appointment. It does not inform the party of the tenure of his office, nor the salary he is to receive. It was quite unnecessary to do so. That was stated in the former letter; and these letters constitute the appointment,

because there can be no doubt of the nature of the conditions which were understood. The salary was £120 a-year, but the master was to hold it during pleasure. Thus a point of law is raised. It is said that it was contrary to the law of Scotland. Why, these trustees have the same power as the author of the gift. They are bound merely to apply it to the erection of a school for the use of the poor in a particular parish. They appoint the salary, of which they are the judges; and they say that the office shall be during pleasure. It is not disputed that there is no law in Scotland to prevent parties in a private establishment appointing a master during pleasure. It would be very strange if there should be such a law; but, fortunately, it does not exist. There are some schools in Scotland, and in this country also, where masters have a freehold in their office, and many contests have arisen in consequence with the trustees, which have generally ended in reducing the benefits of the charity by the expenses of the contest; and where they have succeeded, they have generally fixed a very heavy burden upon the funds out of which relief was to be afforded to the poor. There are cases of both descriptions in both countries, but nothing throwing any doubt upon the power of persons administering a private charity to appoint persons to execute the office of master during pleasure. That is the foundation of the pursuer's title. If he does not show the Court a case in damages from having been removed, he fails in his case. He seems to have been well advised before the commencement of his suit, because he carefully avoids setting out that part of the letter which is fatal to his case. He comes before the Lord Ordinary in the first instance; and he ought to show a *prima facie* case of damage to be tried by a jury; but before that stage of the cause arrives, the real state of the case becomes known, and it is found that there is an apparent objection on the face of the document, which raises a doubt whether the appellant can be entitled to any thing. The Court of Session had the case before them, and they viewed the question not as a matter of fact in dispute; but upon the face of the very document—the foundation of the title stated by himself,—they saw there was no possible case to entitle him to any damages. Then it is said, though the Judges of the First Division saw that manifestly upon the face of the proceedings, it was not competent to them to deal with it as they have done,—namely, to decide against the pursuer. For what possible purpose could it be sent to them (it is admitted it is well sent to them) but to decide the point of law, and prevent its going to a trial by a jury? The Court saw—not upon disputed facts, but upon undisputed facts, and the pursuer's own showing—that it would be quite absurd, in a case in which the Court saw he could not recover, that he should go to a jury. There can be no course of practice to lead to such an absurdity; and so the Court of Session decided. Taking the documents upon which his case rested, they decided against him, and held he was not entitled to what he asked. It appears to me that this is a case of all others, since I have had a seat in this House, which ought not to have been brought here, and the appeal must therefore be dismissed, with costs.

Appeal dismissed, with costs.

First Division.—Lord Fullerton, *Ordinary*.—Deans and Dunlop, *Appellant's Solicitors*.—Richardson and Connell, *Respondents' Solicitors*.—[W.H.D.]

27th May 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 190.—WILLIAM DILL, *Appellant*, v. MAJOR-GENERAL SIR ROBERT HOUSTON and OTHERS (*Alexander Houston's Trustees*), *Respondents*.

Succession—Vesting—Faculty—Obligation—Husband and Wife—*Held* (reversing the judgment of the Court of Session), that a clause in a postnuptial contract of marriage, by which the husband bound himself to make payment to "his wife, or to any person or persons she shall appoint by a writing under her hand at any time in her lifetime, or without the consent of her husband, and that whether she survive or predecease him, and whether she have issue or not, of the sum of

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£3000 Sterling money, or such other lesser sum as she shall direct," vested the sum absolutely in her; and that, although she had not uplifted it during her life, nor disposed of it by any writing under her hand, it transmitted after her death to her next of kin.

The late Alexander Houston, of Clerkington, was married to Helen M'Kie, only daughter of the deceased Alexander M'Kie, merchant in Glasgow. She was then a minor, and possessed of considerable property. No settlements had been made previous to the marriage; but the rights of the parties were afterwards arranged by a postnuptial contract, executed in April 1785. By that contract Mr Houston bound and obliged himself, his heirs and executors, to pay to his wife, during her life, after his decease, in case she should survive him, a free annuity of £400, and to grant to her a life interest in certain heritable property in security thereof. By the same contract he likewise bound himself

"to make payment to the said Mrs Helen Houston, his wife, or to any person or persons she shall appoint by a writing under her hand, at any time in her life, with or without the consent of her said husband—and that whether she survive or predecease him, and whether she have issue or not—of the sum of £3000 Sterling money, or such other lesser sum as she shall direct, and that at the first term of Whitsunday or Martinmas after the death of her said husband, in case he shall survive her, or shall predecease her without leaving issue of the marriage, or at the first of these two terms next after the failure of the issue of the marriage, in case he shall predecease her leaving issue who shall fail before her, or at the first of these two terms next after her decease, in case she shall survive him leaving issue of the marriage then existing, or at any term of Whitsunday or Martinmas, after any of these events respectively; so that it shall not be in the power of the said Mrs Helen Houston, or the persons to whom she shall appoint the foresaid sum of £3000, or any part thereof, to be paid, to uplift the same during the life of the said Alexander Houston, or even after his death, during the joint existence of the said Mrs Helen Houston and the issue of this marriage, and with 4s. of penalty for each pound of principal, in case of failure; and the legal interest of the said principal sum, from the term at which the same shall be appointed to be paid, during the non-payment of the same. But with this provision alwise, as it is hereby specially provided and declared, that in case the said Mrs Helen Houston shall happen to survive her said husband and the issue of the marriage, and shall ask and recover payment of all or any part of the foresaid sum of £3000 Sterling, then, and from thenceforth, her said life interest annuity of £400 Sterling shall suffer such a restriction as shall be equal to the legal interest for the time of the principal sum which she shall so recover."

It was likewise provided that Mrs Houston, in the event of her survivance, should have £600 in name of furniture and mournings; and these provisions were declared to be in full satisfaction of all other claims, legal or conventional, which she could ask or demand through the death of her husband.

It was further mentioned in the contract, that Mr and Mrs Houston had, of the date thereof, granted a disposition to Robert Dunmure, Esq., younger of Kelvinside, merchant in Glasgow, uncle of the said Mrs Helen Houston; Robert Houston, Esq., merchant in Glasgow, brother of the said Alexander Houston; and David Erskine, clerk to the Signet, as trustees for the said Alexander and Mrs Helen Houston, and the issue of this marriage, of the whole lands, heritages, debts, sums of money, and other estates and effects whatsoever, as well heritable as moveable, which belonged or was resting and owing to the said Mrs Helen Houston

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at the time of her marriage with the said Alexander Houston, to the end and intent that the said trustees might, in the first place, secure to the said Mrs Helen Houston upon land or other property, heritable security for the foresaid annuity of £400 Sterling, to be restricted in manner before mentioned; and, in the next place, that, after the said Mrs Helen Houston was so secured, the said trustees should convey the said trust-funds, under the burden of the foresaid annuity, to the said Alexander Houston in liferent, and to the child or children of the marriage between him and the said Mrs Helen Houston in fee; whom failing, to the said Alexander Houston and his heirs and assignees whomsoever, but always with and under the burden of the payment of the foresaid sum of £3000 Sterling, thereby provided to be paid to the said Mrs Helen Houston and her foresaids, in manner before mentioned; but which burden should only be personal on the said Alexander Houston, and his foresaids having right to the said estate for the time, so as to oblige them to relieve the other heirs of the said Alexander Houston of the payment of the said sum of £3000, or any part thereof, but nowise real upon the said trust-estate itself.

In 1816, Mr Houston executed a disposition and settlement in his wife's favour, whereby he settled upon her an additional annuity of £600, over and above her former provision. He likewise conveyed to her a liferent right to the mansion-house and offices of Clerkington, with the lawn, garden, park, shrubberies, &c., amounting to about seventy-eight acres. In the following year, Mr Houston executed a general trust-disposition of his whole property, heritable and moveable, in favour of the defenders.

The marriage was dissolved, by the death of Mr Houston, on the 22d March 1822, without issue; and thereafter, Mrs Houston continued to occupy the house of Clerkington until her death.

Mrs Houston died on the 13th May 1837, without having uplifted, or executed any appointment relative to the sum of £3000 during her husband's lifetime or after his death. The only deed of settlement executed by her, was a will, dated 25th February 1804, whereby she bequeathed to the person or persons who, upon her death, should succeed to the estate of Clerkington as heir of her husband, the whole furniture and effects of every kind which should be in the house of Clerkington at her death. Her nearest of kin having brought this action against Mr Houston's trustees, concluding for payment of the £3000, the defenders *pleaded*—1. Nothing was conveyed to the late Mrs Houston but a faculty or power to uplift or dispose of, by a writing under her hand, the whole or any lesser part of the sum of £3000. That faculty was personal to herself; and as she never exercised it during her life, it fell by her death; and as the sum of £3000 never vested in her during her life, it could not be taken up or claimed by her executors *ab intestato*; and, 2. As Mrs Houston left a will which contained no reference to this sum of £3000, it must be presumed that she purposely abstained from exercising the faculty, and from disposing of the whole, or any part of the aforesaid sum.

The Lord Ordinary pronounced the following interlocutor:

" 27th February 1839.—The Lord Ordinary having heard the counsel for the parties on the closed record, writes produced,

and whole process, repels the defences, and decerns in terms of the conclusions of the libel; finds expenses due; allows an account thereof to be given in, and remits the same, when lodged, to the auditor for his taxation and report.

" *Note*.—This case is not without difficulty, from the singularity of the terms in which the provision of £3000, in the post-nuptial contract, is conceived. But, on the whole, the Lord Ordinary has come to be satisfied, that according to the just construction and true meaning of that deed, the said provision was fully vested in the widow, and became, to all intents and purposes, her property, if not from the first constitution of the trust, at all events at the first term after the death of her husband, without surviving issue of the marriage. Even after that time, it is indisputable that she had all the rights and powers over this sum, which would be enumerated in the most comprehensive definition of absolute and entire property. She could call it up as freely and directly as if she had herself lodged it in a bank on a deposit-receipt. She could spend or lend it out anew to the original trustees, or to any other party, without calling it up herself. She could assign and make over the instant right to it, onerously or gratuitously, *mortis causa* or *inter vivos*, to any one she chose. If she married a second time, the entire right to it would pass to her new husband *jure mariti*, whether she wished it or not; and, finally, her own creditors, or the creditors of such second husband, could attach, pursue for, and recover it, in spite of both her and the defenders. It is difficult for the Lord Ordinary to conceive how a fund over which she had thus all the imaginable rights of a proprietor, should yet not be *vested* in her, so as to entitle her next of kin to succeed to it *ab intestato*.

" The opposite proposition, however, is rested on two points—*first*, and principally, on the omission of the ordinary destination in such provisions to the 'heirs, executors and assignees' of the wife, and the introduction, in its stead, of a precise specification of a person to be nominated in a writing under her hand, *as the only party* who was to take after her, or in her right; from which it is alleged that an absolute exclusion of her successors *ab intestato*, is necessarily to be inferred. The *second*, or corroborative argument on the part of the defenders, is derived from the apparent uselessness of this anxious power of nomination and appointment, if the wife was herself vested with the full right of property, which must necessarily have carried such a power, and a great deal more. When duly considered, however, neither of these views appears to be maintainable.

" The mere omission of the ordinary remainder to heirs, executors and assignees, is plainly of no consequence, where the words are sufficient to carry a direct (and not contingent) right of property to the person actually named, especially in the case of a mutual and *onerous* provision like that in a contract of marriage; while the specific power to nominate an assignee or successor, *even during the life of the husband*, might well have been thought not to follow from the mere constitution or vesting of the right itself in the person of a *married woman*. Even if it were to be held, therefore, that the wife was the proper beneficiary as to this sum, from the first constitution of the trust, the insertion of this specific power of appointment would not be either superfluous or unaccountable; since, without it, no such power could be competently exercised during the subsistence of the marriage.

" But the Lord Ordinary conceives that the best explanation of this perplexing part of the deed is to be found in the supposition, that it was understood by the parties to it (whether that view was legally correct or not), that the right to this £3000 would not vest fully in the wife during the life of the husband, or of children by whom she was survived, nor until the full right to demand payment of it had opened to her, free of all conditions or qualifications, by her being the only survivor. How the law would have construed the deed, if the first had been the case that occurred, it is not now absolutely necessary to determine, though it is easy to see that the *claim* of her representatives would then have been encumbered with difficulties to which it is not now liable.

" If she had died before her husband, and without making any appointment, it might obviously have been maintained that the property was still in the trustees, and that all the right she had ever over it, was truly a mere *power* or faculty to affect its

ultimate vesting when the proper time arrived, by the death of the husband; and that if she predeceased him, without executing that power or exercising that faculty, it would remain with the trustees for the general trust-purposes, and would never be claimed by the legal representatives, as having never been truly in her person.

"The Lord Ordinary thinks the tenor of the deed is sufficiently explained by assuming that this was the view of the case entertained by the framer of it. But he is also of opinion that it is the sound and the true view. By the constitution of trust, the vesting of all future and contingent interests may be competently suspended, especially in mere money provisions. And so long as all actual rights are contingent as well as future, it will generally hold that they are so suspended, and that, in the *interim*, there is no vested property but in the trustees. Now, the wife was here to have no right to draw this money during the life of her husband, or even after his death, while issue of the marriage survived. Her own actual or beneficial right to it, therefore, was truly contingent, and might never have opened in her life; and if the property consequently remained vested in the trustees, while it was still in contemplation to give her a power to dispose of it by special deed; and not only was such a provision, as actually occurs in this contract, necessary, but it was obviously the fittest and most natural way of effecting that purpose; and what was given was truly nothing more than a power or faculty to affect a subject which did not belong to her, which must be exercised *in terminis*, in order to be available, and left nothing to be taken up by her representatives *ab intestato*, if she died without so exercising it.

"But after the husband's predecease without issue of the marriage, the whole aspect and state of the case was changed. There was no longer any contingency, or even futurity, in the description of her right; all pretence for a suspensive or fiduciary vesting in the trustees, as for uncertain beneficiaries, was at an end, and they were direct and full debtors to her, and to her alone, for the money. It seems really impossible, therefore, to doubt that the full property was *then* vested in her; and if it was so vested, it seems plain that, without a proper clause of return, or a most express exclusion of her representatives *ab intestato*, it must go to those representatives.

"To infer or construe such a clause of return, or such an exclusion out of the granting of a specific power of assignation, would be difficult, under any circumstances, and however hard it might be to account, on any other assumption, for the granting of such a power. But if there was no proper vested right in the wife herself till after the death of the husband and children, and if her ever having any such right was consequently a matter of contingency, the necessity and the object of granting that power, with a view to one result of the contingency, is at once apparent, and the whole difficulty of the case is solved, in the Lord Ordinary's apprehension, by holding that the power was granted to enable her to affect the fund in question, in the event of its never vesting in her, but flew off and became null and inoperative as soon as the object or necessity of it ceased by the full right to it vesting, by her sole survivance, in herself. The expression is not so lucid, perhaps, as might be desired, but the object and purpose are thought to be plain enough; and, at all events, the Lord Ordinary can never hold that the constitution of a special power which might be necessary in certain events, can either bar the vesting of a right in which all the imaginable tests and attributes of a vested right are combined, or imply a clause of return, or a capricious and most improbable exclusion of legal heirs or representatives."

The defenders reclaimed, and counsel were heard on 22d November 1839. The Court then delayed advising the cause. At advising on 7th December 1839, the Court recalled the interlocutor, and assoilzied the defenders, but without finding them entitled to expenses.

The claim having, subsequently to the raising of the action, been assigned by Mr Houston's executors to Mr Dill, writer in Newton-Stewart, he appealed against this judgment.

Lord Chancellor.—My Lords, the question in this cause

arises between the representatives of the wife, and the representatives of the husband; and the question is, whether a sum of £3000, which is the subject of a postnuptial-settlement, in the event which has happened, of the husband dying first, and there being no issue of the marriage, vests in the representatives of the wife, or vests in the representatives of the husband? The Lord Ordinary was of opinion that the estate of the wife was entitled. When it came before the Inner-House, the learned Judges there were of opinion that it belonged to the estate of the husband, and that the title of the wife had never become, under the terms of the settlement, absolute, so as to give her representatives a title to the sum of £3000. My Lords, this, of course, can only be ascertained from an accurate examination of the terms of the settlement. The obscurity has arisen from an attempt, on the part of the individual who framed the settlement, to express a great deal more within one sentence than one sentence was capable of bearing, so as to be sufficiently explicit to ascertain the rights of the parties without difficulty. Now, it is quite clear that there were four events contemplated—the death of the wife, leaving her husband surviving, or the death of the husband, leaving the wife surviving. Those were two of the events. The two others would be either of those events happening—there being or there not being children; so that there were four contingencies that the parties had evidently in contemplation. Having those four events in contemplation, the provision was expressed in these terms: In the *first* place, an annuity of £400 a-year was provided for the wife for her life; and there was this proviso added, that in case the wife "shall, at any time during her life, uplift the sum of £3000 Sterling, therein provided to be paid to her in manner hereinafter mentioned, or any part thereof, then and from thenceforth the said annuity of £400 Sterling, provided to the said Mrs Helen Houston, as said is, shall suffer such a restriction and abatement as shall be equal to the legal interest for the time of the sum so to be uplifted by her." Then comes the covenant by the husband as to the £3000: And "the said Alexander Houston hereby binds and obliges himself, and his forebears, to make payment to the said Mrs Helen Houston, his wife, or to any person or persons she shall appoint by a writing under her hand, at any time in her life, with or without the consent of her said husband, and that whether she survive or predecease him, and whether she have issue or not, of the sum of £3000 Sterling money, or such other lesser sum as she shall direct, and that at the first term of Whitsunday or Martinmas after the death of her said husband, in case he shall survive her, or shall predecease her without leaving issue of the marriage, or at the first of these two terms next after the failure of the issue of the marriage, in case he shall predecease her leaving issue, who shall fail before her, or at the first of these two terms next after her decease, in case she shall survive him, leaving issue of the marriage then existing, or at any term of Whitsunday or Martinmas after any of these events respectively; so that it shall not be in the power of the said Mrs Helen Houston, or the persons to whom she shall appoint the foresaid sum of £3000, or any part thereof, to be paid, to uplift the same during the life of the said Alexander Houston, or even after his death, during the joint existence of the said Mrs Helen Houston and the issue of this marriage, and with four shillings of penalty for each pound of principal in case of failure, and the legal interest of the said principal sum from the term at which the same shall be appointed to be paid during the not-payment of the same; but with this provision alwise, as it is hereby specially provided and declared, that in case the said Mrs Helen Houston shall happen to survive her said husband, and the issue of the marriage, and shall ask and recover payment of all or of any part of the foresaid sum of £3000 Sterling, then, and from thenceforth, her said life rent annuity of £400 Sterling shall suffer such a restriction as shall be equal to the legal interest for the time of the principal sum which she shall so recover." Now, certainly, on reading that sentence, there is great confusion apparently in the construction of it, and a great variety of events are contemplated which are endeavoured to be provided for in the same sentence. Now, my Lords, the parties not only had those four events to provide against, but they evidently had in contemplation, that although the enjoyment of the £3000

was postponed, the wife, during the life of the husband, should have the power of bestowing that, or any part of that sum, upon any person she might please; and it was necessary, therefore, to provide that she should have that power; for although it may be that she might, by will, have had that power without any special provision, she could not have had it, except with the consent of her husband, by any deed executed *inter vivos*. It was necessary, therefore, in order to give to the wife that power over the property which the parties evidently intended her to have, that there should be an express provision in the settlement that she should have the power, during the life of the husband, of giving a future interest in the property in question to any person she might please. There were, therefore, these four events to be provided for, and there was also a power to be reserved to the wife of disposing of the principal, or any part of it that she might please, during the time of coverture. My Lords, these several provisions, if they had been provided for in different clauses of the settlement, would no doubt have been expressed in very different terms from those which we find upon the face of this deed. But the parties have endeavoured to express all under one provision; and from thence, as it appears to me, has arisen the obscurity. But the mode of dealing with a case of this sort is, first of all, to look at the event which has happened, and then to see whether that part of the deed which is in question in the present discussion, does or does not embrace within itself the means of ascertaining the intentions of the parties in that particular event. If that be sufficiently clear, it is not material whether the other events which have not occurred, are or are not provided for with a degree of obscurity, which, if those events had happened, might have created considerable difficulty as to the construction of the settlement. Now, the event that has happened is the death of the husband, leaving the wife, and there being no issue of the marriage. I have only to call your Lordships' attention to the different provisions to be found in this instrument relative to that state of circumstances; and the question for your Lordships will be, whether there are not to be found upon the face of this instrument, sufficient words of gift to the wife, in the event which has taken place. My Lords, in calling your attention to the first part of this settlement, I shall read it divested as far as possible of the other provisions for contemplated events which have not taken place. It begins by the husband binding himself to make payment to the wife of the sum of £3000 Sterling money at the first term of Whitsunday or Martinmas next after the death of the husband, if he shall predecease her without leaving issue of the marriage. All those words are to be found in the sentence. They are mixed up, it is true, with other words, which other words contemplate other events; but those words are to be found upon the face of the settlement, and those words contemplate the event which has taken place. Now those words, if they stood by themselves, would leave no doubt or ambiguity whatever, because they are so expressed as to be amply sufficient to bestow upon the wife, in the event which has happened—namely, her surviving the husband without issue—the sum in question. Then, is any ambiguity thrown upon this intention by the different parts of this instrument? There can be no ambiguity thrown upon this gift by the provisions made for other events that have not taken place; or, if there were any ambiguity from those provisions, in contemplation of other events, it must be of a very cogent nature, in order to destroy the effect of the terms which are found in this part of the deed. But I do not find that there are any words which throw any doubt upon the intention of the parties, in contemplating the event which has happened; but, on the contrary, I find very distinct provisions in this deed which very much confirm this construction of the deed, and to my mind, leave no doubt of that being the intention of the parties. For I find in a subsequent provision these words: that it shall not be in the power of the wife, "or the persons to whom she shall appoint the sum of £3000, or any part thereof, to be paid, to uplift the same during the life of Alexander Houston, or even after his death, during the joint existence of Mrs Helen Houston and the issue of this marriage." That contemplates, therefore, the wife being entitled; but in case of there being children of the marriage, it provides, that during the lives of those children, the wife shall not have the power of uplifting the £3000, but, after the expiration of the lives of those

children, it is a necessary inference that that power was to exist in her of uplifting. But that is not so strongly expressed in this part of the sentence as it is in the following, where it is said, that in case the wife "shall happen to survive her husband and the issue of the marriage, and shall ask and recover payment of all or any part of the sum of £3000, then, and from thenceforth," her annuity shall suffer diminution to that extent. Now, that contemplates the precise event which has happened. It contemplates the wife surviving, and there being no issue of the marriage; and in that state of circumstances, which is the precise state of circumstances which has happened, it assumes that she would have the power of asking for, and recovering that £3000 or any part of it; and all that it provides is this, that in that event, that is, if she shall think proper to ask for, and demand that £3000, or any part of it, then the £400 a-year which she was entitled to for life, shall suffer a diminution equal to the amount of the interest of the sum she shall so recover. Now, although the party contemplated that if the wife survived, and there should be no children, she should have a right to the £3000, or any part of it, that she should not exercise that right, and demand payment, was very natural, because she had £400 a-year during her own life; and unless she had some occasion for the employment of the capital, her income would not be benefited by applying for the £3000, or any part of it, because she could not apply for the £3000, or any part of it, without sustaining a corresponding diminution in her income of £400 a-year. It was very natural, therefore, that unless some particular occasion had occurred which made her wish to have control over the capital, she should leave the fund in the state in which her husband had left it, namely, as a charge upon his property,—she receiving an income which would not be increased by the receipt of any part of the £3000. But then the words, "any part of it," were very much relied upon in the argument. It was said that it is clear that this party contemplated her exercising some power by which she was to receive part of the £3000. It is obviously necessary that those words should be introduced; because the object was not only to give her power over the whole, which would include a power over any part, but it was contemplated that she might, during her husband's lifetime, have exercised the power which the instrument gave her, of transferring her right to part of the sum to somebody else, and the individual, therefore, to whom she might thus transfer her right to part, would be entitled to demand, not the £3000, but to demand so much of the £3000 as he obtained through the power that was so reserved to the wife. It appears to me, therefore, that the introduction of those words refers to those who might claim through the wife, or to the wife herself, in the case of her demanding only part of the £3000. If she thought proper to demand only part, then, of course, her annuity of £400 a-year would be diminished, not by the interest of the whole £3000, but by so much as she might ask for and demand of it. She might ask for £1000 out of it. The £1000 might be paid, and of course the annuity would then be diminished by the amount of the interest of £1000, and not by the amount of the interest of £3000. These words, found in the instrument, therefore, do not at all appear to me to shake the construction of what is to be found in the instrument, as applicable to the event which has taken place. There are certainly to be found in this deed, terms of gift directly applying to the case which has occurred; and when there is found upon the face of an instrument a clear and distinct expression of the intention of the party, those terms of gift are not to be superseded by ambiguities not having reference to the particular state of circumstances which has occurred, but to other events which have not occurred, and which, therefore, call for no decision. My Lords, for these reasons, I am of opinion that the construction put upon this instrument by the Lord Ordinary was correct, and that the construction put upon it by the Inner-House was not correct. I shall therefore move your Lordships to reverse the interlocutor appealed from, and in its place, to substitute the interlocutor pronounced by the Lord Ordinary.

Interlocutor reversed.

Second Division.—Lord Jeffrey, *Ordinary*.—G. and T. W. Webster, *Appellant's Solicitors*.—Richardson and Connell, *Respondents' Solicitors*.—[W.H.D.]

1st June 1842.

SECOND DIVISION.—(G. D. F.)

No. 191.—LIEUT.-COL. H. F. HOLCOMBE, *Advocator*,
v. JOHN STEWART, *Respondent*.

Proof.—Contract.—Advocation.

This action was brought against the advocator for payment of the value of certain materials furnished, sums advanced, and personal expenses incurred by the respondent, in the character of superintendent in the erection of a house at Riemore, then the property of the advocator, together with a charge for making out specification and plans, and for superintendence. The advocator did not deny the furnishings, payments, or expenses, as detailed in the account libelled on, but rested his defence on the existence of a contract between him and the pursuer, under which, he alleged, the defender acted in the character of contractor, and not of superintendent, and that the amount sued for was included in the contract price, on an accounting, for which, it was alleged, the respondent had been overpaid, and was further liable in damages for an alleged breach of contract.

After a proof, the Sheriff held that there was no evidence in support of the defence, and accordingly decreed in terms of the libel. In an advocacy, the Lord Ordinary pronounced the following interlocutor:

"3d December 1841.—The Lord Ordinary having heard parties, and considered the record, advocates the cause; recalls the interlocutors complained of: Finds that the action, as laid in the summons, proceeds on the statement and on the principle that the pursuer was the superintendent of the building in question, and not the contractor: Finds that the evidence does not establish this, but on the contrary, establishes that he was the contractor, and not the superintendent: Therefore, on this ground of fact, sustains the defences, assoilzies the defender, and decrees, but without prejudice to any other action or proceeding which the pursuer may think proper to adopt as contractor, or to the defences thereto: Finds the respondent liable in expenses, both in this and in the Inferior Court; appoints accounts thereof to be given in, and when lodged, remits the same to the auditor to tax and to report.

"*Note.*—The transaction was gone about with such excessive looseness that it is very difficult to arrive at any satisfactory result about it. But on the whole, the Lord Ordinary cannot reconcile the evidence, but particularly the written evidence, to the idea of the respondent having only been a superintendent. He can reconcile it, however, to the idea of his having been contractor, though under a contract not strictly framed—materially deviated from—and finally broken. All that the pursuer was entitled to under this contract, which made provision for deviations, it is still open to him to seek, only not under this action."

On a reclaiming note, the Court *adhered*.

Lord Ordinary, Cockburn.—*Act.* Rutherford; W. and J. Cook, W.S., *Agents*.—*Alt.* T. Maitland; Ritchie and Hill, W.S., *Agents*.—*T. Clerk*.—[G. D. F.]

2d June 1842.

FIRST DIVISION.—(H. B.)

No. 192.—JAMES STEVENSON, *Pursuer*, v. JOHN LOVE
and SAMUEL STEVENSON, *Defenders*.

Settlement—Lease—Assignment—Circumstances in which a lease for thirty-eight years, and not expressly secluding assignees, was held not to be assignable.

On 4th July 1814, Hugh Stevenson, by disposition

and deed of settlement, disposed his lands of Threepwood, under certain burdens and declarations, to three of his sons, James, Andrew and Samuel Stevenson. Of the same date he executed a tack of the said lands in favour of two of these sons, Andrew and Samuel, equally between them, and failing either of them without heirs of his own body, to the survivor and his heirs. This lease, of which absolute warrandice was given, was to endure for thirty-eight years from its date, but there was specially excepted from it such part of the lands as had been, or might afterwards be let to two other sons, Robert and John Stevenson. In consideration of this lease, Andrew and Samuel Stevenson bound themselves, jointly and severally, and the heirs of their bodies, whom failing, the survivor of them and his heirs and successors, to make payment, after their father's death, 1st, of an annuity of £10 to their mother during her life; 2d, of an annuity of £5 (to be increased after their mother's death to £6,) to their brother James, or failing him to his children, during the subsistence of the lease; 3d, of an annuity of £4 to their sister Elizabeth, or conditionally to her children; farther, to make payment of an heritable bond of £300, secured over the lands in favour of James Wilson, at any time during the currency of the lease, when the same was demanded, or if not demanded, to pay the interest of the principal sum as it should fall due, from and after their father's death; and *lastly*, to make regular payment of the whole public and parish burdens on the lands,—it being declared that the above payments were to be in full of all tack-duty. It was also declared that the disponees, James, Andrew and Samuel Stevenson,

"shall not be entitled to enter into possession thereof as proprietors during the bail space of this tack, but the said Andrew and Samuel Stevenson shall be bound and obliged, as by acceptance hereof they bind and oblige themselves, to hold the occupancy thereof in the character of tenants, in manner and for the purposes before mentioned; declaring that they shall not be bound to any rule of cultivation or management during this tack, but shall be left to manage the same as they may think proper; but they shall be prohibited from cutting any trees now growing on said lands of Threepwood, unless they have planted three for each one they chose to cut down; and declaring, that the annuity to be paid to the said James Stevenson shall be in full to him of all rent or other interest he can have in the premises during the existence of this lease. And as it is the evident intention of the said Hugh Stevenson, by this deed, to make provision for payment of the foresaid annuities, heritable debts, and public burdens, during the said space, in order that the lands may be disburdened at the expiry of this lease, it is hereby expressly provided and declared, that the said James, Andrew, and Samuel Stevenson shall not be empowered by any voluntary deed of their own to defeat this purpose, by renouncing or cancelling this lease, or by entering into any agreement in prejudice hereof, or by contracting debts so as to lay the foresaid lands open to be evicted from them; declaring that all such deeds, agreements, debts, and vouchers thereof, shall be null and void, and of no force whatever, to the effect of infringing this lease; reserving, however, to the said Hugh Stevenson, power and faculty to alter the same as he may see cause at any period during his life, and even on death-bed."

To this deed Hugh Stevenson added a codicil in 1818, farther burdening his sons, Andrew and Samuel, with a payment of £5 to his daughter Elizabeth, the first term after his death, and making a new arrangement as to her annuity of £4, stipulated by the lease. Previous to Hugh Stevenson's death, the heritable bond of £300 was called up by the creditor, and the money

with which it was paid was procured by a bill drawn on, and accepted by the father and his four sons, to whom he granted a letter, acknowledging that the sum contained in the bill was wholly his debt. On Hugh Stevenson's death in 1819, the three disponees took infestment in the lands; while two of them, Andrew and Samuel, continued their possession under the lease till, by the death of Andrew, unmarried, in 1830, Samuel became sole tenant. At the same time, James and Samuel made up titles to their deceased brother's share of the lands, each of them thus becoming *pro indiviso* proprietor of the half. In 1835, the affairs of Samuel Stevenson having become embarrassed, his brother James Stevenson came forward to assist him, and obtained, in security of his advances, a disposition to Samuel's *pro indiviso* half of the lands, and an assignation to the tack. In this way James Stevenson became sole proprietor both of the lands and lease, and possessed accordingly till 1840, when he received payment of his advances from Samuel, who thereupon obtained a reconveyance to his share of the lands, and a retrocession to the lease. Shortly afterwards, Samuel Stevenson disposed his share of the lands, and assigned the lease to John Love for £1500,—the assignation providing and declaring,

"that the said John Love and his foressaids shall be bound and obliged, as he by acceptation hereof binds and obliges himself and his foressaids, to make payment to the person or persons entitled to receive the same, of the whole rents, annuities, and other sums stipulated by the foressaid tack to be paid by me and my foressaids, and also to perform, implement, and fulfil the whole other obligations and prestations incumbent on me by the said tack, and that yearly during the whole space thereof, and at the terms and times therein respectively specified."

Love having taken infestment on the disposition, and entered to possession under the tack, James Stevenson brought the present action of reduction, declarator, &c., in which he called John Love and Samuel Stevenson as defenders, and concluded for reduction of the assignation, and any subtacks granted under it, on the following grounds:—*Primo*, (formal).

"*Secundo*, The original tack or lease was granted by the said Hugh Stevenson to his said sons, Andrew and Samuel, and to the survivor of them, and was truly a trust for family purposes, with which an assignation to a stranger would be altogether inconsistent, and destructive of the object and intentions of the granter; and the subjects were let to the deceased Andrew Stevenson and the said Samuel Stevenson equally between them; and failing either of them, without heirs of his own body, to the survivor and his heirs, but were not let to his assignees; and the right to the predeceasing brother's share and interest descended, therefore, to the survivor alone, and the defender, the said Samuel Stevenson, had no power to convey the right to any third party; so that the said assignation in favour of the other defender, the said John Love, was altogether *ultra vires* of the said Samuel Stevenson. *Tertio*, The tack-duty, or the payments stipulated to be made by the said Andrew and Samuel Stevenson in lieu of tack-duty, were not such adequate payments as would have been demanded from the defender, or any third party to whom the lands might have been let; and certain clauses contained in the tack are inconsistent with, and altogether exclude, any assignation thereof to a third party." "*Quarto*, The said lease, granted by the said deceased Hugh Stevenson to the said deceased Andrew Stevenson and the said Samuel Stevenson, and the survivor of them, imposed certain obligations on the said Andrew and Samuel Stevenson, which, by their acceptance of the said lease, they bound themselves to perform, and which the said Samuel Stevenson, as the survivor, is now liable to perform and fulfil; in particular, they were both bound to abide by their character of tenants, to avoid the contraction

of debts, and to pay the whole debts specified in the lease, from the profits of the lease itself, so as to leave the fee of the lands clear and disencumbered of debts at the expiry of the lease, and the said Samuel Stevenson, defender, had no right or title to grant the said assignation to the said defender, John Love, for the purpose of endeavouring to relieve himself of the said obligations, or any other purpose inconsistent with the provisions made by the said deceased Hugh Stevenson, as aforesaid. *Quinto*, The said John Love, who resides in the immediate neighbourhood of the other defender, and was intimately acquainted with the family affairs, and with the intention of the said Hugh Stevenson, was perfectly aware of the circumstances in which the said lease was originally granted, and did not act in *bona fide* in the transaction made with the said Samuel Stevenson, whereby he acquired the said assignation, but, on the contrary, must be held as a conjunct and confident person with him, and not an onerous assignee of the said lease."

The defenders *pleaded*—1. The first reason of reduction is groundless, in respect the deed of disposition and assignation challenged is in every way regular and formal. 2. The second reason of reduction is also groundless, in respect—(1.) The original tack, both by its endurance and by its general terms, was *sua natura* assignable or transferable; and, (2.) It contained no express nor implied prohibition against assignation, and the defender, Mr Love, was entitled to deal with the tenant, relying upon the terms of, and legal construction of the lease, without reference to any understanding or arrangement not appearing *ex facie* of the tack. 3. The third reason of reduction is groundless, in respect—(1.) The payments imposed upon the tenants were quite adequate. (2.) The supposed inadequacy of the payments imposed upon the tenants could never render the lease unassignable. (3.) The present pursuer has no interest to maintain any such plea; and (*lastly*), He is barred *personali exceptione* from maintaining such a plea, in respect he himself actually took a transference of the tack from Samuel Stevenson. 4. The fourth reason of reduction is groundless, in respect the defenders have not attempted to elide or violate any of the payments or obligations imposed by the tack, all of which are anxiously secured by the transaction challenged. 5. The fifth reason of reduction is likewise groundless, in respect—(1.) The defender, Mr Love, received the assignation sought to be reduced in perfect *bona fides*, and for full consideration; and, (2.) The allegation in the reason is altogether irrelevant at the instance of the present pursuer.

The Lord Ordinary pronounced the following interlocutor:

"19th February 1842.—Having heard parties on the reductive conclusion, Repels the defences against that conclusion, and decerns in terms thereof: Finds the pursuer entitled to expenses under this branch of the discussion; Appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same, and to report.

"*Note*.—The Lord Ordinary thinks, that considering the terms and intention of the lease, it can only be construed as containing a virtual exclusion of assignees."

The defenders reclaimed:

When the cause was advised, both Lord Gillies and Lord Fullerton being absent, Lord Jeffrey was called in to make a quorum.

Lord President.—After careful consideration, I am not able to see any grounds for altering the Lord Ordinary's interlocutor. The disposition by Hugh Stevenson in favour of his three sons, and the lease or deed of the same date in favour of two of them as tenants, compose an arrangement very much of the nature of

a family settlement. The deed in favour of the two sons contains many of the clauses of style, and much of the common phraseology of a lease, but within the four corners of it are to be found many clauses, and reservations, and expressions of intention altogether inconsistent with an ordinary lease, and with the rules of law applicable to such a lease. It is true it bears to be for thirty-eight years, and in the ordinary case, as there is no seclusion of assignees, would be assignable; but then the obligations imposed are of a kind which appear to exclude the idea of assignation, at least to a stranger. It is given to the two sons, and failing one of them without issue, to the "survivor and his successors." Why not to his assignees? The deed is drawn by a professional man, who must have known this legal term, but who, instead of it, uses special terms for the purpose of showing that there was a special predilection for the sons. Then look to the particular clause as to possession. They are to possess as tenants only, and not as proprietors. Why? for the purpose of carrying out the intentions of the father. But is it not clear, that if they were not to possess as proprietors, they were not permitted to assign, since the necessary result of assigning would be to extinguish their possession as tenants, and compel them to continue it as proprietors only. Another material clause, showing the predilection for the sons, is that which gives them unlimited power to manage the cultivation in any way they pleased. Is it possible to believe the father would have given such a power, if he had supposed that the lease might pass, by assignation, into the hands of strangers, who, if they chose, might reduce the soil to a mere *caput mortuum*? Looking at the whole construction of the deed, as containing clauses altogether inconsistent with an ordinary lease: for example, the reserved power of the grantor to alter as he might see cause—a power, too, which he actually exercised by appending a codicil.—I am convinced that the Lord Ordinary has decided correctly in regarding it as a mere family settlement—by its very nature excluding the idea of assignation.

Lord Mackenzie.—I am of the same opinion. The defenders maintain the right to assign, on the ground that a lease for thirty-eight years is legally assignable. Now, it is fixed that when an assignation is effectually made, the assignor is liberated, and the assignee takes his place. Is the present a case in which that can be done? I think it is not. Assignation is substantially excluded by the indicated intentions of the grantor or testator, or whatever he may be called. It was not truly and substantially a lease—certainly not such a lease as would stand good against singular successors under the Act of Parliament. But it is said that it was a *quasi* lease. If it was so for its whole endurance, it must have been during the lifetime of the grantor as well as after his death. But during his lifetime, the grant was not only revocable, but liable to any burdens he might be pleased to impose. Could any man imagine a grant of that sort assignable? Though called a lease, it was evidently a mere family arrangement. One remarkable feature of the deed, considered as a lease, is, that during the grantor's lifetime there was no rent. Then look to the kind of obligation laid on the tenants as to management. They are laid under no restriction, but are to manage at pleasure. Is that a power to be made over to a stranger for a price? Such a power a father might grant to his own son, or a joint proprietor, knowing that in such hands it would be safe; but it is not supposable that he would grant it to a stranger. There is a clause in the deed barring the tenants from renouncing the lease. Why so? If it could be assigned, one would think it might also be renounced, as being a milder act than assignation; but yet this act is expressly barred. The whole deed is framed in a manner implying that the right conferred by it was not assignable. Indeed several of its clauses appear to have been framed for the express purpose of preventing assignation.

Lord Jeffrey.—I concur in the view taken by your Lordships, and generally on the same grounds; but there is one separate ground to which I may advert, as showing that the deed was no lease at all in the sense of an onerous contract, but was merely a gift by a proprietor to his sons. It is in the form of a lease; but there is no pretext for calling it a lease, at least during the four or five years of the father's survivorship after the deed was granted. During that time, not only was the deed revocable, but it wants the *essentialia* of a lease, inasmuch as

it contains no stipulation for payment of rent—all payments being expressly postponed to the father's death. The effect of this consideration is to cut off several years from the duration of the lease, and bring it within the period which, according to our authorities, excludes assignation. But the substantive objection to the defenders' plea rests on a wider basis. The deed is called a lease by a mere misnomer; for I agree with your Lordships that the disposition and other deed, which continually refer to each other, are to be regarded as one family settlement, in which family arrangements are made for the sake of the family. In one word, the object of the deeds was to regulate the father's succession, and they were accordingly so construed both before his death and after. The nature of the burdens imposed, viz, certain annuities *intra familiam*,—the power to manage the lands without restriction as to cultivation,—and the reservation of the grantor to recal the deed on deathbed—all combine to show that the deed cannot be regarded as one of those ordinary leases to which the rule of law as to assignation admits of being applied. I am clear for affirming the judgment of the Lord Ordinary.

The Court adhered.

Lord Ordinary Cockburn, for Jeffrey.—*Act.* Anderson, For-man; John N. Forman, W.S., *Agent.*—*Alt.* Solicitor-General (M'Neill), G. Bell; William Patrick, W.S., *Agent.*—*B. Clerk.*—[H.B.]

2d June 1842.

SECOND DIVISION.—(G. D. F.)

No. 193.—*The TRUSTEES of the late MARQUIS of BREADALBANE, Raisers, v. HIS GRACE RICHARD PLANTAGENET DUKE of BUCKINGHAM and CHANDOS, her GRACE the DUCHESS of BUCKINGHAM and CHANDOS, and LADY ELIZABETH PRINGLE and HUSBAND, Claimants.*

Parent and Child—Legitim—Annuity—Heritable and Moveable—Trustees, Duties of—Executry—Entail—Meliorations—Probate—Expenses—Multiplepointing—Process—*In a question raised in a multiplepointing as to what was the amount of a testator's personal property, with a view to fixing the amount of legitim due to a child, and the charges which properly formed burdens on the personal property, with reference to that claim—Held, 1. That the value of certain annuities payable by the testator could not competently be deducted from the fund prior to fixing the legitim, but fell on the heritage or dead's part: 2. That, though the testator only conveyed to trustees certain property and effects, and there were other personal subjects unconveyed, the party claiming legitim was entitled to have those separate subjects taken in computo with what was conveyed, so as to ascertain properly the amount of the fund; and that it was competent to call on the trustees to state the amount in the multiplepointing: 3. That valuations taken after the decease of the trustor by competent persons, for the purpose of settling with the Stamp-Office, were sufficient, if now verified on oath by the appraisers, and that the party in right of the legitim was not entitled to force a new valuation, on the ground that the previous valuation was too low, and that the interest of that party, which had not then been found good, had not been protected by some one attending on the occasion of the appraisement: 4. That the trustees were not bound to take up, and carry on a process which the trustor, as heir of entail in possession, had instituted, but allowed to fall asleep, for the purpose of constituting on the entailed estate and succeeding heirs certain sums of money which he had expended on meliorations, nor, in the particular circumstances, to lend their names to pursue the action to the effect that the legitim should attach to the sums which should be so constituted and recovered from the succeeding heir: And accordingly, that neither the sums in that action, nor a sum already rendered a burden on the next heirs, but specially excluding from the operation of the decree the heir who next came to possession (the brother of the party claiming the legitim), were to be taken into account in fixing the legitim: 5. That a*

bond of annuity payable to the truster was not to be taken into the account of the personal property in computing the legitim; and, 6. That the expense of probate in England was a proper charge against the personal estate, and fell to be deducted therefrom prior to striking the amount of legitim.

Continuation of case *ante*, Vol. VIII. p. 178 (26th January 1836), Vol. XII. p. 400 (5th March 1840), and Vol. XIII. p. 158 (15th January 1841).

This action was brought by the raisers to determine certain questions which had occurred in reference to the succession of the late Marquis of Breadalbane; and by the decision first referred to (affirmed on appeal 16th August 1836, *ante*, Vol. IX. p. 66), it was, *inter alia*, found that his daughter, the present Duchess of Buckingham, had not renounced by her marriage-contract, to which her father was a party, or otherwise, her claim to legitim; and the Court accordingly found that her claim of legitim extended over one third part of the free moveable estate of the Marquis. By the second decision it was found that the Duchess, having succeeded in her claim of legitim, against the evident intention of the Marquis, had repudiated thereby his settlements, and accordingly that she was not entitled to another claim she had advanced, to one-half of the yearly proceeds of the unentailed lands.

In order to ascertain the amount of the personal property, over which the claim of legitim extended, the raisers lodged a condescendence, in which they set forth what they considered the fund *in medio* to consist of, and stating the deductions which fell to be charged against that portion of the succession. The claimants having given in objections, a record was made up, and thereafter cases were prepared in regard to the various objections of the parties, which were afterwards reported to the Inner-House by the Lord Ordinary. *Inter alia* there occurred the following points:—

1. By a codicil, dated 26th August 1829, annexed to the trust-deed, the truster, in the exercise of a power therein reserved, gave the following directions to his trustees:

"That my said trustees, instead of investing the free rents of my unentailed lands and estates, in manner before mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, Lady Elizabeth Campbell, and Mary Marchioness of Chandos, equally between them, while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them shall be alive. But that always without prejudice to the obligations and provisions granted by me in favour of Mary Countess of Breadalbane, or to the obligations contained in the contract of marriage between John Viscount Glenorchy and Eliza Baillie, his spouse."

The Marquis had also become bound to pay certain annuities, amounting in whole to £2270 per annum, but none of them was in any way created a real burden upon the unentailed lands or rents thereof, and one of them stood upon a mere personal obligation; and in regard to these annuities the raisers maintained, that supposing it to be found that they did not form a primary burden upon the *universitas* of the late Lord Breadalbane's succession, then these annuities were burdens upon the unentailed lands, and the rents thereof,—and consequently, Lady Elizabeth Pringle could only draw her share of the free rents, under deduction of a proportional part of these annuities.

Lady Pringle *pleaded*—1. The free rents of the un-

entailed estates having been specially provided by the testator to his daughters, and there being other funds left by the testator sufficient to pay all his debts and engagements, no part of the subject of that special provision could be withdrawn, in order to implement any obligations he might have incurred to pay the annuities in question: 2. That the testator having directed all his debts and engagements to be paid by the trustees out of the general trust-funds, they were bound to pay the annuities in question out of these funds, and were not entitled to apply to that purpose the subject of the separate special provision made by the testator in favour of his daughters.

In regard to this point the Court (by interlocutor of this date) held,

"in the question between the trustees of the late Marquis of Breadalbane and Lady Elizabeth Maitland Pringle, and her husband, Sir John Pringle of Stitchell, Baronet, for his interest, that the annuities constituted by the late Marquis of Breadalbane cannot be laid upon the rents of the unentailed lands belonging to the said Marquis, so far as the same are payable to the said Lady Elizabeth Maitland Pringle; and find the said Lady Elizabeth Maitland Pringle and her husband entitled to the expenses of the discussion of this point."

In reference to the annuities, the Duke and Duchess of Buckingham objected to the value of these annuities being brought against the personal estate before the legitim was struck; and the ground they took was, that supposing they had been payable to, instead of by the late Marquis, they would have been held to be heritable, as having a tract of future time; and, accordingly, they maintained that the value fell to be laid on the unentailed heritage: *Ersk. II. 2, 6. Stair, II. 1, 4. Bell's Com. II. p. 4. Principles, § 1480. Hill v. Maxwell, Feb. 5, 1663; M. 5473, Fol. Dict., Vol. I. p. 368, and Stair, Vol. I. p. 171. Ewing v. Drummond, 29th November 1752; M. 5476. Ersk. II. 9, 67; I. 6, 41.*

The raisers seemed rather to acquiesce in this view, but they *argued*, that in the circumstances and peculiar shape of the case, into which it is unnecessary at present to enter, the point should meantime be reserved.

The Court

"Find that it is not competent to the said trustees to deduct the value of the foresaid annuities from the amount of the personal estate, and to the prejudice of the Duchess of Buckingham, before the amount of the legitim due to the latter is to be fixed, so as to leave the half of the free rents of the heritable property to be applied for the other purposes of the trust, according to the directions of the truster, out of whose personal estate legitim is due; and find that the said annuities must be paid by the trustees out of the said heritable property, or the dead's part; reserving all questions which may arise in the event of such funds being insufficient to meet the annuities."

2. Though the raisers had generally conveyed to them the whole unentailed estate and the truster's personal property, it was said there were certain portions of his estate which were not conveyed to them, and were either expressly assigned away to other persons, or not tested on; and there was a question involved, besides, whether certain English mortgages were heritable or moveable in succession? In regard to this the Duke and Duchess of Buckingham maintained, that whatever was not conveyed to the trustees, but otherwise specially conveyed away, must be looked on as gifts out of the dead's part, and that, though it was not necessary to convert them into money, their known amount should be stated, and that the whole should be

put *in computo*, in order properly to ascertain the fund over which the legitim extended: But the raisers *pleaded*, that supposing, but not admitting, that there were portions of the estate not conveyed to them, it was not competent in this process to raise the question, as, if any such situation of matters existed, they were not accountable for subjects not conveyed to them. But, on the other hand, it was *argued*, that the whole personalty, whatsoever or wheresoever, should be ascertained, in order to fix the legitim, and that decree could competently go out against the trust-estate for the same. The Court

“ Find that the Duchess of Buckingham is entitled to insist that the amount of the legitim must be ascertained and fixed in this process of multiplepinding, raised by the general representatives and executors of her father, and that any property which may be shown to be personal, but which is not conveyed to the trustees, being the subject of separate and special bequests, must be considered to be gifts out of the dead's part,—the value of the whole personal property, whether conveyed to the trustees or not, being computed and taken into account in estimating the amount to be paid as legitim to the Duchess of Buckingham by her father's trustees and executors.”

3. When the late Marquis died, the usual inventory and appraisements were made by competent persons of the whole out-door and in-door plenishing,—of course before the question had occurred, as to whether the Duchess of Buckingham was entitled to legitim, and when the only parties who then appeared to have an interest were the Dowager and the present Marquis of Breadalbane. After the legitim question had been decided, the Duchess *argued*, that as she was no party to the valuation, another should now be taken, to ascertain the true value of the furniture in the different residences of her late father,—contending that the previous valuation was very considerably under the proper amount, having been made merely with a view to the Stamp-Office returns consequent on the death of the Marquis, and not in reference to any claims competent to her. The ground taken was, that as the trustees were bound in law to have known of the existence of her claim of legitim, her interests should have been provided for at the time, by affording her an opportunity of having some one present on her part during the valuation. The Court

“ Find, that the valuations of the furniture, linen, plate, books, pictures, wine, and other moveables in the houses occupied by the late Marquis of Breadalbane in London, Teymouth Auchlyne, Holyrood and Langton, were fairly obtained from competent persons by the said trustees, in perfect good faith, in order to ascertain the free amount of the executry of the late Marquis, and were fairly and properly left in the possession of the present Marquis, without intimation of the claim of legitim for the Duchess of Buckingham; and repel the objections stated by the said Duchess to the said valuations: Reserving, however, her right to obtain a commission and diligence if she is so advised, in order to have the accuracy of the said valuations verified by the examination on oath of the parties by whom they were respectively made, if still in life.”

4. Upwards of £100,000 had been expended by the late Marquis in improvements on the entailed estates, and part of these sums he might have rendered a burden (to the extent of £75,000) on the succeeding heirs of entail. In point of fact, he had followed out proceedings, and obtained decree in reference to certain entailed improvements, whereby he had constituted a claim against the succeeding heirs for three-fourths of £5089. 1. 8,

being £3816. 16. 3; and in regard to the balance, he had raised an action in 1820, likewise to constitute it a burden; but the case, after being remitted to certain accountants to examine the procedure, fell asleep in 1830, in the lifetime of the Marquis, and before any thing final had been done, and it had never since been awakened. The Duke and Duchess of Buckingham *argued*, that from these steps it was plain that the intention of the Marquis was to constitute the whole a burden, and consequently, that the raisers, who refused to proceed with the action, or to allow their names to be used for the purpose, were bound to take up the same, and to follow it out to its practical results, in order that the claim of legitim should likewise apply to it.

The raisers stated that they were satisfied, from their knowledge of the circumstances, and the mind of the late Marquis, that he had given up all thoughts of carrying on the action, and had, in point of fact, abandoned it; and they were more especially satisfied of this, from the circumstance that it had been found, in the course of investigation before the accountants, that such objections occurred to the way in which the steps had been taken with the view of registering the vouchers, &c. &c., that the case could not have succeeded, and no part of the expenditure could have been rendered a burden on the estate. In these circumstances, and feeling that the truster had abandoned the action, they declined to moot the question at all; and they stated their belief, that if they were to proceed with the case, they should be acting in direct opposition to the will of the truster. In regard to the sum of £3800, it was explained, that it had not been constituted as a debt against the present Marquis, but only against the heirs succeeding subsequent to him,—a circumstance, however, which the Duke and Duchess of Buckingham *argued* was *ultra vires* under the Statute. The Court

“ Find that the deceased Marquis had not resting-owing to him at his death any sums of money due, as expended in improving his entailed estates, and that no such sums were, or ought to be, included in the fund *in medio*; and repel the whole objections and claims stated by the Duchess of Buckingham on this head of her supplementary condescendence and claim; and repel the claim as made in the multiplepinding, that the trustees are bound either to enforce or follow out any actions against the present Marquis of Breadalbane, respecting his father's expenditure and improvements on the entailed estates, or to give their name to the said Duchess of Buckingham, in order that she may attempt to enforce or prosecute such actions.”

5. The late Marquis was in right of an annuity, payable by Mr J. A. Campbell, who, in the event of his death, is bound in payment of a certain principal sum. Over this sum the Duke and Duchess of Buckingham *pleaded* that the legitim extended, in respect, as they suggested, that it was not heritably secured. The raisers explained, that the late Lord Breadalbane had bought various superiorities, or rather that they were bought in the name of Mr John Campbell, W.S., then his law-agent. Mr Campbell conveyed them away in portions to the gentlemen for whom the freeholds were intended; and, as the purpose was to give them a liferent only, the transaction was arranged in the following manner:—An absolute disposition was granted to each, and each, in return, granted a bond, payable at his death, for a sum equal in amount to what was considered the value of the superiority. Where

a feu-duty was attached to the superiority, the bond contained a farther obligation on the freeholder to pay, during his lifetime, an annuity equal in amount to the feu-duty. In subsequent years, some of these parties expressed a wish that the true nature of the transaction (which was to confer a liferent right only) should be put upon a more distinct footing; and, therefore, with Lord Breadalbane's concurrence, they reconveyed the superiorities to his Lordship, reserving only their own liferents; and, at the same time, the bonds for the price were delivered up to them. Two of the freeholds, however, remained upon the original deeds,—one of which, the annuity in question of £37, was payable by Mr J. A. Campbell, constituted by bond to Mr John Campbell, dated 24th July 1813. And by that bond he was likewise taken bound to pay the sum of £1403. 11. 2. Sterling, as the price of the superiority, at the first term of Whitsunday or Martinmas, six months after his death.

It was admitted that it was not heritably secured; but its heritable nature was maintained on the same plea as that which was advanced by the Duke and Duchess of Buckingham, in reference to the previous annuities. The Court

"Find, that the sum payable under a bond by Mr John Archibald Campbell, after his death, must be viewed as a *surrogatum* for the annuity now payable by the said Mr John Archibald Campbell, and belongs to the party in right of that annuity: Find that the right in the said annuity is heritable, and that the sum payable as aforesaid, cannot be taken to be any part of the moveable estate of the late Marquis of Breadalbane, or subject to legitim."

6. The late Marquis was an obligant on certain bills in reference to certain turnpike-road Acts, which the trustees claimed as a deduction against the personal estate. But this was opposed by the Duke and Duchess of Buckingham, on the ground that the road trust-funds, and not the late Marquis, was liable for the debt. It was answered, however, that that question could not arise here, but fell to be tried, if an arrangement could be made with one of the bill holders, in the form of suspension as of a threatened charge.

The Court superseded consideration of this point.

7. The raisers claimed deduction for the price of the lands of Kynachan, which they alleged the late Marquis had purchased before his death, the price being stipulated to be paid at the Whitsunday following the transaction, but his Lordship had died prior to the payment. The Duke and Duchess of Buckingham objected, that there was no evidence to show, and denied that there was, any completed transaction, and that if it had been entered into at all, it was by the Dowager Marchioness, and not by her husband, and therefore not conclusive or binding. The raisers explained the circumstances attending the transaction, and that it had been carried through, with the sanction of the Marquis, by the factor and his regular professional agents, assisted by the Dowager. The Court

"Find that the price of the estate of Kynachan is a debt which must be deducted by the trustees, if the bargain for the purchase of the said estate was sanctioned by the late Marquis of Breadalbane, and closed during his lifetime: Find that a bargain and transaction for the purchase of this estate, carried on during the lifetime of the late Marquis by his regular agents, his factor and his wife, the Dowager Marchioness of Breadalbane, must *prima facie* be taken to be a transaction sanctioned and directed by the said Marquis, there being no averment of incapacity, fraud or

imposition: But find, in respect of the averments and pleas of the Duchess of Buckingham, that she is entitled to prove that the late Marquis did not sanction, know, or direct the said purchase, and that there was not a concluded bargain before his death; and appoint the following issues to be tried by a jury respecting these matters, of which issues declare and appoint that the said Duchess of Buckingham and Chandos, and her husband, his Grace Richard Plantagenet Duke of Buckingham and Chandos, shall stand as pursuers, viz.,—1. Whether the late Marquis of Breadalbane did not give authority for the purchase of the lands of Kynachan, in the county of Perth, and did not approve of, and sanction the said purchase? 2. Whether the transaction for the said purchase was not a concluded bargain, and not binding on the late Marquis of Breadalbane?"

8. The raisers charged as a deduction from the personal estate, £6000 as the expense connected with the probate in England. The Duke and Duchess of Buckingham resisted this, on the ground that the charge should properly affect the dead's part, and not the fund over which the legitim extended. The raisers, on the following authorities, contended that it fell against the personal estate: *Hog v. Lashley*, 1795. House of Lords, 24th June 1802. Robertson on Personal Succession, 462, 6. The Court

"Find, that the trustees are entitled to charge, as a general deduction from the moveable estate administered and recovered by them, before the amount payable as legitim is ascertained, the whole legal expenses of such administration, whether by confirmation or probate, and on the inventories given up therewith respectively."

The case having been reported by the Lord Ordinary to the Court, it was advised by the Second Division on 26th May, and a judgment pronounced in the terms above quoted, on the several points which have now been narrated.

Lord Justice-Clerk.—As to the first point, his Lordship thought, that as the bequest of the rents of the unentailed property to the daughter was special, and only subject to the proper expenses, these annuities must fall on, and be deducted, not from the rents, but from any other funds. The special nature of the bequest of the rents prevented it being burdened with any separate obligations. With regard to this question, as affecting the Duchess, whose share of these rents had fallen to the trustees in consequence of the judgment in March 1840, his Lordship considered that the trustees were not entitled to burden the personal estate with the annuities, and so to disappoint the legitim, but must repay them out of the half of the rents to which they acquired right, or out of the dead's part, to which also they had obtained right. As the heir, in a case of intestacy, would not be bound to repay them, so the trustees were not entitled to deduct them from the personalty. As to the point whether the Duchess was entitled to throw into account every subject conveyed or not conveyed to the trustees, his Lordship thought that she, as a creditor for the legitim, was entitled to claim it from her father's trustees, who were also his executors, leaving it to them to obtain their relief. She did not wish the unconveyed subjects to be converted into money, and brought into the fund; but she contended, as she was entitled to do, that the executors were bound to take the amount into the estimate of the personal estate. If there were any gifts, then these would fall on the dead's part. Bearing on this point, there are certain questions touching English law, as to what was, and what was not moveable, and as to them, a case should be submitted for the opinion of English counsel. (This was appointed to be done by the interlocutor). In regard to the valuations, his Lordship thought they had been fairly and *bona fide* entered into; and if the valuers now verified them on oath, that would be sufficient. Upon the question, whether the trustees should now be compelled to carry on the action of meliorations, his Lordship considered there was sufficient evidence in process to show that the late Marquis had abandoned the action; and in regard to the decree which he had obtained,

that the trustees would run great risk if they endeavoured to insist in it as against the present Marquis, who was not comprehended in it. His Lordship was besides of opinion, that they could not be compelled to give their names, so as to enable the Duke and Duchess of Buckingham to carry on the action. As to the price of the estate said to have been purchased, his Lordship thought there was a *prima facie* case of a settled transaction, but in respect of the averments made by the Duchess, his Lordship thought she should be allowed an issue to try the case. As to the probate, his Lordship thought the case of Hog in favour of the raisers' plea, and that the expense of it must be deducted from the personal estate. The raisers had a right to claim the expense of making up their title from the estate; and if the Duchess had any claim of relief, it would be against the Crown, in regard to the legacy duty, in so far as duty was paid on her third.

The other Judges concurred, when an interlocutor, of which portions have already been given above, applicable to the points at present decided, was pronounced. There still remain other points, but consideration of them was postponed till the opinion of English counsel should be obtained, and certain other parties appeared in the case.

Lord Ordinary, Cockburn.—*For Duke and Duchess of Buckingham, Solicitor-General (M'Neill), G. Moir; Gibson-Craig, Dalziel and Brodie, W.S., Agents.*—*For Lady Pringle, Marshall; Nairne and Bertram, W.S., Agents.*—*For Raisers, Dean of Faculty (Wood), G. G. Bell; Davidson and Syme, W.S., Agents.*—*F. Clerk.*—[G. D. F.]

2d June 1842.

SECOND DIVISION.—(G. D. F.)

NO. 194.—ROBERT HENRY ROBERTSON, *Appellant, v.* THOMAS CLARK, *Respondent.*

Landlord and Tenant.—*Hypothec.*—*Miscropping.*—*Penal Rent.*—*Held, in terms of a lease which prescribed a certain system of cropping, and which stipulated for a payment "of £5 Sterling of additional rent yearly for each acre or part of an acre" that should be cropped differently, that a claim preferred by the landlord for this additional rent, fell under, and was secured to him by his right of hypothec, in the same way as his claim for the ordinary rent.*

The late John Robertson, Esq. of Tullibeltoun, by formal lease let to James Baxter the farms of Corrielea and Mains of Tullibeltoun, for the space of nineteen years from Whitsunday 1827, as to the houses, yards, and grass, and from the separation of crop 1827 from the ground, as to the arable and laboured lands, at the rent, and under the provisions and declarations contained in the lease. With regard to the mode of cropping, it was specially provided that the tenant should observe and follow,

"strictly and undeviatingly, the following rotation of cropping, viz.,—1st, Green crop and fallow, properly dunged. 2d, Wheat or barley, properly sown down with grass seeds. 3d, Grass. 4th, Grass: And 5th, Oats."

It was declared also, that if this rotation should be departed from, the tenant should be bound

"to pay at the rate of £5 Sterling of additional rent yearly for each acre, or part of an acre, that shall be laboured, manured, or cropped in manner different from that above mentioned,—the payment to continue while such contravention exists; and which additional rent is hereby declared not to be a penalty, but as conditional rent, which shall be payable at the same terms, and in the same proportions, with the original rent of the year in which such change or deviation shall take place, and which additional rent shall be payable every year in which the said rotation shall be altered."

The landlord was to be entitled to put a stop to any

deviation from the stipulated rotation, if he should think proper to do so; but it was expressly declared, that "his not doing so, even if it should come under his notice, shall not bar his right to said additional rent."

The late Mr Robertson died in 1834, and was succeeded by the appellant as proprietor. It was provided in the lease,

"that in the event of the tenant in possession of the farm becoming bankrupt or insolvent, it shall, in like manner, be in the power of the proprietor forthwith to declare his tack irritated, in which case the tenant shall be bound to remove from the lands hereby let, in the same manner as if the tack had finally terminated."

Baxter was sequestrated in July 1841, under the Bankrupt Act, and the appellant exercised the power conferred on him by the clause above quoted, of declaring the tack at an end. The appellant then discovered that the tenant had, for crops 1840 and 1841, miscropped to the extent of 44 acres, by following a four-years' shift instead of a five-years' shift rotation. Previous to the date of Baxter's sequestration under the Bankrupt Act, the appellant had used a sequestration of the crop and stocking on the farm, for payment of the ordinary rent for crop 1841, and he subsequently brought a supplementary sequestration for the proportion of additional rent due, on account of the deviation from the prescribed mode of cropping to the extent set forth, and demanded payment both of the ordinary and additional rent from the trustee on Baxter's sequestrated estate, as preferably secured by his diligence. The trustee paid to the appellant the ordinary rent for 1841, as preferably secured by his sequestration, but he refused payment of the additional rent, at all events, as a preferable debt. The appellant accordingly lodged a claim for the additional rent, as a preferable debt in the sequestration, but the trustee disallowed it.

Clark, who was the tenant's trustee in the bankruptcy, stated, that the tenant had carried on an extensive distillery on the farm, which, at his entry, was so divided as to be incapable of the adoption of the five-course shift. And it was accordingly admitted, that instead of cultivating according to the regulations in the lease, a four-shift rotation had been followed, which, it was averred, was of itself more beneficial to the farm, as it enabled the tenant to place on it a greater quantity of manure, of which he had a superabundant supply from the distillery, than he could have done had the five-course shift been followed. There was an averment that the late proprietor was cognisant of the impossibility of dividing the farm, so as to carry on the course of cropping established by the lease, as well as of the opposite system of cultivation which had been pursued; and it was explained, that he had taken payment of the ordinary rent down to 1841, without preferring or reserving any claim for additional rent as for the alleged miscropping. It was, however, denied that the late proprietor was cognisant of the system, or that, by granting receipts for rent in the usual terms, he had at all departed from the claim for additional rent.

It was admitted by the parties, that in the event of it being held that the appellant was entitled to his claim for additional rent, the extent of deviation should

be taken at 44 acres, which, at £5 per acre, gave £220 as the amount of the claim.

The appellant *argued*—That the landlord's claim for rent under his hypothec was preferable over the subject of the hypothec to the claims of all ordinary creditors of the tenant: That the additional rent stipulated in this case, as payable on a deviation from the mode of cropping prescribed by the lease, was not of the nature of a penalty, and so subject to modification, but of proper conventional rent, payable in full, on a deviation from the prescribed mode of cropping, and was secured as rent over the subject of the hypothec, for payment of the rent of each year in which it might become due, in the same way as the ordinary rent for each year. And as it was admitted that the tenant had deviated, the corresponding amount of stipulated additional rent claimed by him was consequently due, and was preferable to the tenant's other debts, in virtue of the appellant's hypothec as landlord, and sequestration.

On the other hand, the respondent *maintained*—That the claim for penal rent must be held to have been abandoned, and the system of rotation followed by the tenant homologated and acquiesced in, both on account of the successive discharges for the ordinary rent, as in full of the landlord's demands for the years in which they were granted, and on account of the knowledge of the landlord, and the parties in his employment, of the deviation, without the expression of disapproval,—more especially, seeing that the system was highly beneficial to the landlord: That the additional rent was not exigible, seeing that it was fixed as a liquidate penalty for loss by miscropping. Whereas, not only had there been no miscropping, and no loss sustained, but the farm had been greatly improved and benefited by the system adopted. But assuming that the additional rent were exigible, it could only form the ground of an ordinary claim against the estate, and could not be exacted as a preferable debt, in respect the hypothec right of a landlord only extended to proper rent, and not to penalties for contravention of the terms of the contract of lease, whether liquidated or not. The fact that the landlord was, in the present case, entitled by the lease, not merely to exact the additional rent, but to prohibit the acts by which right to demand the rent may emerge, while no power was given to the tenant, on payment of the stipulated sum, to crop the lands otherwise than according to the rule prescribed by the lease, was decisive as to the rent being truly a liquidated penalty for contravention, and consequently not being secured by the right of hypothec. Besides, the stipulation by which it was provided that the extent of the contravention, and consequent amount of the penal rent should be ascertained in a reference to the Sheriff or Sheriff-substitute, admitting the uncertainty of its amount, and necessary delay in ascertaining it, was also decisive against the use of the immediate summary remedy of sequestration for recovery of that additional or penal rent.

The trustee refused to sustain the claim as preferable, and as being covered by the hypothec; but on an appeal to the Lord Ordinary, his Lordship pronounced the following interlocutor:

" 4th April 1842.—The Lord Ordinary having considered

the note of appeal, the revised condescendence, the revised answers, and whole productions, and having heard parties' procurators—Alters the interlocutor submitted to review, and remits to the trustee on the sequestrated estate of the said James Baxter, to sustain the preference claimed by the appellant for the sum of £220 Sterling of additional rent for the farm of Corrilea, for crop and year 1841, payable at the term of Martinmas 1841, and ordains him to pay the said sum to the appellant out of the first and readiest monies in his hands, as trustee on said sequestrated estate; and finds no expenses due."

On a reclaiming note, the Court unanimously held, that as the lease expressly stipulated for additional rent in case of deviation, there was no room for doubt that the claim was covered by the tack, in the same way, and as extensively, as the rent due in the ordinary course, and could not be viewed as penalty, in respect the lease conclusively stated it to be additional rent. Their Lordships accordingly *adhered*.

Lord Ordinary (in vacation), Gillies.—Act. A. S. Cook; W. and J. Cook, W.S., Agents.—Alt. Patton; M'Intosh and Ducat, W.S., Agents.—F. Clerk.—[G.D.F.]

2d June 1842.

SECOND DIVISION.—(G. D. F.)

No. 195.—ROBERT LAIDLAW, Pursuer, v. CHRISTOPHER SMYTH, Defender.

Agent and Client—Contract—Proof.

This was an action raised by an Edinburgh agent to recover from a country agent, who had employed him in certain cases before the Court of Session, the expenses connected therewith, of which the Edinburgh agent had been unable to obtain payment directly from the clients—Circumstances in which the defence of the country agent, which turned on the correspondence in process, &c., sustained, that the pursuer had undertaken the employment on condition that the defender was not to be liable.

Lord Ordinary, Cockburn.—Act. Solicitor-General (M'Neill), Russell; Party Agent.—Alt. Patton; James Malcolm, Agent.—T. Clerk.—[G.D.F.]

2d June 1842.

SECOND DIVISION.—(G.D.F.)

No. 196.—WILLIAM ARMSTRONG, Pursuer and Advocate, v. THE REV. ROBERT WILSON, Defender and Respondent.

Bill of Exchange—Vitiation—Process—Proof.—A creditor poinded his debtor's effects, which, notwithstanding, were thereafter sold by a creditor who used a poinding subsequently. The first poinder brought an action, to recover from the second double the appraised value, as for an unlawful poinding, and the second poinder raised a reduction of the bill on which the diligence first in date had proceeded, on the ground that the date of the bill was vitiated or erased. The Lord Ordinary found that one figure in the date was erased, but held that it was competent for the defender to prove *prout de jure*, that the erasure was made prior to the issue and discount of the document, and to correct an inadvertent mistake; and his Lordship, on a proof, subsequently found that the proof was affirmative of the question of fact remitted to probation. But the Court, on a reclaiming note, reduced, decerned, and declared in terms of the libel, in respect the defender had failed to prove that the vitiation on the bill was made with the knowledge or consent of all parties thereto.

George and John Sharpe having dishonoured a bill due by them to the defender, the latter poinded their

effects, and obtained from the Sheriff of Dumfriesshire the usual warrant to sell. Notwithstanding this procedure, the same effects, or part of them, were thereafter poinded and sold by Armstrong, in consequence of which Wilson brought an action on the Statute 54 Geo. III. c. 137, in the Sheriff-Court of Dumfries, to recover from him double the value of the appraised goods, as having rendered himself liable therefor as for an unlawful poinding. Appearance was entered for Mr Armstrong, who, besides other grounds, stated that the bill on which Wilson founded, and which was produced, was not probative, but, on the contrary, was vitiated *in substantialibus*, as the date was either erased, or one date had been superinduced on another, and he accordingly stated as a plea, that the vitiation, which was apparent *ex facie* of the bill, was a bar to the action. This plea, however competent in a reduction, not being relevant *ope exceptionis*, the Sheriff repelled, in consequence of which Armstrong first raised an action, concluding that the bill should be reduced and set aside, in so far as it was the ground and warrant for the diligence and proceedings following thereon, and he also presented a note to have the Inferior Court process advocated, *ob contingentiam* of the reduction.

The Lord Ordinary having advocated the Inferior Court cause, and the same being conjoined with the reduction, certain procedure took place, which is sufficiently intelligible from the note of the Lord Ordinary appended to the following interlocutor:

"15th June 1841.—The Lord Ordinary having heard counsel in these conjoined actions of reduction and advocacy, and thereafter considered the record, documents produced, and whole process, finds that one figure in the date of the bill under reduction is written upon an erasure, but finds it competent for the defender, in support of his claim and diligence raised upon the said bill, to prove *pro ut de jure*, that the erasure was made prior to the issuing and discounting of the bill, and to correct an inadvertent mistake made by the writer of the document: Therefore, before farther answer, appoints the cause to be enrolled in the motion-roll, that parties may be prepared to state in what manner they propose such proof to proceed; reserving consideration of all the other pleas of the parties, both in the reduction and advocacy, till the question as to the validity of the bill, and of the diligence raised thereon, be discussed.

"Note.—The pursuer and defender are both poinding creditors of one of the common debtors, but the defender's diligence is *prior in date* to the pursuer's. The latter, therefore, seeks by this action to *reduce* the defender's bill, on the ground of vitiation alone.

"Upon inspecting the bill, it is plain that one figure is written upon an erasure, and it may still be perceived that the date first written on the bill was 7th March, though it has been afterwards changed to 8th March. Under that aspect of the document, the Lord Ordinary intimated, that he held the defender, who was poinding and doing diligence on the bill, was bound, in the first instance, to undertake the *onus* of showing that the date was corrected or adhibited to the bill as it now stands, *before it was completed or issued*, and to correct an innocent mistake. The defender answered, that he was willing to adduce such proof, and as affording *prima facie* evidence of the error said to have been first inadvertently committed in writing the bill, the almanac for 1838 was referred to, showing that the 7th of March in that year fell on a *Sunday*, and it was added, that as the 8th of March was *Monday*, that was the *market-day* of the adjoining village of Thornhill, where the bill was drawn, and where the parties usually met weekly.

"The Lord Ordinary was impressed with the apparent *bona fides* of this explanation, and, at all events, he was of opinion that the offer of proof by the defender was relevant. But the

pursuer took a different view of the law, and maintained, that in every case of erasure, summary diligence was incompetent till the holder of the bill has constituted his right by ordinary action. Having stated that he wished a judgment to that effect, the prefixed interlocutor has been pronounced.

"There appears to be no authority for the proposition contended for by the pursuer as an abstract and inflexible rule of practice. It is no doubt possible, that in some cases of very suspicious erasure, complained of by the *obligants* in the bill as perpetrated to effect fraud, the Court may have held the creditor bound to proceed by action, and not by summary charges; but even in questions with the *obligants*, sundry cases of erasure are on record of suspensions of summary diligence, the charges in which have been sustained. See the cases of Sutherland, 2 Shaw, p. 442; Miller, M'Kay and Co., 11th July 1832; and Mr Thomson, in his last edition, p. 612, observes, that the plea of erasure 'may be pleaded either against an action, or in a suspension of the charge.'

"It is observed, however, that the cases reported have been chiefly questions with the *obligants* in the bills, and not with *third parties*, and it was added, that a bill erased cannot be founded on in a question with *third parties*, till its authenticity is established by an ordinary action; but where the direct *obligants*, in the present instance, do not challenge the bill,—when, on the contrary, they received charges, and acquiesced therein, it seems to follow, *a fortiori*, that the holders of such bills must be entitled to follow out ulterior diligence against the effects of the debtors. The very circumstance that other creditors were in the course of doing diligence against the common debtor's effects, entitled the defender to raise summary diligence on his bill; he was not bound to lie by and see the effects of the debtor swept off by other creditors; but if the proceedings of the pursuer had been correct, a proper process of competition should have ensued before the Judge Ordinary, in which all competitors for the debtor's effects would have been heard on the report of the poindings. Both claimants would have been in the same situation as if, under other circumstances, a process of multiplepoinding had been brought. In a competition of poindings, as well as of arrestments, and in other competitions, the process for extricating the preferences of parties is a congeries of actions, in which the attaching creditors may prove their claims *habili modo*, as in a constitution, on the principle explained by Lord Stair and Mr Bell (2 Bell, p. 299): hence the plea of the defender, as a creditor holding a bill *admitted* by the debtor, is in no respect barred by the consideration that he is here competing with *third parties*."

Thereafter the Lord Ordinary pronounced the following interlocutor:

"16th July 1841.—Of consent, and upon special motion of both parties, allows the defender a proof *pro ut de jure*, that the erasure was made prior to the issuing and discount of the bill, and to correct an inadvertent mistake made by the writer of the document, and to the pursuer a conjunct probation thereanent; grants diligence at the instance of both parties, or either of them, against witnesses and havers, and commission to the Judge Ordinary of the bounds within which the witnesses and havers reside, or may be for the time, to take the said proof,—to be reported at first calling of the cause in November next; holds the reservation contained in the interlocutor of 15th June last as herein repeated."

A proof was accordingly adduced, when the Lord Ordinary pronounced this interlocutor:

"16th March 1842.—The Lord Ordinary officiating for Lord Cuninghame, Ordinary in the cause, having heard counsel for the parties on the proof adduced, and whole process, and thereafter considered the same,—in respect it was found competent by the interlocutor of Lord Cuninghame, of 15th June 1841, now final, 'for the defender, in support of his claim and diligence raised on the said bill, to prove *pro ut de jure* that the erasure was made *prior to the issuing and discount of the bill*, and to correct an inadvertent mistake made by the writer of the document,' Finds that the proof adduced is affirmative of the (question of ?) fact remitted to probation: Therefore, in the reduction, repels the reasons of reduction, sustains the defences,

and decerns; and in the advocacy, disjoins this process from the reduction,—remits the original cause to the Sheriff, with power to him to direct the proceedings to be completed, which were interrupted by the advocacy *ob contingentiam*; and generally, to proceed in the cause as to him shall seem just; allows the decret absolutor in the process of reduction, and the act and remit in the advocacy, to go out and be extracted separately: Finds the defender entitled to expenses in the conjoined actions in this Court; appoints an account thereof to be lodged, and when lodged, remits the same to the auditor to tax the same, and to report.

"*Note.*—The result of the evidence in this case is, that the bill was written by the second witness, George Sharpe: That he never altered the bill, and that the figure 8 is not in his handwriting: That after it was signed in his presence by John Sharpe and Samuel Buchanan, he gave the bill to Mr Wilson, who carried it into his house, and in a few minutes returned it with his signature to the witness, in whose custody 'it remained from the time that he wrote it, until the time that he delivered it to Mr Moffat' (the agent for the Glasgow Union Banking Company at Thornhill), 'excepting for the few minutes that Mr Wilson had it in his house when he signed it.' This witness 'is quite certain that the bill was never altered from the time it was written, till it was delivered to Mr Moffat, unless it was so altered when Mr Wilson had it in his house for signature.' It is clear from Mr Moffat's evidence, that the bill bore the date of the 8th January, when brought to the bank for discount; and although Moffat did not observe the alteration of the date, which is not very apparent unless narrowly looked into, there seems no reason to doubt that it was either done at first, or made by Mr Wilson when the bill was delivered to him, and can be attributed to no other circumstance than that mentioned by Lord Cuninghame in his note, *that the 7th was a Sunday*. George Sharpe swears 'that he is quite certain it was written upon a week-day, and not upon a Sunday, as he never wrote any bill whatever on a Sunday.' He may, however, have inadvertently dated it the 7th, and the parties observed the mistake and corrected it, though this witness does not recollect it.

"In many cases the issuing a bill is a distinct act from discounting it; but here the bill remained in the hands of the writer who got it signed, until he discounted it at the bank. The issuing and discounting took place, therefore, at the same time. Although any alteration in the date of a bill is to be viewed with extreme jealousy, the Lord Ordinary, after reconsidering the case, and consulting with Lord Cuninghame, has come to be of opinion, that where the bill is issued and discounted at the same time, and no alteration has taken place in the date after it was discounted, a previous alteration of the date cannot be fatal to the bill; and that, therefore, this action of reduction is not well founded.

"Lord Cuninghame has furnished the Lord Ordinary, since this opinion was written, with some English cases, which seem to confirm it, and which are subjoined for the information of the parties."

"*Hemnan v. Dickenson*, 1829, Bingham's Reports, Vol. V. Skerrington *v. Jermyn*, Carringt. and Payne, III. 374. Jacob *v. Hart*, Maule and Selwyn's Reports, VI. 143. Begbie *v. Levy*, Jervis and Crompton's Reports, I. 180. Leykariff *v. Ashford*, Moore's Reports, XII. 281."

Armstrong reclaimed, when the Court, viewing the proof differently, pronounced the following interlocutor:

"In respect the defender, Robert Wilson, has failed to prove that the vitiation on the bill was made with the knowledge or consent of all the parties thereto, Alter the interlocutor reclaimed against; and in the reduction, sustain the second reason of reduction founded on the vitiation of the bill libelled, and reduce, and decern, and declare accordingly; and in the advocacy, advocate the cause, and assoilzie the said William Armstrong, the defender, in the original action, from the conclusions of the libel, and decern: Find the said William Armstrong entitled to the whole expenses incurred by him, both in this Court and in the Inferior Court; appoint an account," &c.

Lord Ordinary Murray, for Cuninghame.—Act. Ruther-

furd, Penney; James Malcolm, Agent.—Alt. Solicitor-General (M'Neill), Whigham; Brodies and Kennedy, W.S., Agents.—F. Clerk.—[G.D.F.]

3d June 1842.

FIRST DIVISION.—(H. B.)

No. 197.—HARRY LEITH LUMSDEN, *Pursuer*, *v.* JAMES GORDON and WILLIAM SIMPSON, *Defenders*.

Arbitration—Decree-Arbitral—An attempted reduction of a decree-arbitral, as ambiguous and ultra vires compromissi, repelled.

Harry Leith Lumsden of Auchindoir, and James Gordon of Craig, agreed to submit to William Simpson of Glenlythan, advocate in Aberdeen, as sole arbiter,

"all disputes, questions and differences, depending and subsisting between us in regard to the line of march between our respective properties of Clova and Craig, on the eastern or south-eastern face of the hill called the Buck, hereby authorising and empowering you to lay down, fix, and determine the line of march between the said lands of Clova and Craig, on the said face of the said hill, in so far as the same is disputed, with power to you to receive the claims of the parties, hear them thereon, and take all manner of probation by writ, witnesses, or oath of party."

After visiting the ground, leading a proof, and hearing parties, Mr Simpson pronounced a decree-arbitral, by which he fixed

"the line of march between the said lands of Clova and Craig, on the eastern or south-eastern face of the said hill, called the Buck, to be in all time coming the following:—namely, the Burn of the Buck, from the ford thereof, a little above the town of Silverford, and continuing up the said Burn of the Buck by its principal stream to its source, and from that source in a straight line to the rock or stone, called the Rock of the Buck."

Mr Lumsden brought the present summons of reduction and declarator, in which, calling Mr Gordon and Mr Simpson as parties, he concluded for reduction of the decree-arbitral, on grounds which are sufficiently explained in the note appended to the following interlocutor pronounced by the Lord Ordinary:

"15th February 1842.—The Lord Ordinary having heard parties in this process of reduction and declarator, sustains the defences, assoilzies the defenders, and decerns: Finds the defenders entitled to expenses; appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same and to report.

"*Note.*—There were three points maintained at the debate against the decree-arbitral:—

"*First*, That while the submission only empowered the arbiter to determine the line of march on the 'face' of the bill, he has made part of the line, consisting of the burn, run along the hill's base. This objection turns entirely on the pursuer's adopting his own view as to where the face of the hill ceases and its base begins,—a fact plainly within the cognisance of the arbiter.

"*Secondly*, That the award, which makes the line run up the burn 'by its principal stream to its source,' is ambiguous, as the stream has various sources. Now, the arbiter may possibly have taken for one of his marks a natural object, the fixing of the exact position of which may require another proceeding; but this is not a ground for setting the decree aside. He has given the mark, and even though it should require a verdict to settle a dispute which one of the parties may choose to raise about its identity, this is not a reason of reduction. Suppose the source of the stream had formed part of the boundary in the titles, would this have become inoperative as a point denoting a line of march, because an application to the Sheriff, or some

such proceeding, might be necessary, in order to refute the assertion made by a party, that what should be held the source was questionable? If two proprietors referred their boundaries to an arbiter, and he decided that all the lands in the parish of A belonged to one party, and all in the parish of B to the other, the decree surely would not be reducible because at one part, or at all parts, there was a doubt about the limits of either parish?

"Thirdly, That part of the remainder of the line, which the arbiter makes to run 'from that source in a straight line from the rock or stone called the Rock of the Buck,' goes beyond the range of the disputed ground. Assuming this to be the fact, it forms no ground for setting the award aside, in so far as it is within the range. The pursuer says that the arbiter may have taken away ground within the submitted space, on the idea that he compensates for this by giving ground beyond it. But he was not empowered either to give or to take. It was not a straightening of marches. It was a mere ascertainment of the fact as to the existing line."

The pursuer reclaimed. At advising,

Lord President.—I am satisfied there are not sufficient grounds in law for interfering with the award of the arbiter. A decree-arbital is a solemn deed, and is not to be interfered with on light grounds. The arbiter appears to have proceeded in the most careful and regular manner, and taken the utmost possible pains to arrive at a correct decision. After inspecting the ground, and giving parties a full opportunity of proving their claims, he pronounces his decree in terms which, notwithstanding of the ambiguity alleged by the pursuer, appears to me perfectly explicit. I don't say that I assent to everything contained in the Lord Ordinary's note. What we have to do with is the interlocutor, to which I am clear we ought to adhere.

Lord Gillies.—I concur, and have very little to add to what your Lordship has said. The arbiter appears to me to have fixed the disputed boundaries very clearly and naturally. This burn of the Buck must have a principal source, unless it can be shown that there are two of the very same dimensions. This may not be absolutely impossible, but I should think the chances against it are a million to one. There have been many disputes as to the sources of the Nile, but I suspect there is little room for dispute as to the sources of the Buck.

Lord Mackenzie.—I am of the same opinion. It is impossible to reduce this decree-arbital on the grounds here alleged against it. It is perfectly intelligible; and as to the objection that it exceeds the limits of the submission by going to the base of the hill instead of keeping to the face of it, it is a great deal too nice, and in the circumstances scarcely seems to be made *bona fide*.

Lord Fullerton concurred.

The Court adhered, with additional expenses.

Lord Ordinary, Cockburn.—*Act.* Solicitor-General (M'Neill), Moir; Robert Roy, W.S., *Agent.*—*For Mr. Gordon,* Robertson, Whigham; Storie and Baillie, W.S., *Agents.*—*For Mr. Simpson,* Anderson; Walter Duthie, W.S., *Agent.*—*B. Clerk.* [H.B.]

3d June 1842.

SECOND DIVISION.—(G.D.F.)

No. 198.—ARTHUR DINGWALL FORDYCE of Culsh and Brucklay, Pursuer, v. SIR HENRY BRIDGES, Knight, Defender.

Process—Jurisdiction—Domicile—*Lis alibi pendens*—Foreign—*Res Judicata*.—A testator living in England, left a will in the English form, by which his trustees were directed to invest the residue in landed estate in England or Scotland, under the fetters of entail, on the same series of heirs as contained in a previous Scots entail of his property executed by him. The trustees invested part of the fund in land in Scotland as directed; but after their decease, A, an heir of entail, took measures in the English Court of Chancery to bar the English will, by orders from which Court he obtained possession of the balance, and thereafter bought land in Scotland, the titles

of which he took in fee-simple to himself, without including the heirs of entail; and on his death, B, a domiciled Englishman, succeeded by settlement of A thereto, and was infeft. A challenge was then brought by an heir of entail succeeding to A, in the Court of Chancery in England, of the previous procedure had there by A, which was directed against A's executor, B; and concurrently therewith an action was raised against B in the Court of Session, with the view, by using diligence on the dependence, of attaching the Scots estate, alleged to have been purchased with the trust-funds, and to which B had now made up titles, and thereby acquiring a security which could not be obtained in England, intermediate to, and to await the issue of the challenge there,—decree in the Scots action being craved conform to the order to be pronounced in the Court of Chancery. Plea in defence of *lis alibi pendens* repelled, and action sustained, in the circumstances, as relevant, and consequently the diligence used on the dependence. But observed, that the Court had the right to prevent the remedy being abused, by calling on the party to show the nature of the progress of the English suit; and that the diligence might be modified, altered, or recalled, as the Court in the circumstances should see fit.

The late John Dingwall, who was by birth a Scotsman, and possessed the estates of Brucklay and others in the county of Aberdeen, died in May 1812, leaving two deeds regulating his succession. The first of these was a tailzie, dated 7th September 1807, whereby, under the fetters of a strict entail, he conveyed his estates of Brucklay, &c., to his grandnephew, John Dingwall, then of St James's Street, Westminster, and the heirs of his body; whom failing, to the heirs-male of the body of William Dingwall of Culsh; whom failing, to the series of heirs therein set forth. The second deed was a will executed in England on 13th June 1808 in the English form, by which he (in the first place) conveyed to James Chalmer of Abingdon Street, Westminster, George Burley of Lincoln's-Inn, Middlesex, and Alexander Crombie of Aberdeen, the survivor or survivors, and executors, administrators, and assigns of such survivor, as trustees, his real property situated in London and Croydon, for the use and behoof *nomination* of the series of heirs contained in the entail of the estates of Brucklay. The testator then, after providing for payment of all debts, &c., conveyed the residue of his estates, whatsoever and wheresoever, after being realised, to the same trustees, to be invested by them in the purchase of lands in England or Scotland; and these purchases, whether in England or Scotland, he expressly bound the trustees to settle, "to the uses upon, and for the trusts, intents and purposes, and with, under, and subject to the powers, provisions and declarations, and in the manner to, upon, for, with, under, subject to, and in which I have settled my estates at Brucklay in Scotland, by a certain deed of settlement, bearing date" 7th September 1807.

After the death of the testator, on 28th May 1812, the institute made up titles under the entail, and the trustees administered under the English will, and confirmed in Scotland; and it appeared, that after defraying all lawful claims on the estate, there remained in the hands of the trustees a balance of upwards of £260,000 to answer the trusts of the testator. In the course of their actings, and while the whole of the trustees and the institute were in life, the trustees invested a portion of this sum, amounting to upwards of £173,000, in certain estates in the counties of Aberdeen and Kincardine, and these purchases the trustees entailed according to the testator's injunctions, under the fetters

of strict entail, on the same series of heirs as contained in the entail of Brucklay. On the death of the trustees there remained a considerable balance, amounting to £100,000, exclusive of interest from 1812, still uninvested, and applicable to the purposes of the will. It is in regard to this sum that the present question has arisen.

The institute having died on 21st January 1833, by which time the whole of the trustees had deceased, the succession opened to his son, John Duff Dingwall, a minor, who then adopted certain proceedings in the English Court of Chancery, for the purposes of setting free from the trusts, and operation of the English will, such sum or sums of money as yet remained uninvested by the trustees; and this appeared to have been done ostensibly in consonance with, or, as alleged, under colour of the views of English practice, by which an entail may be defeated or barred by certain procedure. Neither the pursuer nor the series of heirs of entail in Scotland were subpoenaed, nor were they parties to these proceedings in Chancery, but it appeared that one of them, having a very remote interest, and who lived in London, was subpoenaed, and the grandfather of the pursuer, who lived in Scotland, had lodged a protest against the validity of the proceedings, which resulted in certain orders of the Master of the Rolls, by which John Duff Dingwall received into free and uncontrolled possession the remaining uninvested balance of the testator's estate, part of which, it was alleged in the summons, he had invested in the purchase of two estates, Fedderat and Ardlaw, in Aberdeenshire, taking the titles to himself in fee-simple.

John Duff Dingwall died in October 1840, leaving a trust-disposition, executed a short time before his death, whereby he conveyed his whole property, heritable and moveable, to certain trustees and executors; *inter alios*, the defender, for the use and behoof of the said defender, who was a stranger in blood, and a domiciled Englishman, and who thereupon completed titles to the foresaid two estates of Fedderat and Ardlaw. By the death of John Duff Dingwall, who survived his wife without issue, the heirs of the body of the institute became extinct, and the succession opened to the second branch of the destination in the Brucklay entail, viz., to the pursuer, Arthur Dingwall Fordyce of Culsh, as heir-male of William Dingwall of Culsh, and he accordingly took up the estates under the old entail, as well as those entailed by the trustees of the testator.

The pursuer then brought this action, in which he set forth, that under colour of obtaining the opinion of the Court of Chancery in England, as to whether, or how far the residue of the testator's means had been applied by the trustees in conformity with his will, and as to how the uninvested balance should be applied, John Duff Dingwall had adopted certain proceedings in that Court, in which, professedly with the above view, but really in virtue of an alleged illegal scheme, concocted by him and certain parties who had officiously interfered with the minor and the estate, he attempted to defeat the trusts of the will, by obtaining the residue to be invested in lands in fee-simple; and that, in pursuance of such scheme, certain orders of the Court of Chancery were procured, by means of which the money was taken possession of by the defender's author, who thereafter invested a portion of the funds, as

now exclusively his own, in lands in fee-simple in Scotland, namely, Fedderat and Ardlaw. The summons specially set forth at length the alleged nature of the various steps in Chancery, subsuming that they were inept, as in defraud of the will, and *funditus* null and void, and alleging that the pursuer had accordingly raised a suit in Chancery in England against the defender, who was a domiciled Englishman, to set aside the previous procedure had by his author John Duff Dingwall. The pursuer then set forth, generally, the nature of his bill of complaint in the Court of Chancery, which was, that that Court was called on to ordain and decern the defender to account for, replace and reinvest in Court, all the sums of money illegally transferred to his author, and to have it declared that these sums were still subject to the trusts of the will.

The summons then proceeded—

"That the pursuer has been advised that the said proceedings, now commenced, and in dependence in our said Court of Chancery in England, are necessary or expedient for the end and purpose of annulling and setting aside the several decrees and other matters complained of: Nevertheless, necessary it is for the pursuer to raise and follow out this present action before our Court of Session in Scotland, concurrently therewith, and to the end and effect that he may be able, by process of law in Scotland, to procure and enforce implement and satisfaction of the decree or decrees to be pronounced in the said cause, now depending in our said Court of Chancery in England, in so far as certain portions of the foresaid residuary trust-funds and effects, attempted to be diverted by the said John Duff Dingwall, or others in his name, were, by him or others acting for him, laid out and invested in the foresaid lands and estates of Fedderat and Ardlaw or Ardley and others, as hereinbefore narrated, and which lands and estates are now, according to the writs and title-deeds thereof, in *hereditate jacente* of the said John Duff Dingwall, as in fee-simple, or are pretended to be vested, by personal or feudal right, in the said Sir Henry Bridges, as the sole accepting trustee of the said John Duff Dingwall, or of the said Sir Henry Bridges himself, as an individual pretending to have lawful right thereto, and beneficiary interest therein, and which lands and estates are not subject to, or within the jurisdiction of our said Court of Chancery in England, and so cannot be attached or secured by any diligence or process of law executorial, issuing out of the said Court: And further, *et separatim*, that the pursuer may obtain decree of declarator and otherwise, on the grounds and to the effect after mentioned."

The conclusions of the present action were—(1.) That it should be found and declared,

"by decree of our said Lords," "conform to, and in concurrence with, the aforesaid cause now depending in our said Court of Chancery in England, and to the end and effect that the pursuer may obtain implement and satisfaction of the decree or decrees, order or orders, to be pronounced therein:"

that the sums paid and transferred to John Duff Dingwall, under orders of the Court of Chancery, formed part of the residue of the testator, and were, and are now subject to the trusts of his will, and that the trusts of said will were not discharged by the proceedings adopted by the defender's author, and that the same ought now to be invested and secured for the benefit of the pursuer, and the series of heirs under the Brucklay entail: (2.) That the defender should be bound to exhibit a particular account of his and the deceased John Duff Dingwall's intromissions with the residuary estate of the testator, so that the sums remaining in his hands should be applied, under the authority of any competent court of law or equity, according to the testator's will: (3.) That it should be found that the estates of Fedderat and Ardlaw were purchased out of the resi-

due, or funds improperly diverted from the trusts of the will: (4.) That the defender ought to be ordained to convey these lands to the pursuer, and the series of heirs in the Brucklay entail, conform to the said will,—the said defender, in that event, being allowed to take credit in his and J. D. Dingwall's account of intromissions with the residue, for such sum or sums as had been laid out in these purchases: (5.) That as to the value of the residue which would then remain, after giving credit as aforesaid, it should be found that the defender ought to consign the same in Court, to the effect of being applied in this or any other competent process, in pursuance of the trusts of the said will, "and in implement of the decree or decrees to be pronounced in the said action and cause now depending in our said Court of Chancery in England, and in this present action."

The summons then contained a conclusion, that in the event of the defender failing to compare, it should be held, after giving credit for the purchases of the said two estates, that £60,000 was the balance remaining over of the trust-funds.

The defender *pleaded*—1. That the action was incompetent, in respect of the *lis pendens* in the Court of Chancery; and farther, in respect that it related to the powers and actings of executors under an English will, and that the matter was already *res judicata* by the decrees of the Court of Chancery,—the competent Court for the decision of questions arising upon the will of the testator. 2. The Court of Session being excluded from the consideration of the merits of the case, or the validity or regularity of the English decree of the Court of Chancery, it was incompetent to raise action in this Court merely as a means of obtaining diligence in security, more especially without leave obtained from the Court of Chancery, in which alone the merits of the questions in dependence could be tried. 3. The conclusion, that the defender should convey to the pursuer the lands of Ardlaw and Fedderat, as purchased out of the funds devised by the will of John Dingwall, was also incompetent,—(1.) Because it was consequent on the other conclusions for setting aside the decree of the Court of Chancery, and for having it declared that, by the purposes of the will, the trustees were bound to invest the residue in lands in Scotland, which could not be maintained before this Court: (2.) Because, even if these estates had been purchased out of the residue, which was not admitted, the pursuer could not insist for a conveyance of the estates so purchased, but only for repayment or replacement in the Court of Chancery of that portion of the residue with which they were purchased. 4. The decrees of the Court of Chancery fixing the interpretation of John Dingwall's will, and the place and mode in which the residue of his personal estate was to be invested, were *res judicata*, until set aside on the ground of irregularity in the proceedings. 5. The whole proceedings having been regular, these decrees are valid and unchallengeable.

The general scope of the defender's argument was as follows:—

The pursuer's real object was not so much to discuss the questions here as to the validity of the previous Chancery suit, as to obtain diligence in security by inhibition or arrestment on the dependence. But could an action with such conclusions, SCOTTISH JURIST.

and in such circumstances, be sustained to any extent? Sir Henry Bridges was an English executor, living and domiciled in England, and in that character administering to an English will. Now, he is called here to answer as executor of John Duff Dingwall in reference to trust-matters arising out of the English will of the original testator, and in reference to the conduct and discretion of the trustees, and that, too, under an admission that the pursuer had taken steps in England with precisely the same object. But it is clear law that an English executor, administering to, and acting under an English will, cannot be called on to account, by any action in this country, as to his intromissions, still less for the actings of others whom he does not represent. It is in England only that he could be called on to account, being an executor under an English will,—and the Court of Chancery was the only competent *forum* for such a question. An executor is bound to account only in the Court from which he derives his authority, and where he must obtain his exoneration. Supposing, then, that the pursuer had tried to found a jurisdiction against the original trustees of the first Mr Dingwall, by arresting the funds of the trust in Scotland with the view *jurisdictionis fundandæ causa*, and had then brought an action against these trustees, to have it found that the residue of the trust-funds was to be invested, like the former part, in Scotland, this Court could have had no right to entertain the action, or interfere as to the construction of, or rights arising out of the testator's will, because it was an English deed, and the Court of Chancery was the proper *forum* for such a question. In such a case, the trustees would have been entitled to say, the propriety of our actings is a question of English law on an English will; we can only be called on to account in England,—and that answer must have been sustained. It was quite possible that there might be jurisdiction in the abstract, if an arrestment *jurisdictionis fundandæ causa* be used; or if the parties had heritable estates in Scotland. But that does not remove the difficulty; which does not so much rest in the absence of jurisdiction, as that the party ought not to be called to account, except within the Courts which are the proper interpreters of the rules according to which he should have acted. It was also true that the general rule suffers an exception which, with the cases bearing upon it, would probably be founded on on the other side, viz., where an English executor, administering under an English will, leaves that country and arrives in Scotland with the funds of the trust. In that case, the Court here might sustain action against him, but in doing so, the Court would proceed on equitable grounds entirely; because in that case, although in the abstract the English Courts would be the proper *forum* to call him to account, yet the party would be deprived of a remedy altogether if the Court here refused to sustain action. But it would be on equitable grounds alone—on the ground that the party, by coming here, had rendered it impossible to sue him within the proper *forum* to which he was primarily answerable—that the Court would proceed. See the case of Brown, 17th December 1830, S. and D., Vol. IX. p. 224; and Dickson, 7th June 1833, S. and D., Vol. XI. p. 685. In this case, the defender is called on to account, not for his own actings, but for something done by the trustees under the original will of Mr Dingwall, senior. Now, independent of the Chancery proceedings, Sir Henry Bridges, who could not be in a worse situation than the original trustees, could not be called on to account here, being an English executor administering to an English succession, and who must get his exoneration in the Court of Chancery; and that particularly, seeing that he was called on to account for a sum transferred to his constituent by authority of that Court. The whole question raised on the merits in the present action, regarding, as it did, a question of discretion of trustees acting under an English will, was not one for this Court, even if there had been no previous proceedings elsewhere. The Court of Chancery was the proper Court to say if the trustees have acted rightly. But that Court had already decided; and the decree is against the pursuer. And, supposing that that decree was a subsisting decree, then, besides the objection arising from the case being brought in Scotland, the decree forms *res judicata* against the pursuer's claims. The pursuer, however, says that he has taken proceedings in England to try the merits of the decree;—that he has commenced proceedings in Chancery for Vol. XIV.—No. XXIX.

having it set aside—equivalent to our action of reduction. But surely it would be a singular result if the action here, being originally incompetent, should become competent, in consequence of the *lis alibi pendens* in Chancery. It surely rendered this action the more incompetent, that the pursuer cannot reach any of the conclusions now maintained against the defender, except by a judgment of the Court of Chancery reducing its former judgment. No judgment on the merits of the questions at issue could be pronounced by this Court; the decisions of the Chancery are final till set aside in Chancery, and the pursuer did not pretend that he could ask this Court to determine the matter; he only says, when the Court of Chancery so determine, I ask a decree conform; and in the meantime security by arrestment and inhibition. This notion was probably grounded on the case of Wedderburn, (*supra*, p. 336). But as to that case, at the utmost it brings out nothing more than the principle, that where an action, which would have been originally competent in this Court, is brought here mainly to obtain security, after an action raised in England, the Court would consider the whole circumstances, and say, if in equity the party was entitled, over and above his original suit, to maintain action here. This case was a contrast to the Wedderburn case. It is a question as to an English will, and as to the discretion of the trustees acting under it in England. Now this was eminently a question for the Court of Chancery, and so it had been submitted to that Court, and decided. 1st, In the Wedderburn case, it was not a question as to an English will, or any one where the Court of Chancery was particularly or exclusively entitled to try the case. It was a mere question of partnership accounting. Therefore, it might have been as well raised originally in the Court of Session, and the defenders there could not have maintained the objection, viz., that they were bound only to account in England as executors there. Some of the defenders in that case were English executors, but not all. But at all events, the question involved nothing peculiar to the English Courts. In this way it was reasonable for the Court here to say, that as the case might have been raised in either Court, they would not throw out the one in this Court till they saw the result elsewhere, and that, in the meantime, they would enable the pursuers to obtain the remedy of diligence. 2d, The Wedderburn case did not involve any questions as to the regularity of proceedings in England, nor was there any previous decree of that Court finding that the trust-money should be invested in England; but here the circumstances are the reverse. Both the regularity and the justice of a previous Chancery judgment are involved, and unless both points are decided in favour of the pursuer, he could not proceed a step here. 3d, Then, in the Wedderburn case, there was authority granted by the Court of Chancery to pursue an action in this Court. That Court had granted leave to the pursuer to obtain such security as he could get by the law of Scotland. The way in which the granting or refusing of leave by the Court of Chancery comes to be relevant, is this, that the plea of *lis alibi*, strictly applied, would go to exclude the action in Scotland entirely; but from equitable motives, it may be competent to the Court in Scotland to say if they will grant, in the circumstances, an intermediate remedy to the extent of supporting diligence in security; and if so, the circumstance that leave has been granted by the Court of Chancery—the Court best acquainted with the merits of the case—is an important consideration in estimating the apparent equity in favour of the pursuer. The consulted Judges in the Wedderburn case did not go the length of saying that when the plea of *lis alibi* is pleaded, it will, or will not, exclude the action here; but they say they have entirely the right to judge whether the action shall be allowed or not. (See page 13 of Opinions at end.) Here no leave had been asked, the pursuer foreseeing that, in the circumstances, none would have been given. In regard to that part of the case which was previously pressed, viz., as to the defender being an English executor, reference is made to the opinions of the majority of the Judges in the Wedderburn case, p. 4. As to the conclusions of the summons, there was one which, it may be said, could not fall within the scope of the previous observations, but then it is one which is clearly put in to give the summons an appearance of competency, viz., the conclusions as to Fedderat and Ardlaw;—that these lands being purchased with moneys be-

longing to old Mr Dingwall's trust-estate, must be held truly to belong to the pursuer. It may be true that that point was not, and could not come within the jurisdiction of the Chancery Court, but then this conclusion is thrown in to give the action an appearance of containing a separate ground of action. But in reference to that ground, 1st, It is not admitted that the money which was paid for these properties formed any part of the trust-property. 2d, But assuming that the case was to be taken as stated by the pursuer, still that was no ground for supporting the action, because this conclusion could not be reached before making out the other conclusions, which, it was maintained, were not relevant in this Court. This conclusion was just the sequence of the others; and if they could not be supported, neither could the conclusion alluded to. If the Court could not say whether the previous Chancery judgment was right or wrong, they cannot entertain the conclusion which proceeds on the assumption that it is wrong. 3d, But there is another view. If the lands were purchased, as was alleged on the face of the summons, this conclusion could not follow from the premises. The pursuer says, Mr Dingwall appropriated part of the trust-funds, and purchased lands with them, and these ought to be conveyed to him. Now, it was conceived that the only extent to which the pursuer, if otherwise right, could claim, is, that Sir Henry Bridges would be bound to replace the money uplifted by Mr D. Dingwall in the hands of the Court of Chancery in England; the pursuer could not call upon Mr D. Dingwall's executor to execute a conveyance in his favour of all the lands which Mr D. Dingwall may have purchased with the funds uplifted. He could only ask that things should be put in *statu quo*.

For the pursuer it was argued—

That the pleas of the defender would have been relevant but for the recent case of Wedderburn, *supra*, p. 336, and the several cases there referred to. Now it was a shut point, that it was competent to carry on a suit here professedly for the same purpose, and against the same parties, and concurrently with a suit in Chancery for the intermediate remedy of diligence, as well as to enforce the decree to be pronounced by the Court of Chancery in the cause. This case was identical in principle with that of Wedderburn. No substantial difference could be pointed out between them, except this, that the present was a stronger case for the application of the principle. The only question, therefore, was, whether the pursuer had set forth a relevant case on the record? because, if so, then he was entitled to have the action supported to the extent of diligence. Now it was distinctly set forth, that the previous proceedings in Chancery were in fraud of the will, and taken in pursuance of a scheme, and quite repugnant to the actings and wishes of the trustees, as alleged to have been duly and publicly announced. The pursuer might not be able to substantiate his averments in the Court of Chancery; but meantime, in a question of relevancy, the truth of them fell to be assumed, and he was therefore entitled to a proof of his averments. The defender had not attempted to show that the pursuer had failed in alleging a relevant case. He only attempts to exclude this action by pleading certain grounds of law which either were inapplicable to the circumstances, or irrelevant after the case of Wedderburn, which must rule the present case. It was said that the previous proceedings formed *res judicata*, but they were now under reduction; and besides, being foreign decrees, they were not to be looked on as final, but decrees in absence, to open up which the pursuer was entitled to time; and he had set forth a relevant ground to show that they were inept *quoad* him. It was also said, that it was incompetent to compel an English executor acting under an English will, and domiciled in England, to account in this Court. But that was to mistake the case; for the defender was not the executor of the testator under the English will, but the executor of John Duff Dingwall under his Scots settlement, and, besides, infest in Scots heritage. The pursuer finds the defender acting under this Scots trust-deed, and also that he is an heritable proprietor in Scotland. Is he not entitled, in these circumstances, to sue that party over whom the Court here have confessedly jurisdiction? It might be true that the process would require to be sisted for the English proceedings before decree conform could be pronounced. But then, with jurisdiction over the party, were not the Court here entitled to interfere and

support an action which was perfectly relevantly laid, while parts of the very funds which were alleged to have been illegally diverted, were actually brought within Scotland, and invested in landed estate? Then again, and besides these pleas, the summons contained conclusions as to the defender being obliged to convey over the landed property to the pursuer, in respect of being bought with the trust-money. These conclusions formed a separate ground of action; and, irrespective of any other ground, they were sufficient to support the case. As to obtaining any order from Chancery to enable the Court here to allow the pursuer to bring an action, it was contended that that was absurd, as neither would the Court here attend to it, even supposing the action were in itself competent, any more than it could render an action competent which otherwise was wholly inept.

The Lord Ordinary pronounced the following interlocutor:

"19th March 1842.—The Lord Ordinary having heard counsel on the preliminary defences, and made avizandum.—In respect it is not competent for this Court to entertain any challenge (whether in the shape of declarator, reduction, or otherwise) of the decrees, orders, or other proceedings of the English Court of Chancery, under authority of which the trusts of the will in dispute were discharged and extinguished, and the residuary estate under said will transferred and paid over to the late John Duff Dingwall (whom the defender here represents), freed from the said trusts, and in all respects as his own absolute and unlimited property,—the said Chancery decrees, &c., having to this effect been carried within their own proper *forum*, into complete and perfect execution: In respect, further, that the mere dependence at the pursuer's instance of such a challenge in the said Court of Chancery, as in truth the only Court competent to entertain the same, is not sufficient to confer upon this Court a primary jurisdiction in the matter, which it would not otherwise have possessed, and, in the absence of such primary jurisdiction, there are not, and cannot be, *termini habiles* for any mere *accessory* diligence in security, on a dependence in itself radically unsubstantial and unreal: And finally, in respect that so long as the foresaid original proceedings, whereby the trusts of the said will stand at this moment extinguished and discharged, shall not, by due and competent authority, have been recalled, the same must operate in this Court as a complete and absolute bar to any demand on the part of the pursuer (even supposing the same were otherwise competent), whether for carrying into execution the trusts of the said will, or any of them, as if they were still lawfully subsisting and effectual trusts; or for replacing under the said trusts any portion of the original trust-estate, or any moneys which may have been realised by disposal thereof, or any new property or estate which may have been purchased by means of the said moneys as a *surrogatum* for the original estate, or otherwise.—Sustains the said defences, and dismisses this action; finds the pursuer liable in expenses, and appoints an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report, and decerns.

"Note.—This case seems clearly distinguishable from that of *Wedderburn*, in which there was a recent consultation of the whole Court; inasmuch as there is here a radical want of *primary* jurisdiction.

"Accordingly, had there been no depending challenge in the Court of Chancery of the original proceedings, whereby that Court put an end to the will, and discharged the various trusts contained in it, it is thought it could not for a moment have been argued that an action, with the conclusions of the present, would have been maintainable. The decree of Chancery must in that case have been received as *res judicata*; and it could not in any respect have been got the better of. It was quite different in the case of *Wedderburn*, for there the action was one which the primary jurisdiction of this Court to entertain (as apart from equitable considerations of expediency, *comitas*, &c.), was not disputed.

"Is the case then bettered by the mere dependence of a *rescissory* process in the competent *forum*? It is conceived not; for in this shape, all the difficulty implied in the old objection of *his pendens* comes just to be superadded; and this too under the most unfavourable circumstances.

"In short, the attempt here made is just an attempt to obtain the security of Scots diligence in aid of an English Chancery suit, under circumstances where there are no *termini habiles* for a proper Scots dependence, and where, therefore, the pretended dependence on which the diligence is to rest has truly in itself no legal substance. But it is essential, in all diligence on a dependence, that the primary action be competently entertainable before the accessory diligence can be supported.

"The analogies of the case seem to approximate it more closely to *Findlater in not. to Leith*, 17th January 1811, than to *Wedderburn*. See also *Ross*, 26th November 1782, and *Douglas, Heron and Company*, 19th November 1793, as reversed on appeal (Dict. 4600 and 4602)."

The pursuer reclaimed. At advising,

Lord Medwyn said, that he could take no difference between this case and that of *Wedderburn*. He retained the opinion he formed in that case; but, seeing no difference between the cases, this one fell to be ruled in conformity with the case of *Wedderburn*. It appeared, however, to him that this was an illustration of the progress which was sometimes made in the application of a principle when once it has been fixed; but he agreed that the Lord Ordinary's interlocutor must be altered.

Lord Justice-Clerk could not distinguish this case from that of *Wedderburn*, and thought it a more favourable one for the principle then decided, than the case of *Wedderburn* itself. (Stated the circumstances of the case). Two things were clear from the record: (1.) That J. Duff Dingwall was not a party charged in any way with the execution of the testator's will, but carried through proceedings in Chancery to defeat it, which are said to have been collusive and illegal. He had not in the face of the summons any connection with England or the jurisdiction of the Court of Chancery, other than his interest as a beneficiary under the trust, which enabled him to appear there: (2.) That the ground of action against the defender does not depend upon any connection with the law of England, nor with his birth or residence as being in England, but as having received, by the settlement of his author, the money of the trust, and, indeed, the estates in this country, alleged to have been purchased by the very funds themselves which are said to have been unwarrantably appropriated, and so liable for the wrong of his author. The action is the same as if it had been directed against any other party who happened to be the executor of J. D. Dingwall, and who was never out of Aberdeenshire. The defender, being an Englishman, has nothing to do with the validity of the proceedings instituted in Chancery by his author, nor has he any connection with the testator's will; and these appear to be important facts in the case. The action narrated that the pursuer has raised a suit in Chancery to set aside the proceedings of J. D. Dingwall as having been fraudulent and illegal under the will, and it claims the money so misappropriated, either as it may remain free in the defender's hands, or as invested in *Federat* and *Ardlaw*. There are conclusive authorities on this point in Scotland, and, his Lordship thought, also in England, in support of such a claim. The pursuer finds the defender in Scotland, or what is the same thing, his heritable property there;—in fact, property purchased, as alleged, out of the misappropriated funds; and the defender represents J. D. Dingwall by universal title. Now, the pursuer does not insist on being allowed a double litigation, but he requests that the action here may be sustained meantime, to the effect of diligence, and that this Court should sist procedure while he follows out his suit in England, where the defender must appear, and if he is successful, then he claims to have the English decree rendered effectual in this case by a decree conform. The pursuer is entitled, in this question of relevancy, to assume that he will succeed in England, and if he do so, he would undoubtedly be entitled to render the estate of the defender in this country answerable for whatever decree he shall obtain there. But if so after the litigation, he has the same claim by our practice intermediately. We are constantly in the practice of allowing diligence on the dependence, as intermediate security. As to leave not having been obtained from the Lord Chancellor to carry on this case, that is out of the question, as no such leave would render an incompetent case competent in this Court. It was said that this Court would

have had no jurisdiction to sustain action against J. D. Dingwall himself; but his Lordship could not assent to that in the circumstances set forth in the summons, though it might have been a question, on that supposition, as to how the case would have been explicated,—whether by compelling him to appear in Chancery, and directing the pursuer to go there, keeping the action here in dependence in this Court,—or in what other way? But it was not necessary to consider that case. And on the view his Lordship took of this case, and of that of Wedderburn, he did not think the competency of the action at all depended on the consideration, whether this Court had jurisdiction to try the case or not, as on the merits between the parties. The principle on which the case of Wedderburn rested was, that a party who raises a suit in England against his debtor there, was entitled to institute a process in Scotland against the same party, if he had property in Scotland, in order to make that estate available here, in case of succeeding in England. There is no intermediate remedy in England pending process; while here the law recognises that, which is a very material difference. In this view of the principle of Wedderburn, it is of no consequence whether this Court had or had not jurisdiction over the merits of the case between the parties. Such action, it is admitted, could competently be raised against the defender, in the circumstances of the case, after the pursuer's success in Chancery; but what difference could be taken between the decree obtained and the action raised? None whatever. The dependence of the suit in England is a civil right and interest to be promoted and vindicated in this country, if the defender has property here. His Lordship was not prepared to say that there was any anomaly in permitting a suit to be instituted in this Court, the merits of which could not be tried; because he could not say that the Court had no jurisdiction over a person with heritage in Scotland, to the effect of trying any questions material to be tried between him, and another raising an action against him. The delay or sisting, to enable the point to be tried in England, was matter rather of discretion, and was distinct from any question of competency. Besides, it rather seemed that the sisting, in order to the case being investigated in England, was just advancing the case, and preparing it for determination ultimately here. The dependence of a suit in England gives the Court in Scotland full jurisdiction over a defender with heritable property here, if there be any end, in material justice between the parties, which the entertaining a suit here may advance and promote. The present case illustrates, as forcibly as any that could be conceived, that the ends of justice would be essentially served by sustaining the action now before the Court. The pursuer appears to have a clear title and interest, in the circumstances stated by him, to call on this Court to sustain his action, to the effect of making the defender's heritage answerable for any decree in his favour which he may obtain in Chancery, by showing that the Chancery proceedings were illegal, and to prevent him dilapidating the property alleged to be purchased out of the very fund in dispute, which, but for our decree, the defender might at any time effect. His Lordship also considered, that by the tenor of the Articles of Union, a pursuer, in such a case as this, had a clear ground of right to insist against a defender so circumstanced, and that the dependence of an action in one of her Majesty's Courts in one part of the United Kingdom, as in England, was a civil right by the law of Scotland and the Treaty of Union, sufficient to found action in this country; and this Court could prevent any abuse of the right, by calling on the party at any time to state the progress of the Chancery proceedings; when, if no satisfactory explanation were given, the Court could easily control the party, either by modifying or recalling the diligence used on the dependence, or by altogether dismissing the action itself. His Lordship, in conclusion, stated, that he considered that the principle decided in the case of Wedderburn was truly involved in *Leith v. General Hay*, 17th January 1811.

Lord Meadowbank could not agree at all in the observation, that this was any illustration of advance in principle. He could see no difference whatever between this case and that of Wedderburn. It just showed the wisdom with which the Court gradually got at the principles which support the ends of material justice. He concurred in altering the judgment of the Lord Ordinary.

Lord Moncreiff absent.

The Court pronounced the following interlocutor:

"Alter the interlocutor complained of: Repel the preliminary defences; and remit to the Lord Ordinary to do further in the cause as to his Lordship may be deemed just."

Lord Ordinary, Ivory.—*Act. Solicitor-General* (M'Neill), Rutherford, Handyside; A. Dun, W.S., *Agent*.—*Alt. Dean of Faculty* (Wood), Neaves, Moir; A. G. Sutherland, W.S., *Agent*.—N. Clerk.—[G.D.F.]

3d June 1842.

SECOND DIVISION.—(G.D.F.)

No. 199.—*JOHN M'FARLANE and OTHERS, Pursuers and Suspenders, v. RANDAL WILLIAM CALLENDER and ROBERT LEWIS, Defenders and Respondents.*

Suspension—Reduction—Remit to Person of Skill—Process—Property—Damage—A pursuer challenged an operation begun by the defenders on their own property, on the ground of its being injurious to his adjoining property, and craved a remit to a person of skill. The Sheriff named a person, who was not objected to, and who reported that the operation was positively beneficial to the complainer, on which the Sheriff recalled his interim interdict, and found the complainer liable in expenses, reserving to him any claim for damages competent to him. In a reduction of the decree on the merits, and suspension of the decree for expenses, the Court repelled the reasons of suspension and reduction, but remitted to the Lord Ordinary to ascertain, 1st, whether the defenders had done every thing to protect the complainer's property from injury by their operation? and, 2d, if not, what further operations should be done for that purpose? and, 3d, whether any damage had been done to the complainer's property by the operation complained of?

The suspenders and Lewis are conterminous proprietors. Callender, the tenant of the latter, having in 1838 commenced to straighten a small stream which flowed principally through his farm, and merely touched the suspenders' march at two points, with the view of making it run close to, and parallel with, the march-dyke for about three hundred yards, the suspenders presented an application to the Sheriff of Stirlingshire to interdict the operation, as injurious to their property. Lewis became a party to the suspension,—in the prayer of which M'Farlane craved the Sheriff to "appoint a person or persons of skill to be named by your Lordship or the parties, to examine and report upon the proposed alteration of the channel of the burn." The Sheriff appointed a Mr Blackadder to report as craved; and on considering the report of that person—who stated that the operation was beneficial rather than otherwise to the property of the suspenders—his Lordship (October 1838) recalled the interdict which had been granted, reserving to the suspenders any claim for damages competent to them, and found them liable in expenses. On a charge for these expenses, the present suspension (on caution) was brought, on the grounds mainly stated in the reduction; and they likewise raised an action to set aside the grounds and warrants of the Inferior Court process, and for damages. The reasons were, that there were no grounds for having subjected the suspenders in expenses, but, on the contrary, good grounds for having interdicted as originally craved, in respect the operations would injure their property.

"*Quarto*, The former channel of the said burn was, except at one place, at a very considerable distance from the foresaid march-dyke and the pursuers' lands, and the pursuers did not apprehend any injury from it; but the defenders, or the said Randal William Callender, acting with the approbation and sanction of the

said other defender, the said Robert Lewis, has illegally and unwarrantably, to an extent of near 300 paces, altered the course or channel of the said burn, and has diverted the burn into a new channel, which approaches within two feet or thereby of the foresaid march-dyke and the pursuers' lands, and thereby has endangered the march-dyke, and placed it in continual risk of being thrown down, and has exposed the pursuers' lands to continual risk of injury, whereby the pursuers will eventually be put to considerable expense by repairs on the said march-dyke, and the value of their property be deteriorated. *Quinto*, That though the said Sheriff, on a pretended report of Alexander Blackadder, land-surveyor in Stirling, recalled the interlocutor of interim interdict first pronounced by him, and pronounced the said decree or decrees, yet the said report is erroneous and unfounded in various of its statements and in its conclusions, and the said decrees founded thereon are also erroneous and illegal; for, since the same were pronounced, the said burn, as so diverted from its old channel, and made to run in said new channel by the said defenders, or the said Randal William Callender, with the approbation and sanction of the said Robert Lewis, has actually injured and damaged the said march-dyke, and the pursuers' lands and property: Therefore," &c.

And they concluded that

"the said Randal William Callender and Robert Lewis, or at least the said Robert Lewis, ought and should be decerned and ordained, by decree foresaid, to bring back or restore the said burn to its former channel, and to replace the said march-dyke and the bed and banks of the said burn, as near as may be, in their former state: Or at least, it ought and should be found and declared, by decree foresaid, that the said Robert Lewis is bound to take immediate and effectual means to protect the said march-dyke and the pursuers' property from all risk of future injury, in consequence of the alteration in the course of the said burn, and he ought and should be decerned and ordained immediately to execute the necessary works for that purpose; and failing his doing so, the pursuers ought and should be authorised and empowered to make the operations necessary for the above purpose at the expense of the said Robert Lewis: And the said Randal William Callender and Robert Lewis ought and should be decerned and ordained to make payment to the pursuers of the sum of £40 Sterling, or such other sum as shall be ascertained to be the damage done to the said march-dyke and the pursuers' lands, by the change of the channel of the said burn."

The defenders, Callender and Lewis, gave in defences denying the allegations in the summons, and averring that the operation had been rendered much more complete than the one recommended by Mr Blackadder in his report (the nature of the alleged improvement was set forth), in consequence of which not only no injury, it was stated, could arise to the suspenders, but the course of the burn, as altered, would prove beneficial to the property of the suspenders.

The defender, Callender, ceased to hold his farm after Martinmas 1839, but the other defender, Lewis, had completed the operations which had been commenced by Callender.

It was *pleaded* in defence—1. That in the circumstances stated, there were no grounds for complaint, or for reducing the Inferior Court process; and, besides, the pursuers were barred from reducing the decree of the Sheriff, or from challenging the operations in question. 2. Mr Blackadder's report having been obtained on the pursuer's own application, and on consent of both parties, who selected this as the proper mode of ascertaining the facts, was conclusive against both parties: *Rowat v. Whitehead*, 17th November 1826; 5 S. and D., 19. *Halket v. Earl of Elgin*, 9th February 1831, 9 S. and D., 412. 3. The conclusion to have the burn restored to its former course was

improperly directed against the defender, Callender, who had ceased to have any connection with the subjects.

The Lord Ordinary pronounced the following interlocutor:

"21st January 1842.—The Lord Ordinary having heard parties in the conjoined processes of suspension and reduction, and considered the record, repels the reasons of suspension; finds the letters orderly proceeded; sustains the defences against the reductive and declaratory conclusions; assoilzies the defenders against these conclusions, and decerns; and with respect to the conclusion for damages, appoints the cause to be enrolled among the motions, in order that the parties may say how they wish it to be disposed of: Finds the suspender and pursuer liable in the expense of discussing the reasons of suspension, and the declaratory and reductive conclusions of the reduction; appoints an account thereof to be given in, and, when lodged, remits to the auditor to tax the same, and to report.

"*Note*.—The question, both in the suspension and in the reduction, is, whether the Sheriff's interlocutor was right when it was pronounced? And this is settled by the facts, that when the pursuer challenged an operation begun by the defenders upon their own property, on the ground of its being injurious to him, he craved a remit to a person of skill, to be named by the Sheriff; that the Sheriff named a person, who was not objected to; that the person's report was, that the operation was absolutely beneficial to the complainer. What, in these circumstances, could the Sheriff do, but recal the interdict, with expenses, reserving the pursuers' right to damages if injury was done.

"He now says that subsequent injury has occurred. But instead of going on only with his claim of damages, he insists that the original decree shall be suspended and reduced, these being the decrees obtained in consequence of the remit craved by himself.

"If the damages be not settled privately, the Lord Ordinary recommends another remit. If this be not agreed to, he must send this conclusion to the issue clerks; but the party who makes this necessary may possibly have to pay for it."

The suspenders reclaimed, praying the Court

"to recal and alter the foresaid interlocutor; and in the process of reduction, declarator and damages, to reduce, declare and decern, in terms of the conclusions of the libel; and in the suspension to suspend the letters and charge *simpliciter*, and to find the pursuers and suspenders entitled to expenses; or to do otherwise in the premises as to your Lordships may seem just."

But the Court

"Adhere to the interlocutor reclaimed against, in so far as, in the suspension, the Lord Ordinary repels the reasons of suspension, and finds the letters orderly proceeded; and in the reduction and declarator, repels the reasons of reduction and assoilzies the defenders from these conclusions of the libel; adhere also to the interlocutor, in so far as the Lord Ordinary sustains the defences against the first alternative of the declaratory conclusions, and assoilzies the defenders from these, and so far refuse the prayer of the reclaiming note: Recal, *in hoc statu*, the finding as to the other declaratory conclusions; and with respect to these conclusions, and to the conclusion for damages, remit to the Lord Ordinary to ascertain, 1. Whether the defender, Lewis, has done every thing which was incumbent on him, in the circumstances of the case, to protect the march-dyke and pursuers' lands from injury in consequence of the alteration in the course of the burn? 2. If he has not done so, what further operations should be performed, or changes made by him? 3. Whether any damage has been done to the march-dyke and the pursuers' lands by the change of the channel of the burn? Adhere also to the expenses found due by the interlocutor, and reserve the question of further expenses as to the defender, Lewis; but as to the defender, Callender, find him entitled to additional expenses, and assoilzie him from this process, as having no longer any interest therein, and decern."

Lord Ordinary, Cockburn, for Jeffrey.—*Act*. Napier; G. and W. Napier, W.S., Agents.—*Alt*. R. Thomson, James Donaldson; John Richardson, W.S., Agent.—*F. Clerk*.—[G.D.F.]

4th June 1842.

FIRST DIVISION.—(H.R.)

No. 200.—SIR WILLIAM RAE (*Her Majesty's Advocate*), Complainer, v. JOHN DOUGLAS, Respondent.

Small-Debt Act.—Arrestment on dependence.—Fees.—Declared irregular and illegal, 1st, to issue and charge a fee for precepts of arrestment on the dependence of small-debt actions; and, 2, to give discount on fees to pursuers, especially without providing that the full fees should not afterwards be charged as expenses against the defenders.

Sir William Rae, her Majesty's Advocate, presented a petition and complaint, stating, that in the discharge of his public duty, he found it necessary to bring under the notice of the Court "certain malversations in office of John Douglas, writer in Glasgow, clerk to the Justices of the Peace within the county of Lanark." The first alleged malversation was,—that though the Justice of Peace Small-Debt Act (6 Geo. IV. c. 48,) distinctly enumerates the fees of the clerk and other officers of court, declaring (§ 17), "that the following, and no other or higher fees shall be allowed;" and (§ 19) "that if any clerk or depute-clerk of the peace, or any constable or other officer, shall exact or take from any party in a case of small-debt, any fee not expressly authorised by this Act, or any higher rate or fee than is authorised thereby, the person so offending shall be liable to a penalty," &c.; and though no authority was given by the Act to issue precepts or warrants to arrest on the dependence of small-debt actions, yet the respondent and his deputies had been in the habit, since his appointment to the office of clerk, of issuing such precepts without any authority, and exacting for each of them a fee of one shilling. The second alleged malversation was,—that the respondent was in the habit of "giving an allowance or discount upon the regular fees to certain parties taking out a number of complaints, and who may be styled, as it were, wholesale dealers in litigation in the Small-Debt Court, while, at the same time, the full fees are apparently charged against those parties in these complaints by a false marking on the back thereof, or in the act book, by the clerk of court, and they consequently get them included in their decrees, and recover them from the defenders in all cases in which they are successful. The obvious tendency of this arrangement is to increase litigation in the small-debt court of the Justices of the Peace, by holding out a premium or bonus to pursuers to bring their cases into that court, by giving them an undue advantage, to the prejudice of the defenders, and evidently for the object of increasing the emoluments of the clerk of court." On these allegations the petitioner prayed the Court, "upon due inquiry, and admission or proof of the premises, to find that the said John Douglas has been guilty of malversation in his said office, and in respect thereof, to inflict such punishment upon him, by suspension from office, pecuniary penalty, censure or otherwise, as to your Lordships, in the whole circumstances, shall seem meet, and to find him liable in expenses."

Mr Douglas admitted, that till the present complaint was served upon him, but not since, the practices now complained of existed; but to the first of the charges of malversation founded upon them, he answered, that the practice not only existed during the whole period while his predecessor held the office, but had been in-

variably observed in Lanarkshire, and in almost all the other counties of Scotland, from the institution of the Justice of Peace Small-debt Court. The practice had not originated with the clerks of the peace; for in 1832, several years before the respondent's appointment, the Justices of Lanarkshire, at a statutory meeting of the Quarter-Sessions, and in the exercise of powers supposed to be conferred upon them by the 23d section of the Act, which empowers them, "from time to time, to make such rules and orders as they shall find to be necessary and most conducive for carrying into effect the purposes of this Act, such rules and orders not being inconsistent with any of the express enactments or conditions therein contained, or otherwise contrary to law,"—issued the following regulation:

"The Justices, in respect that, in cases of small-debt complaints, it is often of importance to the complainer to have an opportunity of securing the effects of his debtor before the day of hearing the cause, authorises the clerk, when required to do so, to grant warrant or precept to arrest the effects of the person complained against, for which a fee of one shilling shall be payable."

In like manner, under the first Sheriff-Court Small-debt Act, which on this point is *verbatim* the same with that of the Justices, it is understood that the Sheriff-clerks were in the practice of issuing and charging for precepts of arrestment on the dependence, in the very manner now complained of.

To the second charge—of giving a discount on the regular fees to parties taking a number of complaints,—the respondent answered, that in giving these discounts, he had only followed the practice of the depute Sheriff-clerk at Glasgow; and so far from suspecting there was any irregularity in giving such discounts, he had prominently stated the fact in an official return to the Home Office in 1838. No dissatisfaction with the practice was intimated till 1841, when the respondent immediately ordered it to be discontinued.

At advising,

Lord President.—The charges against the respondent are made in very pointed terms, but after considering the answers, it appears to me that the justice of the case will be satisfied by our declaring our opinion of the practices complained of. As to the practice of granting precepts of arrestment on the dependence of small-debt actions, I am clear that it ought not to be sanctioned. Whether or not the granting of such arrestments be for the convenience of one party or other, it is not authorised by the Statute, and must be discontinued. I see, however, that it has existed for a long time, and has been followed in the Sheriff Court. This affords a strong defence to the respondent, as showing that he has not been intentionally wrong. He finds the practice in existence, and he, moreover, produces a resolution of the Justices, expressly authorising the clerk to issue such warrants, and charge one shilling for each of them. The Justices had no power to pass such a resolution; and the clerk, by looking attentively to the Statute, might have seen cause to doubt if he could safely act upon it; but still, its existence is sufficient to satisfy us that here no corruption is proved. It seems enough for us to declare, that the continuance of the practice will not be sanctioned. As to the other matter of giving discounts, I must express a similar opinion. It is not the proper way of bringing business to Court, and therefore ought not to be sanctioned. I see no ground, however, for impugning the respondent's motives. There is not only the length of time, but a similar practice appears to have existed in the Sheriff-Court, though it is no doubt true, as observed in the replies, that an improper practice in one Court will not justify the same practice in another. The respondent says he allowed the discounts out of favour to the parties; but then he should have taken care that the deduction allowed to the pursuer was not afterwards

charged against the defender. It is plain, however, that the practice could not put any additional fees into the respondent's pocket, and cannot form a ground of personal exception against him. I am of opinion, then, that instead of pronouncing any censure or personal findings against Mr Douglas, it will be sufficient to declare that the practices complained of ought not to be continued, and that if they are continued, the consequences will be serious.

Lord Gillies.—I am of the same opinion. The practices are undoubtedly illegal, but the excuse is sufficient; and all that is necessary, is simply to declare the illegality. I cannot see what end could be proposed in inflicting punishment, which, as the respondent is not morally culpable, is not deserved, and which, moreover, could be of no use by way of example, as the practices have ceased.

Lord Mackenzie.—I agree as to both points. The practices were incorrect, but they involve nothing of personal delinquency, and indeed nothing even of gross neglect. The respondent might fall into the practices naturally, and it would be hard to censure him for not looking more narrowly into the power of the Justices. It was proper to stop when the irregularity was pointed out; and in point of fact, Mr Douglas did immediately stop.

Lord Fullerton absent.

The Court pronounced the following interlocutor:

"Find that the practices complained of are irregular and illegal, and prohibit the continuation thereof; but find, that, in the circumstances of the case, it is not necessary to award any sentence of punishment or censure against the respondent, and decern."

Act. Solicitor-General (M'Neill), Urquhart; James Tytler, W.S., *Agent.*—*Alt. Anderson*; James Peddie, jun., W.S., *Agent.*—*N. Clerk.*—[H.B.]

4th June 1842.

FIRST DIVISION.—(H. B.)

No. 201.—AMBROSE GRIMSHAW and OTHERS, *Suspenders*, v. JOHN MALCOLM, *Respondent*.

Debtor and Creditor.—Donation.—Bankrupt.—Bill of Exchange.—*A party, after being discharged on a composition-contract, granted to one of his creditors, who had not claimed in the sequestration, a bill for the full amount of his debt. Suspension of a charge on this bill refused, in the absence of any averment that it had been obtained from the granter through fraud or concussion.*

Joseph Grimshaw, post-master in Glasgow, having become indebted to John Malcolm, hay-dealer, Falkirk, in the sum of £71. 12. 10., he, along with his father, Ambrose Grimshaw, granted a bill for the amount, of date 28th September 1840, and payable at three months. The bill was discounted at Falkirk, but on the 16th of October, during its currency, the estates both of Joseph Grimshaw and Ambrose Grimshaw were separately sequestered. The bankrupts obtained their discharge, on a composition, in the beginning of April 1841. Shortly after, on the 28th April, Malcolm who had not claimed in the sequestration, obtained from Joseph and Ambrose Grimshaw a new bill for £71. 12s., in lieu of the former one for the same amount which had fallen due subsequent to the sequestration. When this bill fell due it was protested for non-payment; and diligence having been used upon it, an arrangement was made, by which Joseph and Ambrose Grimshaw, on 15th February 1842, granted two new bills, being the amount of the former bill for £71. 12s., with interest and expenses. The one of these bills, bearing the additional names of James Richard, and James Brown Adams, was for £36. 3. 5., payable at two months; and the other, without any additional names, was for £36. 18. 5., payable at five months.

The former of these bills having fallen due and been protested for non-payment shortly after Joseph Grimshaw had again been sequestered, a charge was given upon it. This charge is the subject of the present note of suspension, in support of which the suspenders—averring (art. 6), that "a few days after the date of their discharge, the charger prevailed upon, and induced the complainers, Ambrose and Joseph Grimshaw, to grant him a bill for £71. 12s., being the full amount of the claim the charger had against the said Joseph Grimshaw previous to their sequestration. No value was given for this bill to either of the acceptors,"—pleaded, 1. There being no debt due by the complainer, Ambrose Grimshaw, to the charger, under the bill charged on, and the only value given by the charger being for the furnishings of hay, under the original bill for £71. 12s., dated prior to April 1841, and the complainer being discharged of all debts granted prior to that period, on payment of a composition, the charger cannot legally demand any sum beyond the amount of that composition. 2. The other complainers having received no value for the bill, and none having truly passed, excepting for the said original furnishing of hay, no claim lies against them. 3. Unless the charger could allege and prove any other value given subsequent to the date of the sequestration, it is illegal and incompetent in him to demand more than the amount of the composition, which would, in law, be to claim an undue preference; and as no other value can be stated or proved, the present charge ought to be suspended.

The charger denied that he had used any undue means to obtain the bills from the suspenders, and averred his belief, that in granting them, the suspenders "were actuated partly by a sincere desire, at the time, to prevent the charger from suffering loss in transactions in which he had derived little or no profit, and partly from the expectation that, by acting in the manner they did, the charger would be induced to continue to supply them with hay upon credit; in this expectation they were not altogether disappointed; the charger subsequently sold and delivered hay to Joseph Grimshaw upon credit, to the extent of about £25, more than one-half of which remains unpaid."

The charger *pleaded*—1. There was a moral obligation on the Messrs Grimshaw, notwithstanding their discharge, to pay their debts in full if they had it in their power. Such an obligation has been recognised in law. *Sutherland v. Mackay*, 14th January 1830, S. and D., Vol. VIII. p. 313; *Roy v. Scoular*, 18th June 1831, S. and D., Vol. IX. p. 766. 2. At all events, it is always competent to a party to make an irrevocable donation. 3. If the Messrs Grimshaw had meant to challenge their agreement to pay the charger's debt in full, it was incumbent on them to have suspended the charge on the promissory-note for £71. 12s., instead of granting renewed promissory-notes, with additional security in respect of one of them. 4. The charger is not in the position he would have been if the Messrs Grimshaw had not agreed to pay his debt in full. In consequence, he refrained from exacting the composition on his debt, while Joseph Grimshaw is again sequestered. 5. If one party to a bill or promissory-note is legally bound in payment, his co-obligants are also bound, although such co-obligants may not have

received any value for interposing their security. 6. There is no statement in the note of suspension which can sanction the passing of it without caution or consignment.

The Lord Ordinary pronounced the following interlocutor:

"19th May 1842.—The Lord Ordinary, in respect it is admitted by the suspenders, (article 6,) that they granted a bill to the charger for the full amount of his original debt, after their discharge, and subsequently granted the bills in question, refuses the note: Finds no expenses due."

The suspenders reclaimed. At advising,

Lord President.—Had the suspenders alleged that they had in any way been concussed into the granting of these bills, investigation must have been allowed. But there is no allegation to this effect, and there is no appearance of any improper influence having been used. We must refuse the note.

Lord Gillies.—I am of the same opinion. In consequence of the discharge in the sequestration, the obligation to pay the original bill was extinguished; but the suspenders voluntarily agreed to pay it, from no deception or concussion having been used, but merely, as averred by the charger, in hope of future benefit. There are instances of bankrupts, who have obtained their discharge, coming forward at a future period and paying the whole amount of their debt. Suppose, in any such instance, the bankrupt, instead of paying money over the table, were to grant bills for the amount—could he, when these bills fell due, plead his discharge as exempting him from liability to pay?

Lord Mackenzie.—There is no doubt that, under the Statute, these bankrupts were discharged from all the debts contracted before sequestration, and that the only claim which any debtor could have enforced against them was for the amount of the composition, and nothing more. Now, had it been averred here that the suspenders had been concussed, or even that they had acted in error—that they had mistaken the law, and thought that, notwithstanding of the discharge, they were still liable to be sued for the debt, and offered to prove this,—the case would perhaps have been different. But the suspenders won't aver this. They don't say they acted unwittingly; while there is an averment by the charger which gives by no means an improbable account of their motives. I think we must refuse the note.

Lord Fullerton absent.

The Court refused the note.

Lord Ordinary, Murray.—For Suspenders, Robertson; Charles Fisher, S.S.C., Agent.—For Charger, Smith; James Burn, W.S., Agent.—N. Clerk.—[H.B.]

4th June 1842.

SECOND DIVISION.—(G. D. F.)

NO. 202.—CHRISTOPHER WOOD, Pursuer, v. ROBERT ANSTRUTHER and JAMES RENTON, Defenders.

Obligation—Contract—Condition—Life-Policy—In security of a loan, the debtor conveyed to the lender certain policies of insurance on his life, and under an obligation to advance the necessary premiums to the lender, who became bound to keep up the policies during the debtor's life, and to pay the premiums as they fell due. The debtor became bankrupt; and having fallen into arrear of the premiums, and being unable to implement the agreement, the lender brought an action to be freed of the obligation of continuing to pay the premiums to his own loss, and to have it found that he was entitled to sell the policies, and to apply the price in extinction of the premiums in arrear, and towards payment of the principal, and also to have it found that the arrangement was at an end.—The Court decreed in terms of the libel.

The defender, Mr Anstruther, borrowed from the pursuer the sum of £10,000, and for this sum he granted his personal bond on 17th March 1835. By another

bond of the same date, narrating the previous one, Anstruther conveyed to the pursuer certain policies of insurance which had been effected on his life, for the better securing to the pursuer the sum lent by him on the first bond, and in order that they might be kept up and made effectual, he became bound to pay annually to the pursuer the sums or premiums annually due on the policies, amounting in the aggregate to £285. 5. 5, besides any sums that should become exigible as extra premiums. Wood was taken bound, on his part, to pay the premiums, and to keep up the insurances during Anstruther's life, and so soon as the sums assured, or any part, became payable, to apply the same towards the extinction of the loan. As an additional security, the bond conveyed to Wood the lands of Caiplie and Thirdpart; but as these were entailed, the deed contained the usual proviso, that the conveyance should not be held to infer contravention, and that any adjudication or legal diligence should only attach the rents, mails and duties, for no other than Mr Anstruther's lifetime.

The summons set forth,

"That the pursuer advanced the foresaid principal sum of £10,000 Sterling, and accepted of the foresaid policies of insurance in part security thereof, entirely in reliance on the faith of the said Robert Anstruther regularly and punctually making payment to him of the yearly premiums due upon the same, in terms of the obligation to that effect contained in the bond and disposition in security before cited: That instead, however, of implementing the same to any extent, the said defender has grossly violated the said obligation, not merely by not paying any of the said premiums or yearly sums due upon the said policies of insurance, but has also, in consequence of his conduct, compelled the pursuer to pay heavy extra premiums on the foresaid policies, so as to keep them in force and prevent them from being forfeited: That amongst other acts of misconduct on his part, in reference to the said policies, and in direct violation of the obligation undertaken by him, the said Robert Anstruther, while he ceased, at the term of Candlemas 1837, to make payment of any interest to the pursuer on the foresaid loan, thought fit to leave this country for America, having solicited and obtained an appointment to serve in Canada during the rebellion in that province, and this without giving the least intimation to the pursuer or to the insurance offices of his intention so to do: That in consequence of the defender's violation of his obligation, and of his failure to pay the interest on the foresaid principal sum of £10,000, and the foresaid premiums of insurance, there is altogether now due to the pursuer, in name of arrears of interest and premiums, no less a sum than about £4000, exclusive of the principal sum itself, and a large sum in name of expenses: That while this is the case, a great variety of adjudications and other diligence have been led and used at the instance of creditors of the said Robert Anstruther, and his life-rent of the heritable subjects conveyed to the pursuer, also in part security of his debt, is in *cursu* of being sold, under a process of ranking and sale presently in dependence."

It then subsumed,

"That, in such circumstances, and while the said Robert Anstruther is bankrupt, and unable to implement his obligations, the pursuer is not bound to continue the payment of the said yearly premiums upon the foresaid policies of insurance, but is entitled to discontinue the payment of the same, and to sell and dispose of the whole of the foresaid policies, and all benefits comprehended under the same, together with the relative obligations undertaken by the said Robert Anstruther for payment of the annual premiums of insurance and others, contained in the foresaid bond and disposition in security, and that either by public roup or private bargain, in ordinary form, and to apply the prices that may be obtained for the same in extinction *pro tanto* of the premiums already advanced, or that may be yet advanced or paid by him on behalf of the said Robert Anstruther, or otherwise,

to account of the large sum of debt due to him, as aforesaid: That while entitled to absolute relief and indemnification under the foresaid bonds, and while, as already said, the whole principal sum of £10,000 Sterling, with the legal interest thereof since Candlemas 1837, is still resting-owing and unpaid, the pursuer is not bound to increase or augment his own loss and liabilities, by continuing the farther payment of the said premiums of insurance for the ultimate benefit and behoof of his bankrupt debtor, but, on the contrary, is entitled, as he judges it expedient, to have the whole of the foresaid certificates or policies of insurance, with the existing or accruing benefits thereby embraced, sold and disposed of, and the prices or proceeds to be realised from the sale applied for the purpose and in manner before mentioned."

The conclusions were framed so as to meet the objects contained in the subsumption. There was likewise the following conclusion:

"And farther, it ought and should be found and declared, by decree foresaid, that the obligation on the pursuer, contained in the foresaid bond and disposition in security, to apply the sums assured by the foresaid policies, on the same becoming payable by the death of the said Robert Anstruther, in satisfaction or extinction of the sums, principal and interest, due by him under the foresaid bond, and to pay and account to him, the said Robert Anstruther, or his foresaids, for whatever balance then remaining in the hands of the pursuer, after satisfying and paying the principal sum of £10,000 and others, thereby obliged for, is, from and after the sale or sales to be effected, as aforesaid, void, extinguished, and of no force or effect, and that the said Robert Anstruther has lost and forfeited all right and interest in such obligation, as well as in all benefits or advantages that may arise, by or through the said certificates or policies of insurance, to the party or parties purchasing the same as aforesaid, and that in all time coming."

Against this action Anstruther's trustee, acting under a trust for behoof of creditors, *pleaded*—That the policies in question were only constituted an operative security to the pursuer, in the event of the defender's death, and could not be realised or disposed of during the defender's lifetime: That the pursuer was not entitled to sell the policies in question without an express power of sale being contained in the deed constituting the security; but no such power was granted. And further, it was maintained that the proposed sale of the policies was at direct variance with the terms, meaning, and spirit of the contract between the parties, and so could not be authorised or sanctioned by the Court.

The Lord Ordinary pronounced the following interlocutor:

"19th March 1842.—The Lord Ordinary having heard parties, and considered the process, repels the defences, and declares and decerns in terms of the conclusions of the libel, with this explanation, that the sale must be by public auction, and on articles and previous advertisements prepared by the clerk, to whom a remit for this purpose is hereby made: Finds the defender liable in expenses; appoints an account thereof to be given in, and, when lodged, remits to the auditor to tax and to report.

"*Note.*—This is not a question under the contract at all. The defender has broken the contract and cannot insist on its strict fulfilment. In the situation to which his breach has brought matters, there is no fair or practicable course except to sell."

Renton reclaimed, but the Court *adhered*.

Lord Ordinary, Cockburn.—*Act.* Rutherford, T. Maitland; Wotherspoon and Mack, S.S.C., *Agents.*—*Alt.* Penney; Roy and Wood, W.S., *Agents.*—*T. Clerk.*—[G.D.F.]

7th June 1842.

FIRST DIVISION.—(H. B.)

No. 203.—SIR ALEXANDER RAMSAY, *Pursuer*, v. *The PRINCIPAL and PROFESSORS of the UNITED COLLEGE of ST ANDREWS, Defenders.*

Mortification—Bursaries—Prescription.—A contract between a patron of bursaries, and the university where they were to be enjoyed, agreeing to create a new bursary for every £20 additional obtained from the mortified lands, reduced, after subsisting above forty years, on the ground of its being a violation of the original deed of mortification, which limited the number of bursaries to three.

By deed, of date 4th June 1681, Master John Ramsay, minister of the gospel at Markinch, for the glory of God, and increase of piety and virtue, mortified his lands of Duniface "for the education and entertainment of three youths at school and college for the space of . . . years," viz., "one year at the humanity school in St Leonard's College at St Andrews, thereafter four years in the study of philosophy in the said college, and thereafter other four years at the divinity in the said town of St Andrews, making in whole nine years' education." Sir Charles Ramsay of Balmain, and Sir Andrew Ramsay of Abbotshall, "they and their heirs of these said heritages," were appointed "undoubted patrons of the said mortification, with full power to present either *per vices*, or if they can agree betwixt themselves, to present three youths to the benefit, and for the space foresaid, of the surnames in order following, viz., first, Ramsay; secondly, Durham; thirdly, Carnegie; fourthly, Lindsay." Failing either of the patrons, the other was to succeed to the full patronage; and failing both, and their heirs of their heritages of the name of Ramsay, the Archbishop of St Andrews was to "have the absolute power of patronage to present for the space and benefit for the education at schools above express; he always observing the surnames foresaid, and in the method and order above express." It was also provided, that "when these three youths shall have followed their study of philosophy in St Leonard's College four years, and their inclination thereafter leadeth rather to the study either of physick or the law than to the study of divinity—each of them shall have his benefit of the last four years,—he closely following his inclination foresaid in the study of physick or law." It was further provided, that "if any of them go abroad for the study of physick or law," they were not to leave Scotland without license from the Archbishop of St Andrews. "For the better and more sure effectuating" of the mortification, full power was given to the Principal and Masters of the College to set tacks and draw the rents of the mortified lands,—the Archbishop of St Andrews being requested "to take particular inspection from year to year, to the end the foresaid mortification may be yearly forthcoming, and faithfully employed for the use foresaid." It was further "expressly provided, that what shall be over and above the entertainment of the foresaid youths, and payment of their regents, it shall be bestowed entirely upon the said youths in three proportions, for buying of books and other necessaries." From 1710, when the deed of mortification took effect, to 1780, not more than three bursars were on the fund at one time; but in 1784, when the value of the lands mortified had

considerably increased, the Principal and Professors of the United College, and Sir Alexander Ramsay Irvine of Balmain, who had succeeded to the sole patronage, entered into a contract, which, after briefly narrating the deed of mortification, proceeds as follows :

" And whereas, from the conception of the above deed of mortification, it is evident that the mortifier restricted the number of bursars to three, in respect of the small revenue arising from the fund ; but as there is now a prospect of a considerable rise in the rents of the mortified lands under the administration of the college, the patron and administrators are on this account desirous to follow out the pious intentions of the mortifier, both by making the provision for each bursar adequate to the purpose intended, and by rendering the fund more extensively useful, by increasing the number of bursars.—Therefore they hereby agree and declare, that as soon as the fund will admit of it, the provisions for each bursar shall be increased from £15 or thereabouts to £20 Sterling yearly, and that as many new bursars shall be added, with the like provision, as the fund will bear ; the surplus, if any be, not amounting to the sum of £20 Sterling, or a provision for an additional bursar, after the public burdens and other necessary expenses are defrayed, to be equally divided among the bursars ; and the said principal and masters bind and oblige them, and their successors in office, to give the said patron, and his heirs and successors, three months' intimation previous to the erection of every additional bursary, so as he may be thereby enabled to present, in terms of the mortification and of this present contract of agreement."

On the execution of this contract, the number of bursars was increased to five. In 1818, it was increased to six ; in 1832, to twelve ; and in 1840, supposing a bursar for every £20, the number admissible was thirteen.

Sir Alexander Ramsay, the present patron of the bursaries, considering that the contract of 1784 was an illegal violation of the original deed of mortification, raised a summons of reduction and declarator, in which, calling the Principal and Professors of the United College as defenders, he concluded to have it found and declared,

" that the defenders are bound to apply the funds of the said mortification, in terms of the deed of mortification, to the entertainment at college of three youths of the surnames favoured by the founder, to be recommended for trial, and presented by the pursuer and his successors, as patron of the said bursaries, and admitted to the same by the defenders as often as one-third of the revenues of the mortified fund shall be set free and disencumbered of the bursars now or afterwards incumbent on the said fund, in the order and manner provided by the deed of mortification, as nearly as the same can be observed in all respects."

Pleaded by the pursuer—1. The expressed will of the founder of a mortification is, by the law of Scotland, the rule for the administration and application of the funds of the same. 2. No right to administer or apply the funds of a mortification in a manner contrary to, or at variance with, the expressed will of the founder, can be acquired by the administrators of the same by usage or by prescription. 3. A party having by the will of the founder a title to insist that the administration and application of the funds of a mortification shall be according to the terms of the deed of foundation, cannot be deprived of that title by the negative prescription, or by acquiescence in a contrary course of administration and application of the funds. 4. The provisions of the alleged contract of 1784, sought to be reduced in this action, and the practice which has followed upon it, in so far as these are complained of by the pursuer, are contrary to the will of

the founder of the Ramsay bursaries, as expressed in the deed of foundation, and the said contract ought therefore to be reduced, and the administration of the fund ought to be restored, in terms of the conclusions of the summons.

Pleaded by the defenders—1. The agreement of 1784 cannot be reduced, inasmuch as it was not inconsistent with the spirit of the original deed of mortification, but was only a wise and beneficial adaptation of the original regulations to the improved state of the mortified fund, and consequently it was not *ultra vires* of the parties by whom it was executed. 2. The contract of agreement having been entered into by the then patron and Principal and Professors of the United College, to whom the execution of the founder's will was intrusted, and having subsisted and been acted on without challenge or interruption for upwards of forty years, all right of challenge is cut off by the negative prescription. 3. As that agreement was entered into by a predecessor of the pursuer, whom the pursuer represents, and as the pursuer himself has taken benefit by that contract, by availing himself of the more extended patronage thereby conferred on him, he is barred from insisting in the present action of reduction.

The Lord Ordinary pronounced the following interlocutor :

" 15th February 1842.—The Lord Ordinary having heard parties, and considered the process, repels the defences ; reduces, declares, and decerns, in terms of the conclusions of the libel, and finds no expenses due.

" *Note.*—The contract of 1784 is a clear violation of the deed of foundation, and in its most essential provisions.

" That deed mortified an estate for the education and entertainment at St Andrews of three youths, each for nine years. There is no provision made in the deed for more than three. On the contrary, anticipating the possibility of there being a surplus after maintaining and educating these in the way he describes, the founder declares that *this surplus* shall be ' bestowed entirely upon the said youths in three portions.' It is added, that this is to be '*for buying of books and other necessaries,*' which shows the style in which he meant them to be kept up. He alludes to the chance of their *going abroad 'for the study of physic or law,*' another indication of the same kind.

" But the contract provides that there shall be one bursar on the fund for every £20, which has already increased the number to thirteen. There are now thirteen, each getting £20, whereas, by the foundation, there ought only to be three, each receiving about £86.

" If it were necessary for the Lord Ordinary to make up his mind on the problem, whether a greater number of small bursaries, or a small number of great ones were best, he would be very clear in favour of the latter. But this speculation is not for a court, and therefore he does not enter at all into the expediency or inexpediency of what the foundation ordained, or of what the contract has done. If it be necessary or useful to interfere with the founder's will, Parliament may do it. The duty of a court consists in enforcing the will, wherever it is clear.

" What can be a stronger example of this than the case of the Managers of the Perth Hospital, 20th May 1795 (Bell's Folio Cases, p. 173), where rents being mortified for the maintenance of four hospital paupers, the Court refused to interfere, though the rents rose so that each pauper received £40 yearly. Some *obiter dicta* were thrown out about the possible occurrence of cases in which the Court might interfere. But in that actual case, far exceeding any thing that has arisen here, the Court refused to interfere.

" If there has been a violation of the will, the defence is, that the pursuer, who is the patron, is barred by acquiescence from now objecting, and that the violation is sanctioned by prescrip-

tion. This defence makes the case important; for if it be well founded, the managers of all mortifications may pervert them for ever, provided they can succeed in doing so for forty years. The Lord Ordinary cannot bring himself to think that the doctrine either of prescription or of acquiescence, or even of positive and personal ratification, can apply to such a case. These doctrines may affect parties managing *their own interests*, but they do not apply to *trustees*, the responsible managers of a private charity, instituted for public purposes, who can claim no right to violate their duty in time to come, by having violated it in time past.

"But the pursuer having himself adopted the contract since 1811, cannot blame the defenders for adhering to it; and therefore, is scarcely entitled to his expenses in now impeaching the system he has been so long acting under."

The defender reclaimed. At advising,

Lord President.—I am for adhering to the Lord Ordinary's interlocutor. We have nothing to do with policy and expediency in interpreting deeds of mortification. The question is, has anything happened to prevent the deed, as framed by the granter, from being carried into execution? I do not think that we could listen to the plea, that by any arrangement between the patron and the professors, the provisions of the deed could be superseded. If so, they might apply the funds to purposes altogether apart from the object of the grant. No length of time can give effect to such an arrangement. I am willing to give all credit to the parties who entered into it. In most universities, there are many bursaries of limited amount, and these parties seem to have thought it advisable to increase the number of the Ramsay bursaries, at the same time diminishing their amount. But that will not do. The deed is free from the slightest ambiguity. Three persons are to be educated for nine years in divinity, law or medicine; and if they wish to go abroad to prosecute their studies, they are to be allowed to do so with a certain consent, still enjoying the bursary. Now, to lay down the proposition that £80 a-year is too large a sum to carry out the course of education here contemplated, is entirely beyond my comprehension. Indeed, looking to the date of the deed, and the sum then afforded by the subjects mortified, I am not sure, considering the difference in the value of money, and the mode of living, that it was much less than that now afforded. But at any rate, we have nothing to do with any thing but the will of the donor. He says that three individuals are to get the means of education, and if there be any surplus of the proceeds of the provisions, that is to be laid out in the purchase of books or other necessities, in three proportions. There is nothing in the deed which warrants us in holding that the provision to each of the three has grown to be excessive. There is nothing in the circumstances which have occurred that calls on us to sustain the total departure which has been made from the directions of the deed;—the subdivision of the grant into portions so miserably small, that it is impossible that any one of the bursars can be educated as the granter contemplated.

Lord Gillies.—I entirely concur. If, instead of £86, the funds had afforded double the amount to each of the bursars, I don't know that we could have interfered.

Lord Mackenzie.—I am entirely of the same opinion. This is a case without difficulty. Cases are supposable which might be more doubtful. If a property in the neighbourhood of a large town, left for the maintenance of a few paupers, were, by the town happening to extend over it, to increase a hundred fold in value, it might be difficult to say that the patrons would be bound to divide the feu-duties among a few persons who were thus to be translated from pauperism to opulence. But no such thing has occurred here;—on the contrary, we cannot be sure that the increase of value which has taken place is greater than the founder contemplated. Land has generally been rising in yearly value in Scotland; and why should we assume that a granter of land for a permanent purpose did not contemplate a rise as great as has taken place? Nor has the rise been such as to make the amount payable to each bursar extravagantly large. Indeed, it is impossible to say whether, in proportion to the ideas now entertained of comfortable life, it has increased at all. Is £80 too much, at the present time, to educate a youth for one of the liberal professions, with the discretion of going

abroad, and also so as to leave a surplus for the purchase of books? Even at home, education as a lawyer, and the purchase of a competent law library, would exhaust the sum; and still more would a medical education, and competent medical library, do so. The founder evidently intended that the education should be a liberal one; and I do not see any thing will happen anywise absurd, or different from what he probably intended, in the payment of £80 to each of the bursars. I believe, if we could summon up his ghost, that he would have no dissatisfaction with this result of his grant. As to the right and title of the patron to pursue this action, I have no doubt. I dare say the arrangement with the professors was a fair one; and the patron was a party to it. But it was erroneous; and when the error was found out, there could be nothing to hinder any of the parties from getting it corrected. The only shadow of doubt arose from the plea of prescription, to which some regard appeared to be paid in the case of George Heriot's Hospital. But that case was very different from the present; and here I see no room for prescription, either positive or negative. Indeed the professors do not seem now to plead prescription as vesting any right in them for their own personal advantage; and if so, it is hard to see for whose interest it could be pleaded.

Lord Fullerton.—The only point to which we can listen is, whether this arrangement be within the fair meaning of the deed of the founder. We can pay no regard to the lapse of time. That is of great importance in matters raising questions of patrimonial right on one side, and of obligation on the other. But there is here no such question. The defenders found no right on the arrangement of 1784. No interest could arise under that arrangement, except that which of course they disclaim, viz., the greater amount of fees in consequence of the increase of bursars. If the agreement, then, be clearly inconsistent with the deed of the founder, it can derive no support from the lapse of time. It is impossible to hold that any lapse of time can sanction and secure the continuance of a violation of duty by the administrators of a trust. I do not think that any support was given to the doctrine of prescription as applicable to such a question in the case of Heriot's Hospital. There a regulation in regard to the age of the entrants had lasted for more than a hundred years, but that circumstance was utterly disregarded by the majority of the Judges, who held the regulation to be unwarranted by the deed of foundation; and although some others took a different view, our opinion proceeded not on the lapse of time, but the ground that the regulation was within the powers conferred by the founder. The contract here rests entirely upon the statement with which it commences, that it would be agreeable to the conception of the grant to increase the number of bursars. Looking at the grant as it stands, I see nothing of that in it. And I entirely concur with the rest of the Court, that the number of bursars must be limited to three. Even though an extreme case of increase of the value of property left for a similar purpose were to occur, I do not think it would be within the province of the Court to interfere. The remedy would be an application to Parliament, and not here.

The Court adhered.

Lord Ordinary, Cockburn.—*Act.* Rutherford, Cook; J. H. Burnett, W.S., *Agent.*—*Alt.* Solicitor-General (M'Neill), Anderson; W. and J. Cook, W.S., *Agents.*—[H.B.]

9th June 1842.

FIRST DIVISION.—(H. B.)

No. 204.—JOHN ANDERSON, *Pursuer, v. The GOVERNOR and COMPANY of the BANK of SCOTLAND, Defenders.*

Property—Disposition—Heritable Creditor—Records.—*A father, in feft in the plenum dominium of certain lands, executed a disposition and settlement, by which he conveyed, subject to revocation, the dominium utile to his eldest son, and the superiority to his second son. Some years after he disposed the lands, as they stood in himself, to the eldest son, recalling the previous conveyance to the second son, without mentioning that*

in favour of the eldest son, but declaring that the disposition settlement should be effectual in so far as not revoked or altered. The eldest son having predeceased his father without issue, after granting an heritable security over the lands—Held, in a competition between the heritable creditor and the second son claiming as his father's heir, that the security extended over the plenum dominium of the lands—the eldest son's right extending to it, and not being limited to the superiority.

By Crown-charter, dated 20th December 1793, and instrument of sasine thereon, recorded 24th January 1794, Robert Anderson stood infeft in the lands of Milliganton, described as,

"Totas et integras duas mercat terras de Milliganton mercat terram vocat Kilncroft Corson's croft et Crossflat cum domibus ædificiis hortis pomariis silvis piscariis partibus pendiculis et pertinenti ejusdem tam bene non nominat quam nominat et decimis rectoriis et vicariis earundem jacen infra parochium et baronium de Holywood et vicecomitatum de Dumfries."

This title was burdened with two feu-rights,—one of them including "the just and equal half of the lands of Milliganton," and the other "Kilncroft, Corson's Croft and Crossflat." On 30th December 1805, Robert Anderson executed a disposition and settlement, by which he disposed to his eldest son, James Anderson, under certain burdens, and with an express power of revocation, *inter alia*,

"All and whole my half of the lands of Milliganton," described in the titles as the two-merk land of Milliganton, "with the houses, biggings, yards, orchards, woods, fishings, parts, pendicles and pertinents of the same, lying within the parish and barony of Holywood, and shire of Dumfries; together with all right, title, and interest which I, my predecessors or authors, heirs or successors, had, have, or anyways may have, or can claim or pretend to the same in all time coming."

Of the same date, Robert Anderson executed another disposition (said to be for the purpose of bestowing a freehold qualification) in favour of the pursuer, John Anderson, his second son, of

"All and haill the two-merk land of Milliganton, the merk-land called Kilncroft, Corson's Croft, and Crossflat, with houses, biggings, yards, orchards, woods, fishings, parts, pendicles, and pertinents thereof, lying within the parish and barony of Holywood, and sheriffdom of Dumfries, with the teinds thereof, great and small, parsonage and vicarage, but excepting always from this disposition the property or *dominium utile* of the said lands of Milliganton, disposed by me on the date hereof to James Anderson, my eldest son, and also the property or *dominium utile* of the other half of the lands of Milliganton, and said lands of Kilncroft, Corson's Croft, and Crossflat, belonging to Edward and William Elton, conform to their titles thereof," &c.

This disposition also contained a power of revocation. In 1809, Robert Anderson executed another disposition, which, after narrating

"that by a disposition and settlement, bearing date the 30th day of December 1805, I disposed the two-merk land of Milliganton, and the merk-land called Kilncroft, Corson's Croft, and Crossflat, with the pertinents hereafter mentioned, in favour of John Anderson, my second son, but excepting from the said disposition the property or *dominium utile* of the lands of Milliganton belonging to me, which I, by another disposition and settlement of the same date, disposed to James Anderson, my eldest son, and by the said disposition and settlement, I reserved full power to myself to alter, revoke, and annul the same at pleasure," proceeds as follows: "And now seeing, that for certain good causes and considerations, I have resolved to revoke the said disposition and settlement in favour of my said son, John Anderson, in so far as regards the said lands, therefore wit ye me to have revoked and recalled, as I hereby revoke and recall the

"said disposition in favour of my said son, John Anderson, in so far as regards the said lands and others hereafter disposed." "And to have given, granted, and disposed from me, my heirs and successors, to and in favour of James Anderson, my eldest son, his heirs and assignees whatsoever, all and whole the two merk-land of Milliganton, the merk-land called Kilncroft, Corson's Croft, and Crossflat, with houses, buildings, yards, orchards, woods, fishings, parts, pendicles, and pertinents of the same, as well not named as named, with the teinds, parsonage and vicarage, of the same, lying within the parish and barony of Holywood and sheriffdom of Dumfries, together with all right, title and interest, claim of right, property, and possession, which I, my predecessors and authors, heirs and successors, have had, or can any ways claim or pretend thereto, in time coming."

The deed farther contains the following clause:

"Declaring always, that my settlements above mentioned in favour of my said sons, John and James Anderson, with the whole conditions and provisions therein contained, shall stand good and effectual, except in so far as the same are altered and revoked by this present deed, or may be altered by any deed to be executed by me hereafter during my life, conform to the powers reserved by me in the said settlements."

James Anderson expedes a Crown-charter of resignation on this disposition, which authorised two modes of holding, and was infeft in March 1810. In 1820, Robert Anderson executed another disposition and settlement recalling the deeds of 1805, and conveying to James Anderson his half of the lands of Milliganton, described in terms similar to those used in the deeds.

In 1827, James Anderson having become indebted to the Bank of Scotland in £10,000, executed in their favour a disposition in security of, *inter alia*, the lands of Milliganton, as described in the Crown-charter expedes in favour of Robert Anderson in 1793. On this disposition, which contained a precept of sasine *a me vel de me*, infeftment was duly taken. James Anderson having predeceased his father, a competition arose between John Anderson, the second son, and the Bank of Scotland,—the former maintaining that the disposition of 1809, in favour of James Anderson, conveyed merely the superiority of the lands contained in it, and that consequently the disposition in security, obtained from him by the bank, could not extend to the *dominium utile*. He accordingly

Pleaded—1. Under the disposition of 1809, granted by the late Robert Anderson in favour of James Anderson, on which infeftment was taken by him, nothing was conveyed, or meant to be conveyed to James, except the same subjects which had previously been conveyed to the pursuer by the settlement of 1805, which it revoked, viz., the superiority of the lands of Milliganton, Kilncroft, Corson's Croft, and Crossflat. The deed of 1809 describes the settlement of 1805 in favour of the pursuer, as excepting the *dominium utile* of the lands of Milliganton, which the granter had by another disposition of even date, conveyed to James Anderson, and instead of revoking it, confirms that previous disposition of the *dominium utile* of Milliganton in favour of James Anderson. 2. If it be competent to refer to any evidence extrinsic of the deeds referred to in the record, the limitation of the conveyance in the deed of 1809 to the superiority of the lands of Milliganton is farther proved—(1.) By the terms of the claim given in by Robert Anderson for enrolment, in which the conveyance to James Anderson is expressly described as a conveyance of the superiority: (2.) By the fact that Robert Anderson, as proprietor

of the *dominium utile* of those lands, continued in possession, and drew the rents as before the execution of that deed, and that James Anderson never had any intromission with the rents, or possession of these lands: (3.) By the fact, that Robert Anderson disposed the property of these lands to his son James by a *mortis causa* deed in 1820, expressly on the footing that they had not previously been conveyed to him by the deed of 1809. 3. No right to the property of the half of the lands of Milliganton ever vested in James Anderson, inasmuch as the *mortis causa* conveyance by Robert Anderson in 1820, by which the property of these lands was intended to be conveyed to him, never took effect, he having predeceased his father. 4. On the assumption that no right to the *dominium utile* of Milliganton vested in James Anderson, the pursuer cannot be affected by any representations made by James Anderson to the bank, or any belief on the part of the bank that he was the proprietor of these lands. 5. But further, looking to the plain meaning of the deed of 1809, the bank cannot plead that they viewed it as a conveyance to James Anderson of the *dominium utile* of the lands in question, or as conveying any thing beyond the superiority of these lands.

Pleaded by the Bank—1. By the progress of titles referred to in the statement for the defenders, James Anderson was validly vested in the *plenum dominium* of the lands of Milliganton as the absolute unlimited fief thereof. 2. Seeing James Anderson so validly vested in the property and superiority of the aforesaid lands, and transacting with him on the faith of the public records, the defenders, for an onerous consideration, obtained from the said James Anderson a valid and effectual conveyance to these lands by the disposition which he executed in their favour on 8th June 1827. 3. It is incompetent, the more especially in a question with onerous third parties transacting on the faith of the public registers, to refer to any evidence extrinsic of the feudal title completed by James Anderson in order to control or limit the express terms of that title. 4. The conveyance by James Anderson in favour of the defenders of the *plenum dominium* of the lands of Milliganton is a valid and effectual conveyance against the pursuer and all others, and cannot in anywise be affected by any latent deeds or declarations on the part of his father or others.

The Lord Ordinary pronounced the following interlocutor:

“10th February 1842.—The Lord Ordinary having considered the separate record made up of consent as to the heritable security granted by James Anderson to the Bank of Scotland over the lands of Milliganton, together with the title-deeds produced, revised cases, and other productions on this branch of the cause, Finds, that at the date of the security in question, the late James Anderson, who granted the same both from the terms of the conveyance and infestment obtained from his father in 1809, and from the titles of his author on record, assigned to him, stood feudally and irredeemably vested in the superiority of the whole lands of Milliganton, and in one-half of the *dominium utile* thereof: Finds that the defenders, as onerous and heritable creditors transacting with the said James Anderson, were not put in *mala fide*, nor in any respect precluded, on any legal or equitable ground, by the terms of James Anderson's titles, from taking a security from him as the true owner of the said portion of the *dominium utile* of Milliganton: Therefore, repels the claim and pleas urged on this branch of the process for the pursuer; sustains the pleas of the Bank of Scotland, and

appoints the cause to be enrolled, that the parties may state in what manner they wish these findings to be applied in the accounting: Finds the defenders entitled to expenses, as the same may be taxed by the auditor, and decerns.

“*Note*.—As this is a question which depends upon a short progress of titles, and as the parties have stated their views upon these in revised cases of great perspicuity and accuracy, it will suffice now to state very briefly the grounds on which the pleas maintained by the defenders at present appear to be insuperable.

“In the first place, there can be no doubt that Robert Anderson, the father, was feudally vested in the whole superiority of Milliganton, and in one-half of the property thereof under his Crown-charter of 1793, and infestment following thereon.

“In the next place, it does not seem to be disputed that, in the conveyance by Robert Anderson to his son James of these lands of Milliganton in 1809, he used the very same descriptive terms, whereby both superiority and property were previously vested in himself by his own charter of 1793. The Lord Ordinary begs to refer to the full and perspicuous analysis of the title given in the narrative of the revised case for the bank, which is sufficient of itself to demonstrate the clear and unassailable nature of the right to the property in dispute, latterly vested in James Anderson.

“In the ordinary case, then, there cannot be a doubt that the whole subjects, and right thereto vested in the disposer, would be held to have passed to the disponee; and this is almost admitted in terms by the pursuer. But his claim is rested on certain pleas alleged to arise under clauses on the face of the principal conveyance by Robert Anderson to James in 1809, which it is said were sufficient to put the bank on their guard, and to indicate that James only got right to the superiority of Milliganton under that disposition, and of course that the security of the bank must be limited to that right. It is humbly thought, however, that the pursuer's construction of this title, and the pleas raised thereon, are in every view untenable. Thus,—

“1st, The main plea of the pursuer is, that there were clauses or references in the disposition of 1809, which clearly showed that Robert Anderson only meant to convey, and only did convey to his son James by that deed, the superiority of the half of Milliganton, and no part of the property. For it is said that that disposition contains a recital that the granter had, by prior deeds in 1805, conveyed the superiority of the said half of Milliganton to John Anderson, his second son, and the *dominium utile* by another deed to James Anderson, his eldest son, both subject to his own power of revocation and alteration; and as he expressly declared in the conveyance of 1809, that he meant to recal the disposition of the superiority in favour of James Anderson, but to confirm the deeds of 1805 in all other respects, it is contended that Robert, by his disposition of 1809 to James, only conveyed the superiority to him, leaving his right to the property to stand on the revocable settlement of 1805, which was neither feudalized nor delivered at the date of the bank's security.

“But this plea appears to be altogether unsupported by any just or safe view which can be taken of the legal import of the deed on which it is founded. It is true that the disposition of 1809 recites that the granter had conveyed one-half of the property of Milliganton to James Anderson by a revocable deed in 1805; but that created no inference that he would not be disposed to give his eldest son a further right in 1809 to the superiority and property of the same estate by an irrevocable deed. In every case of the kind, the intention of the granter must be collected from the terms of the last deed that he granted; and the disposition of 1809 seems to be framed in terms which absolutely exclude the construction or inferences drawn by the pursuer as to the limited nature of the right given by old Anderson to his son James, now under consideration. In that disposition the lands were described in the most comprehensive terms, and the whole parts and pertinents, as appears in the records to belong to Robert Anderson, were given over to James; in particular, there was not only no exception of any prior revocable *feu-right* granted to the disponee, but the conveyance of 1809 specially contained *procuratory* and *precept*; and the right given to the disponee was to him and his forebears

heritably and irredeemably. It humbly appears to the Lord Ordinary that it would be contrary to every principle of sound and safe construction, to hold such a feudal title as of a *limited* nature, on the ingenious but strained inferences raised up by the pursuer in the present case.

"2d, The pursuer, however, founds strenuously on the clause in the conveyance of 1809, whereby the granter declared that his settlements above mentioned, executed in 1805 'in favour of my said sons, John and James Anderson, with the whole conditions and provisions therein contained, shall stand good and effectual, except in so far as the same are altered and revoked by this present deed, or may be altered by any deed to be executed by me hereafter during my life.' And it is argued, that Robert Anderson, by this clause, preserved entire the revocable feu-right granted to James Anderson (though never feudalized) in 1805. But this is a begging of the whole question at issue. The granter only declared the deed of 1805 subsisting, in so far as 'not altered or revoked by the present deed;' but surely he altered and recalled the feu-right in the most decisive and effectual manner in 1809, when he gave a new conveyance, in terms which included both the superiority and property of Milliganton, to his son James and his heirs, heritably and irredeemably.

"It is impossible not to hold that this was, *quoad* that property, a complete alteration of the settlement of 1805. Nevertheless, the reservation quoted by the defender was a clause of material efficacy, although the pursuer's interpretation of it be rejected. As the settlement of 1805 by Robert Anderson on James contained *various other properties* besides Milliganton; and the effect of the reservation was to preserve the former deed as to these, good and effectual, 'excepting so far as altered or revoked.'

"While these views of the title now appear clear, with all the light we possess, from production of the whole deeds referred to, including the undelivered settlements of 1805, it is a circumstance not without its weight, that the defenders, as onerous creditors of James Anderson in 1827, had not that advantage. They apparently treated with Anderson on his feudal title alone, as he had not then the settlement of 1805 to exhibit. And, therefore, the plea of the pursuer comes to this, that the defenders, as creditors and singular successors of Anderson, were bound to recur to every document, even *generally referred to* in the title of their debtor. But it is apprehended that the right vested in proprietors, under an unlimited feudal title in our law, cannot be controlled by other deeds only mentioned *by reference* in the narrative of the title. It is unnecessary, however, in the present instance, to enter into any disquisition on this point, as the Lord Ordinary is of opinion, that even if a skillful conveyancer had actually got a perusal of the settlements of 1805, when the title of James Anderson, obtained in 1809, was exhibited to him, he certainly would have come to the conclusion that this title gave James Anderson an undeniable right to the *dominium utile* in dispute.

"It is stated by the pursuer, as a strong circumstance to show that Robert Anderson did not intend to give his son James any interest in the property in question, that the old man *continued to draw the rents* and annual profits of the whole subjects conveyed by the disposition of 1809 for years after that date. It is apprehended, however, that this state of the fact, even if proved, could not affect the right of onerous parties trusting to the disponent's title on record, when an heritable security was granted at a subsequent period. There is no allegation that the bank knew that James Anderson did not get possession immediately after his infeftment. And the fact that he was in possession long prior to the date of the heritable security under challenge, hardly seems to be disputed."

The pursuer reclaimed. At advising,

Lord Gillies.—I think the interlocutor is right.

Lord Mackenzie.—I am of the same opinion. The bank hold an heritable security as onerous creditors, and are entitled to maintain it against the granter and all representing him. Here John Anderson, the survivor of his elder brother and father, claims the lands over which the security was given, on the ground that his brother's right in them extended only to the superiority. I cannot admit this. The conveyance has

every characteristic of a conveyance of the *dominium plenum*, and not of superiority merely. The subject conveyed is not the superiority but the lands. There is no exception of the *dominium utile*. Two modes of holding are authorised, and there is an assignation to the rents after Martinmas, with an obligation of relief thereafter, and with a farther obligation of relief from burdens, which all fall on the property and not on the superiority. But it is said that, *ex facie*, one-half of the property was reserved, because the granter, who had previously executed two revocable dispositions,—one of the *dominium utile*, and the other of the superiority,—expressly revoked the latter, but not the former. It is plain that the words used were fit to revoke the grant of the property to John Anderson; for they do so expressly; but as to James Anderson they were not fit to revoke any thing. As to him they do not revoke, but supersede the previous grant, and add to it,—expressly conveying the lands to him,—"together with all right, title and interest, claim of right, property and possession, as well petitory as possessory, which I, my predecessors and authors, heirs and successors, have had, or can any way claim or pretend thereto in time coming." Here he conveys not only the superiority, but all right of every kind which he had or might acquire as to the subjects. The mention of the lands in the subsequent settlement of 1820, does not prove that the *plenum dominium* had not been conveyed by the deed of 1809. It is unnecessary to say any thing of the pursuer's other pleas, which are sufficiently adverted to by the Lord Ordinary. The disposition on which James Anderson was seised, implying a conveyance both of the property and superiority, and there being nothing on the face of the records to prove the contrary, the security is good to the bank. It is said that the bank stands in the shoes of James Anderson. This is not correct. The father, after granting the conveyance, might have been able to prove by James's oath that he was bound to reconvey; but he could not have done so after the lands had been conveyed away to onerous creditors, who are entitled to look only at the records.

Lord Fullerton.—I am entirely of the same opinion. The question is, if the security of the heritable creditor is limited to the superiority? This question must be decided, *first*, by the terms of the security, and the right existing in the party granting it; and, *second*, by the state of the records. On both points, I have no doubt that the claim of the bank is well founded. It is admitted that, *ex facie*, the deed of 1809 conveyed to James Anderson all the right existing in Robert Anderson. It is also admitted that nothing to the contrary appears on the records. In these circumstances, how can we limit the right of the bank? As to the presumptive evidence of the conveyance, I agree entirely with Lord Mackenzie. I see nothing from which it can be fairly inferred that there was an intention to limit the grant to the superiority. The granter revokes what he had disposed to the second son. This was necessary in order to give the eldest son the whole; and he does accordingly give him the whole, in the precise terms in which it stood in himself. The heritable security extends over the whole property thus conveyed; and as there is nothing to the contrary in the records, I have no doubt that the title of the bank is good.

Lord President.—From the time I first read the papers in this case, I have been of the same opinion. The whole property was conveyed to James as it stood in the father in 1793, and he conveyed the whole in security to the bank. In these circumstances, there can be no doubt that the security carries both the *dominium utile* and the superiority. We are told, indeed, of certain extrinsic family arrangements which are said to prove that the superiority only was conveyed. Nothing of this appears on the records; and it would be dangerous to hold that an heritable security in favour of creditors could be affected by such pleas as the pursuer's.

The Court adhered, with expenses.

Lord Ordinary, Coningham.—Act. Dean of Faculty (Wood), Moir; Hope and Oliphant, W.S., Agents.—Alt. Rutherford, Whigham, Marshall; Davidsons and Syme, W.S., Agents.—B. Clerk.—[H.B.]

9th June 1842.

SECOND DIVISION.—(G. D. F.)

No. 205.—SAMUEL BEVERIDGE, *Advocator*, v. WILLIAM MOFFAT and ALEXANDER BRASH, *Respondents*.

Superior and Vassal—Agreement—Joint and Several Obligation—Intromission—Liability.—*A prime superior feued out certain subjects to A, who subfeued part of them to X and Y; Y subfeued his out to C; C never completed any title to his feu, but possessed under the personal obligation derived from Y. A, the mid-superior, to whom the several subfeuars had regularly paid their feu-duties, fell into several years' arrear of feu-duty to the prime superior, and he having threatened eviction therefor of all the subfeus, X paid the amount, and brought an action of relief against C for a proportion of the arrears corresponding to his feu-duty.—Held that X was entitled to demand relief from C of a proportion corresponding to the amount of his feu-duty.*

Mrs Gavin and husband feued out certain subjects at Darling's Brae and Yardheads, Leith, to Alexander Grant, builder there, at a feu-duty of £120, and the latter subfeued them to different individuals, in a variety of lots, for certain annual feu-duties, which, in the aggregate, amounted to the precise sum he had to pay to his own superiors, the Gavins.

One of these lots Grant subfeued to James Nichol, messenger in Leith, at a feu-duty of £37, and he afterwards conveyed it away in two portions—one of which was disposed in feu to the defender in 1825 for a price of £550. By the feu-disposition the defender was taken bound to relieve Nichol of the feu-duties applicable to the subjects disposed to him, as well as of the public and parish burdens, and likewise to pay to him a yearly feu-duty of £15, which was stated to be the proportion effeiring to the subjects (conveyed to the defender), of the cumulo feu-duty payable by Nichol to Grant.

The defender entered to possession, but was never infeft under Nichol's feu-disposition, nor did he enter with Grant as superior, but he possessed under the personal right derived from Nichol, and paid the feu-duty to Grant up to Martinmas 1827.

Prior to Martinmas 1827, the feu-duties due by Grant to the Gavins, the prime superiors, had fallen into very considerable arrear, and at the time of his sequestration, in November 1829, they amounted to £740, exclusive of interest.

As stated by the pursuers, it appeared that the subfeuars had taken alarm at this situation of matters, and the probability of eviction at the instance of the prime superior, and that, in order to prevent this result, they, or part of them, had a meeting, at which they resolved to pay up the arrears to the Gavins and obtain relief, by allocating the same among the several subfeuars in sums proportioned to the feu-duties respectively payable by them for their several feus. It did not appear that the defender attended this meeting, but he was subsequently made aware of its nature, and of the resolution of the subfeuars; and it also appeared that several states of accounts had been handed to him, containing particulars of the arrears due by Grant, and of the outstanding feu-duties, and of the way and manner in which it was proposed to allocate the sum of arrears among the several subfeuars. It did not appear that the defender protested against, or opposed this arrangement, or that he had directly approved of the

proceeding, but he had signified by letter his belief that the state of arrears was correct, for any thing he knew.

The trustee in Grant's sequestration exposed the mid-superiority of the subjects held by him to public sale at a sum of £30, and it was bought by the pursuers at the upset price. The pursuers, who were two of Grant's subfeuars to the largest extent, stated in regard to this purchase, that the mid-superiority was valueless in a pecuniary point of view, as the feu-duties payable under it were just equal to those exigible by the prime superior. But they were desirous to acquire it, to prevent any future loss accruing by the bankruptcy of another interjected mid-superior. In the conveyance of the mid-superiority, which was granted by the trustee and commissioners, with the concurrence of Grant himself, in favour of the pursuers, and which excepted all the feu-rights which had been entered into by Grant, there was the following stipulation:

"And farther, in regard the feu-duty of the said subjects is greatly in arrear, and it being expressly in the articles of roup that the same should be sold under the burden thereof, therefore the said William Moffat and Alexander Brash bind and oblige them and their foresaids to free and relieve the said James Macdowall, as trustee foresaid, and the said sequestrated estate of Alexander Grant, of the payment of all feu-duties now due or to become due in all time coming; and farther, of and from all cess, ministers' stipend, and other public burdens whatsoever, now due or to become due for the said subjects hereby disposed in all time coming; without prejudice to the said William Moffat and Alexander Brash exercising any right of ranking which may be competent to them upon the sequestrated estate of the said Alexander Grant, but reserving all objections, if any, which may be competent against such claim."

The pursuers brought this action in the Sheriff-Court of Edinburgh, alleging that the prime superior had called upon them for payment of the whole arrears of feu-duty, amounting with interest to £894, due by Grant, and threatened to evict the feus in case of non-compliance, and that they were accordingly obliged to pay up the same, to save eviction. It did not appear, by any evidence in process, that they had paid up the whole arrear, but only a part of it, when the summons was raised. The summons then set forth,

"That the feu-duty payable by the defender, under the feu-contract or other conveyance of his subjects by the said Alexander Grant, to his authors or to himself, is £15 per annum, and as the cumulo feu-duty payable to the said Alexander Grant by the whole feuars was £120, the defender was consequently bound to pay or to relieve the pursuers of the sum of £111. 17s. 2d., being the proportion of the foresaid arrear of feu-duties corresponding to the extent of feu-duty payable by him as aforesaid: That the defender is still resting-owing a balance of his proportion of the foresaid arrear, amounting to £71. 6s. 5d., including interest to the 15th of May last, conform to the state or account marked No. 2, herewith produced, referred to, and held as repeated *brevitatis causa*."

It then proceeded, that in virtue of their purchase of the mid-superiority, the pursuers were *in titulo* to receive the feu-duties due by the defender from and after Martinmas 1830, and they accordingly concluded, 1st, for payment and relief of the sum of £71. 6s., with interest, as the defender's proportion of the aggregate arrears alleged to have been paid by them to the prime superior; and, 2d, for payment to them, as mid superiors, of the feu-duties due by the defender since Martinmas 1830, the date of their entry under the conveyance from Grant's trustee.

The defender *pleaded*—

That the action was untenable, both as to the claim for arrears and for the feu-duties. In regard to the arrears he argued, that the pursuers had no right to insist for them, so far as his feu was concerned, because the pursuers were in no better situation than Grant was, who could have had no title to sue; for, as the defender never made up a title under Grant as superior, or any title at all, he merely stood on the personal right to the subjects, which flowed, not from Grant but from Nichol. Grant he never recognised in any way in the title, and he had no concern with, and was no party to, the defender's subfeu from Nichol. Accordingly, Grant had no right or title of any sort to insist in any demand whatever against him on account of any matter whatsoever connected with the subfeus by Nichol. But if Grant had no such right, neither had the pursuers, who plainly came into Grant's shoes, and had no other character but as his assignees. They transacted with his trustee; and the latter, in consideration of their paying off the arrears, and of the price of the mid-superiority, assigned them into Grant's rights and interests, and no further. The disposition to them showed this most conclusively; and that they were to relieve the subfeuars. Accordingly, on this ground, the pursuers had no title to insist in this action; and then, as Grant had received the feu-duties, he himself could not now make the present demand: so neither could the pursuers, who were assigned into his room. Again, the prime superior was claiming nothing. He was no party to the right in virtue of which the defender held the subjects, neither was he any party to the action: nor did he, nor could he, in any way make any claim against the defender for the arrears. Had the pursuers paid at once to Gavin, and obtained an assignation of the superior's rights, the matter would have been different. But that was not the case; and therefore, as neither the prime superior nor the pursuers had any title or interest to make any demand against the defender, the action was incompetent, in any view of the case. Besides, no evidence had been produced of Gavin having been paid the arrears. Then, again, as to the feu-duties contained in the second conclusion,—in the first place, the pursuers had not settled with the prime superior for them; and therefore, even supposing the defender was liable, he was not *in tuto* to pay. But the defender denied the pursuers' right to claim them at all, on the same ground as that urged in regard to the other claim, viz., that as the defender held under his personal right with Nichol, and no title was made up by him with Grant as superior, the purchase of the mid-superiority invested the pursuers with no right to claim the feu-duties from him, the defender. No doubt, so long as he possessed the subjects conveyed to him by Nichol, he was bound, as the condition of doing so, to pay the yearly stipulated feu-duty of £15, but that was all that could possibly be demanded from him under any personal engagement which he could be held to have undertaken. Nichol, with whom alone he contracted, might insist upon being relieved by the defender of his *cumulo* feu-duty of £37, to the extent of the £15 yearly; but in the circumstances of the case, it was perfectly clear that neither Grant, nor any person in his right, nor even Gavin, could make any direct personal claim against the defender for the feu-duties. Gavin or Grant, or those in his right, might attach the property for the payment of the feu-duty; and such was the great depreciation of property in Leith, that the defender did not object to their doing so. But he did not admit that he had incurred any personal liability for the payment of the feu-duty. No doubt, while he should keep possession of the property, he fell to pay the feu-duty; but if he relinquished the property, which he was willing to do, he would then be free from all further claim for the feu-duty. He had already paid the feu-duty up to Martinmas 1831, as appeared from the documents produced; and if the pursuers would take the property on account of the arrears which were due, and the feu-duty to become due, which was all the benefit they could derive by a forfeiture *ob non solutum canonem*, the defender stated his willingness to convey to them the subjects in question: *Macvicar v. Cochrane*, 14th July 1748, and *Magistrates of Edinburgh v. Horsburgh*, 16th May 1834.

The pursuers *answered*—

That all that was required of them was to have paid or satis-

fied the prime superior as to the arrears. They had done so by paying the arrears, or the greater part of them, to the prime superior, and had received, or, what was the same thing, the defenders had received, a letter from the prime superior stating that he was in safety to pay. Accordingly, the claim they made against the defender was a claim urged by them as *correi debendi* against the defender, as a *correus*, to pay up the quota of a larger sum due, *singuli in solidum*, by one and all, and which quota they had already paid for him, for the purpose of preventing a tinsel of their several feus, which all had a manifest interest to prevent. It was in no other way they insisted in the action, so far as the arrears were concerned; and as the defender knew of, and had never objected to the arrangement, which was for mutual behoof, there was no ground for his present argument. The transaction with Grant's trustee, to which the defender was no party, and on which, therefore, he had no title to found, was explained to be an arrangement solely to free the sequestrated estate, but by no means to relieve the subfeuars of Grant's arrears, which was never meant or contemplated. As to the feu-duties contained in the second conclusion, it was admitted they were not paid to Gavin. That, it was alleged, arose from the defender having himself refused to pay to them as mid-superiors. But they were willing that the defender should settle with the prime superior if he liked. At the same time, having purchased the mid-superiority, they maintained they were *in tuto* to demand it.

A separate argument was raised by the pursuers, to the effect, from the letters and other documentary evidence in process, that the defender was bound to pay according to the arrangement of the subfeuars. But as the same evidence was founded on by the defender as instructing the reverse, and that he always objected to pay any thing but his own feu-duty, it seems unnecessary to go into it. Different views appear also to have been taken of it by the Lord Ordinary and by the Court.

After considerable procedure, the Sheriff-substitute found,

"that in November 1830 the arrears of feu-duties due by Grant to Gavin, his immediate superior, amounted to £783, with £111. 12. 2. of interest, amounting *in toto* to the sum of £894. 17s. 4d., for which the lands subfeued by Grant, or possessed under titles originally derived from him, including those belonging to the pursuers and defender respectively, were liable to be evicted by Gavin as superior thereof: Finds that the defender, as one of the *correi debendi* along with the pursuers for that sum, is liable, in a question with the pursuers, for one-eighth part of the said arrears and interest, being the proportion corresponding to the amount of the feu-duty payable by him: And finds, that in that proportion, the defender is bound and liable to relieve and repeat to the pursuers one-eighth part of whatever sums were paid by them, or either of them, to account of the said sum of £894. 17. 4., before the summons in the action was executed, but under deduction of such sum as the defender may have paid to account of said sums and interest—Appoints the pursuer within ten days to lodge a state of the arrears and interest paid by him, framed according to these principles; reserving to the pursuer his right of action for such farther payments as he may have made since this action was raised, and to the defender his defences as accords: Farther, and in reference to the second conclusion of the action, Finds the defender liable to the pursuers in the sum of £90. 8. 9., being the amount of the feu-duties payable by him from Martinmas 1830, with interest till Whitsunday 1836, conform to state No. 3 of process, and finds the defender also liable in interest at the rate of five per cent., from Whitsunday 1836 till the date of this interlocutor, on the principal sum of feu-duties due at the former of these dates, and from the date of this interlocutor till payment, on the said sum of £98. 8. 9: Repels the defences, and recalls the interlocutor of 6th July 1838, so far as inconsistent with these findings: Reserves in the meantime all questions of expenses, and decerns accordingly. (Signed) "JA. MACDONALD."

"Note.—It is unnecessary to repeat the circumstances of

this somewhat involved case, which are correctly detailed in the last interlocutor on the merits, in the principles of which the Sheriff generally concurs, except in so far as it held that the pursuers had not libelled a sufficient title to insist in the first conclusion of the summons, in which the Sheriff cannot agree. He is of opinion that the defence principally urged against that conclusion is utterly unfounded. The pursuers' title to insist for payment of the arrears, is distinct and separate from their title to insist for payment of the defender's feu-duties, since the pursuers acquired right to the mid-superiority, and it seems perfectly clear that neither the rights and securities of Gavin, nor the liabilities and obligations of the sub-vassals, either to him or *inter se*, can or would be affected by that purchase, in the circumstances in which it was made. The obligation of the pursuers to relieve Grant's estate of Gavin's claim, was a condition of the sale, but the arrears of feu-duties formed no part of the price, and notwithstanding that obligation, all the possessors of the sub-feus were equally liable to the superior, and they as much entitled to their relief *inter se* as if that obligation had not been a condition of the sale of the mid-superiority. It was intended to relieve Grant's sequestrated estate of Gavin's claim, but without prejudice to the pursuers ranking on it for the amount of the arrears. It is difficult to imagine how this limited obligation can be construed into an obligation to relieve the sub-vassals of their legal obligation to the superior, or of their mutual claims of relief *inter se*. The Sheriff is also of opinion that the pursuers' argument respecting the defender's liability for interest on his feu-duties, is well-founded. It is proved by Nichol's sasine, from whom the defender acquired his property, that the liability for interest was a condition of his feudal right; and, according to the principles of the feudal law, when he disposed to the defender to hold of his superior (Grant), he was only entitled to make this substitution under the burdens and conditions of his own right. The Sheriff regrets he was unable to dispose of this case finally, without ordering a new state applicable to the principles stated in the interlocutor, but it appears unavoidable."

Thereafter,

"Edinburgh, 7th October 1840.—The Sheriff having resumed consideration of the cause, along with the state of arrears of feu-duty, No. 47 of process, and having heard parties' procurators thereon—Approves of the second method of stating the arrears and interest in said state, and in terms thereof, finds the defender liable to the pursuers in the sum of £57. 9. 4. Sterling, as the proportion of the arrears and feu-duties due by him under the first conclusion of the summons. And in reference to the second conclusion of the summons, of new finds the defender liable to the pursuers in the sum of £90. 8. 9., being the amount of the feu-duties payable by him from Martinmas 1830, with interest till Whitsunday 1836, conform to state No. 3 of process; and finds the defender also liable in interest at the rate of five per cent. from Whitsunday 1836 till the date of this interlocutor, on the principal sum of feu-duties due at the former of these dates, and from the date of this interlocutor till payment on the said sum of £90. 8. 9. And decerns against the defender for payment of said sums accordingly: Finds the defender liable in expenses; allows an account to be lodged for taxation, and decerns." (Signed) "GRAHAM SPEIRS."

On an advocacy, the Lord Ordinary pronounced the following interlocutor:

"14th December 1841.—The Lord Ordinary having heard counsel in this advocacy, and thereafter considered the record in the Inferior Court, and whole process—In respect, 1mo, that it is clearly established by the letters and documents produced, that the advocate, Mr Beveridge, one of the subfeuars of the property libelled on, specially undertook and agreed, several years before the commencement of this action, to pay his proportion of the arrears due by the mid-superior at his bankruptcy to the prime superior, so as to save his property from forfeiture at the instance of the latter: 2do, That the pursuer, on the faith of that agreement, purchased the mid-superiority, and paid the whole arrears to the over-superior, whereby all proceedings at the instance of the latter against the subfeuars were superseded and stopped: 3io, That it farther appears that the de-

fender, in acknowledgment and fulfilment *pro tanto* of the agreement, actually made various payments to account of the said arrears, though he latterly refused to pay the balance due by him, and thereby rendered it necessary for the pursuer to raise the present action—approves of the Sheriff's interlocutors, in so far as he has decerned against the advocate for the sums specified in the interlocutors complained of, with expenses; and therefore repels the reasons of advocacy, and remits the cause to the Sheriff *simpliciter*, and decerns: Finds the respondent entitled to his expenses, as the same may be taxed by the auditor, and decerns.

"Note.—This is a case which appears at first to be complicated, and it has swelled to great bulk from voluminous proceedings and productions; but truly it is very simple in itself.

"The late Mr Gavin of Leith feued a property in the vicinity of the town to one Alexander Grant for a principal feu-duty of £120. Grant subfeued it to different persons for building—the subfeu-duty amounting to £120, the precise sum of the principal feu-duty.

"One of the subfeus was made to Mr Beveridge, who purchased a house from one Nichol (another subfeuar) for £550 in 1826. The portion of feu-duty laid on the advocate's lot was £15 Sterling per annum. Other subfeuars had still more valuable buildings on their portions of the ground.

"Grant became bankrupt in 1829, owing a large arrear of feu-duties (nearly £800) to the prime superior, Mr Gavin. It is obvious that all the subfeuars were interested in paying off the arrear, as their subfeus, and all the houses thereon, could have been attached by the prime superior for his payment. It seems, therefore, to have been arranged that the pursuers, Moffat and Brash, should buy Grant's mid-superiority, and pay up the arrears of the prime feu-duty to the over-superior, on the understanding that the same should be repaid by the subfeuars in proportion to the amount of their subfeu-duties, whereby their properties would be saved from forfeiture. This accordingly Moffat and Brash did in 1830. They then paid the arrears to the over-superior, and they now claim from the advocate his share of the arrears so paid up; which, after a long litigation, the Sheriff has decerned for, and the Lord Ordinary is of opinion that his judgment is well founded.

"He rests his opinion on this plain proposition, that when the prime superior's claim against the subfeuars and their properties emerged in 1829 on the bankruptcy of Grant, it was clearly their interest to save their properties from forfeiture. The prime superior could undoubtedly have instituted an action of irritancy, *ob non solutum canonem*, against all the subfeuars, without regard to their settlement with the mid-superior; and Moffat and Grant, as assignees of Gavin, could have taken a similar step. But the defender superseded such a process by specially agreeing to pay his proportion of the arrears. The fact of the advocate coming under such an arrangement is proved beyond all doubt by the most explicit letters under his hand.—See, in particular, the advocate Mr Beveridge's letters of 19th March 1832 and 2d May 1834. These letters appear to be decisive of the defender's liability. The chief pleas maintained by the advocate were these:—

"1st, He stated that the pursuers had, by the articles of roup under which they made the purchase of this mid-superiority, undertaken Grant's obligation, and became bound to pay all the arrears of feu-duty to the prime superior, in the same way that Grant himself would have been bound to relieve them, and therefore that the pursuers could not now claim any share of the arrears from the defender. But that was not the meaning of the obligation referred to in the articles of roup, as the Sheriff has very clearly demonstrated in the note annexed to his interlocutor of 24th July 1840. The obligation on the purchasers to pay arrears, contained in the articles of roup, did not form part of the price, but was made a condition of the sale in order to relieve the sequestrated estate, while the purchasers and subfeuars were to have all the remedies and rights of relief *inter se* for their several proportions, which the over-superior could have enforced; so that the pursuers acquired the mid-superiority for the common behoof of themselves and the other subfeuars; and it would have been utter folly in them to have purchased them with any other view. The defender's own letters in 1832 and 1834 afford the clearest evidence that he viewed the purchasers'

acquisition of the mid-superiority, and their settlement with the over-superior in that light.

"2d, The defender alleged that the pursuers made the purchase on the most improper and disadvantageous terms for him, as they had renounced all right to rank on Grant's estate for the arrears which formed a debt due by that party on his failure. But this plea seems to be founded on a mistake of the fact. The right of the purchasers or subfeuars to rank for the arrears exacted from them on Grant's account, is expressly reserved in the conveyance by the trustee to the pursuers, in these words: 'without prejudice to the said William Moffat and Alexander Brash exercising any right of ranking which may be competent to them on the estate of the said Alexander Grant, but reserving all objections, if any, which may be competent against such claim.' See also receipt, No. 60 of process, subscribed by the defender, showing that he at one time applied for the composition on that very feu-duty. It does not very clearly appear from the states whether it was recovered or not.

"3d, The advocator alleged that he had offered, in his defences, to surrender his whole subfeued property to the pursuers; and as the prime superior himself could get no other remedy against any subfeuar, it was argued that this should have satisfied the pursuers' claim. It is to be observed, however, that these defences were not lodged till November 1836; and if the defender was bound by special agreement to pay his share of the arrears, by letters prior to 1836, he could not insist on the pursuers then taking houses in place of money for their debt. The defender's statement is, that property in Leith has been for some time gradually depreciating; and if this be the case, it affords just the stronger reason for holding that a party could not carry on a correspondence, and so act for the years between 1830 and 1836, by making payments and otherwise, as to lead a co-vassal to understand and believe that he was to pay his share of certain common burdens affecting his own and their properties, and then throw his property on their hands, when, perhaps, it had reached its lowest point of depreciation.

"At the same time, the defender's offer, when examined, seems to have been a proposition to give up his property to the pursuers, on condition that they should relieve him, not only from Grant's arrears, but from the whole of his own subfeuduties, past or future, which no vassal can refute or renounce so long as he is solvent, as laid down in the case of the Marquis of Abercorn v. Marnoch, Fac. Col., 26th June 1817. The pursuers, therefore, were not bound to accept of the defender's offer as made. At the debate, the defender evidently hesitated to surrender his feu, merely to be relieved of his share of Grant's arrears."

The sums contained in the second conclusion of the libel having been paid a long time previously, the only question in the advocacy was as to the arrears.

The defender reclaimed. At advising, the Court held, in opposition to the Lord Ordinary, that no concluded agreement of the nature alluded to by his Lordship appeared to have been entered into; that the actings of the parties themselves, as appearing from the evidence in process, were repugnant to that idea, and that, moreover, it was not libelled on in the summons. Their Lordships were of opinion that the defender was liable, as intromitter with the fruits of the subject; and that as the pursuers, who, with the defender and the other subfeuars, were all liable *singuli in solidum* for the arrears, had paid the same, the defender was liable in relief to the extent claimed.

The Court accordingly recalled the findings of the Lord Ordinary as to the agreement referred to in the interlocutor reclaimed against, but adhered to that interlocutor, so far as it approved of the Sheriff's judgment decerning against the defender for the portion of the arrears effeiring to his feu, and contained in the first conclusion of the summons.

Lord Ordinary, Cuninghame. — Act. Dean of Faculty

(Wood), J. S. More; Party Agent.—Alt. Solicitor-General (M'Neill), Buchanan; Wilson and Milne, Agents.—F. Clerk.—[G.D.F.]

10th June 1842.

SECOND DIVISION.—(G. D. F.)

No. 206.—MRS MARGARET ALLAN or HUTCHISON, Pursuer, v. JOHN HUTCHISON Senior, and OTHERS, Hutchison's Trustees, Defenders.

Husband and Wife—Antenuptial Contract—Jus Mariti.—In an antenuptial contract in which the wife reserved right to the whole property coming to her from her father and mother, and the husband's jus mariti, &c., was excluded, as also the rights of his creditors—Held, on the terms of the deed, that the jus mariti was excluded as to the annual profits thereof; but question raised, whether the wife was bound to contribute, out of the profits accruing, stante matrimonio, to the current expenses of the family?

By antenuptial contract of marriage in March 1811, entered into between the pursuer and her husband, the deceased John Hutchison, and Richard Allan, her father, also deceased, the pursuer reserved to herself the right to dispose, use, or alienate the whole property she might succeed to through the death of her father or mother, or otherwise, or through any deed executed by them, or either of them, or to which she might succeed during the subsistence of the marriage; and her husband thereby renounced all right thereto, or to any part thereof, and the same was declared to be unattachable by his debts or deeds, and not attachable by his creditors. The following is the clause in the marriage-contract:

"Declaring, however, that the said Miss Margaret Allan reserves to herself the right and liberty to dispose, use, or alienate the whole property she may succeed to through the death of her father or mother, or otherwise, or through any deed executed by them, or either of them, or to which she may succeed during the subsistence of the said future marriage, and the said John Hutchison hereby renounces all right thereto, or to any part thereof, the same being hereby declared unattachable by his debts or deeds, nor attachable by his creditors,—the said succession being always subject to the destination and conditions contained in the deeds by which she may succeed to the said property, and which she shall have no power to alter."

During the subsistence of the marriage, the pursuer succeeded to certain property, both heritable and moveable, through the death of her father and mother, and also by the death of her sister Lydia. It was alleged that her husband, besides obtaining loans or advances from the pursuer's separate funds, also intromitted with the property she had succeeded to, and the produce thereof, without her authority and against her wish, and applied the same to his own uses and purposes in various transactions and speculations in which he was engaged, and thereby increased his own estates.

Mr Hutchison died in 1837, and the pursuer brought this action (in 1839) against her husband's trustees, to obtain payment of his intromissions with her funds, which, according to an account she produced, were alleged to amount to £1780. 12. 1. of principal, and £1364. 9. 5½. of interest.

Under the marriage-contract the pursuer was entitled to a jointure of £175 on the husband's death, and it appeared that he had granted certain letters to Mrs Hutchison, in which he acknowledged to have received from her sums amounting to £370, on which it was

provided by the pursuer no interest was to be chargeable. The defenders tendered payment of that sum, but they denied that the truster was indebted in any further sum such as that now claimed. They admitted that Mr Hutchison had been in use to intromit with the revenue arising from his wife's separate estate; but they averred that the wife, on the other hand, had intromitted with, or received, funds from him, which they specified, and which fully compensated any claim for intromissions she had against her husband, and they averred, that whatever sums he had intromitted with had been applied, with her consent, to the current expenses of the family. It was also averred that she had received certain sums of money, *stante matrimonio*, amounting to £240, which she had concealed from her husband and applied to her own purposes; and besides, that she had given no account of various other sums on which they condescended.

Mrs Hutchison had lodged an account of the sums she claimed against her husband, as taken from her husband's books; but the trustees averred that the account was made up upon erroneous principles, and they stated, that upon a just accounting, the pursuer would be found indebted to her husband's estate, instead of the estate being due any thing to her.

The pursuer *pleaded*—That her husband having received advances from her out of, or having intromitted with, her separate property, and the same not having been gifted by the pursuer to her husband, or repaid or accounted for by him to her, his estate was liable for the sums so advanced or intromitted with; and the account thereof, libelled in the summons, being correctly stated both as to principal and interest, the pursuer was entitled to decree to the amount concluded for. At all events, she was entitled to decree for such sums as should, upon due inquiry, appear to be duly instructed to be justly resting-owing to her.

In defence it was *pleaded*—1. This action cannot be maintained; because, on a just accounting, it will be found that the pursuer, in place of having any claim against the defenders, stands indebted to the trust-estate of her deceased husband. 2. The claims of the pursuer, at least so far as not founded on written acknowledgments, are cut off by prescription. 3. According to the sound construction of the marriage-contract, and in consequence of the proceedings which followed under it, the late Mr Hutchison had a right to intromit with the interest or produce of his wife's separate estate; and, at all events, any intromissions which he may have had with her annual income, having been either accounted for by him, or appropriated to family purposes with her full knowledge and consent, cannot now be reared up as a debt against his estate. 4. As the pursuer succeeded to a separate estate during the subsistence of the marriage, she was bound to contribute a reasonable sum from her income to defray her own personal expenses, as well as those of the family. 5. In the present accounting, the pursuer is likewise bound to give credit for all sums acquired by her during the subsistence of the marriage, which fell under the *jus mariti*, and were retained by her, as well as for all her intromissions with the private funds of her husband, and all advances made by him on account of her separate estate.

The Lord Ordinary, of consent, remitted to an ac-

countant to make up a state of accounts between the parties, and to report. The accountant reported *ad interim*, that from the state of information before him, he was unable to comply fully with the Lord Ordinary's interlocutor, but he was of opinion that the pursuer had not as yet substantiated her claim. The following is the result of the views of the accountant:

"On the whole consideration of the circumstances, and evidence as yet adduced in this case, the accountant humbly reports to the Lord Ordinary,—

"1. That if the Lord Ordinary shall be of opinion that the contract of marriage, before quoted, only excludes the husband's *jus mariti* as regards principal sums to which the pursuer succeeded during the subsistence of the marriage, but that it does not exclude the interests of such sums after being uplifted, then there is nothing due to the pursuer.

"2. If the Lord Ordinary shall be of opinion that the *jus mariti* is excluded as to all interests, but that the wife was bound to contribute a fair sum towards the expenses of the establishment, say to the extent of £100 a-year, still there is nothing due to the pursuer.

"3. But should the Lord Ordinary be of opinion that the *jus mariti* is excluded, and that the wife is bound to contribute nothing towards the general expenditure of the establishment, but that he should be of opinion that the *plea of prescription* applies to bygone interests till within three years of the husband's death, even then, were a strict accounting gone into, and keeping in view that she consented to her husband retaining £370, chiefly without interest, till his death, little or nothing would be due.

"4. Should he hold that the plea of prescription does not apply, but that there is a good plea of *bona fide percepti et consumpti*, still then nothing is due.

"5. But should the Lord Ordinary be of opinion that none of these pleas will avail the defenders, then the accountant has humbly to report, that the pursuer has not produced as yet such a satisfactory account of her own concealed transactions, during the subsistence of the marriage, as to enable him to make up an account of a satisfactory nature betwixt the parties.

"6. *Lastly*, That it appears to the reporter that the pursuer has not proved that she succeeded, during the marriage, to sums exceeding

£764 13 0

"Not including the sums left in liferent by her father, and exclusive of gifts, £240.

"And that it is proved she was in possession, at her husband's death, of funds to the amount of

1010 0 0

"Leaving an excess in her hands of

£245 7 0

"Or holding that the gifts by her father and mother were excluded by the *jus mariti*, amounting to

240 0 0

"There would still leave an apparent surplus in her hands of

£5 7 0

"And according to this view, she would have no claim even to the sums contained in her husband's written acknowledgments, in respect that she is shown to have been possessed of sums to an extent equal to, and beyond what she succeeded to, and which, of course, would extinguish these apparent loans."

The Lord Ordinary pronounced the following interlocutor:

"30th November 1841.—The Lord Ordinary having heard parties, and considered the process,—Finds, 1st, That the *jus mariti* of the pursuer's late husband was excluded, by their contract of marriage, as to any property to which she might succeed during the subsistence of the marriage, and that this exclusion extended to the annual profits of such property: 2d, That in the circumstances, her husband had no right to require her to contribute, out of her separate estate, to the maintenance of the family, or of herself as a member of it, and that she is not liable to be debited with such contribution in this accounting: 3d, That the *jus mariti* was not excluded *quoad* the £210, which the pursuer acquired during the subsistence of the marriage by donation;

quoad ultra, appoints the cause to be enrolled, in order that it may be settled how the remaining points are to be proceeded with; and reserves all questions of expenses.

"*Note.*—As to the exclusion of the *jus mariti*, the Lord Ordinary proceeds entirely on the words and the apparent object of the deed. The wife 'reserves to herself the right and liberty to dispoise, use, and alienate the whole property she may succeed to,' &c.; and the husband 'renounces all right thereto, or to any part thereof,' &c. The Lord Ordinary thinks that these words entitle the wife not only to the exclusive right to the fee of the property, but to the exclusive use of its profits. If this construction be not applied, then, in so far as what she succeeded to was only a life rent, she could have no use of it whatever. The word 'use' gets no meaning according to the defenders' interpretation, for they make it synonymous with alienate. If any case could be produced which fixes, as a general rule, that the income of property, over which the *jus mariti* is excluded, belongs to the husband, effect would have been given to it here. But there is no such case. They are all special,—the speciality in each consisting of its own particular language and objects.

"2d, Whatever a wife may be compelled to do for the maintenance of herself or family, with her separate estate, where the husband be bankrupt, or destitute, the Lord Ordinary knows no principle or authority for saving a husband who is solvent from fulfilling his legal obligation to maintain his spouse, because she happens to be able to maintain herself. The deceased married under a contract of marriage, allowing the wife to keep her own, and yet he insists that she shall virtually give her own to him, in the form of keeping his wife.

"3d, The £240 was not got by succession, but by donation. The word succession may, in one sense, be said to be the same with acquisition, but not in the sense of this contract. 'The deeds' by which she may succeed cannot apply to donations.

"The Lord Ordinary has decided nothing about the part of the second defence, which states that her funds were appropriated to family purposes 'with her full knowledge and consent,' because neither party has yet renounced farther probation as to this fact. This is one of the points, in reference to which he has directed the cause to be enrolled."

The trustees reclaimed, praying the Court

"to recal and alter the foresaid interlocutor, except in so far as it finds 'that the *jus mariti* was not excluded *quoad* the £240 which the pursuer acquired, during the subsistence of the marriage, by donation; to sustain the defences, and assoilzie the defenders from the whole conclusions of the action; or, at all events, to recal the first two findings in the interlocutor complained of, and remit to the accountant, with instructions to prepare a final report; or to do otherwise in the premises as to your Lordships shall seem just."

At advising, several of their Lordships appeared to consider that the finding of the Lord Ordinary, so far as it held that the profits of the wife's separate property should not be applied to family purposes, was premature, and that a presumption rather arose that these profits, arising *stante matrimonio*, where the husband was not taken bound to accumulate for the wife's separate estate, had been used, with the wife's consent, in the family; and that the *onus*, instead of being on the husband's representatives, lay on the wife to show that it was otherwise. Lord Moncreiff was understood to be of opinion that the interlocutor was right, and that the *jus mariti* was excluded, both as to principal sums and as to profits.

The Court pronounced the following interlocutor:

"Adhere to the first finding in the interlocutor of the Lord Ordinary, and to that extent refuse the prayer of the reclaiming note; recal the second finding, and remit to the Lord Ordinary to hear parties as to the rules and presumptions of law respecting those parts of the annual profits of the pursuer's separate estate, drawn by the husband during the subsistence of the marriage, and used and consumed in the maintenance of the family while the spouses lived together, and also to the relevancy and effect of any offer of proof which may be made by either party

of their respective averments, with power to his Lordship to proceed farther in the determination of the cause as to his Lordship shall seem fit, reserving all questions of expenses."

Authorities.—Aston, 1 Vesey, senior, p. 267. Bett's Sup. to Vesey, senior, 8 Bly., p. 224; 16 Vesey, junior, p. 126.

Lord Ordinary Cockburn, for Jeffrey.—Act. Dean of Faculty (Wood); A. Dunlop, W.S., Agent.—Alt. Solicitor-General (McNeill), T. Mackenzie; T. Duun, S.S.C., Agent.—F. Clerk.—[G.D.F.]

SECOND DIVISION.—(G. D. F.)

* No. 207.—JOHN STIRLING and ARCHIBALD LORD DOUGLAS, Pursuers, v. ROBERT EWART, Defender.

Superior and Vassal.—Casualties of Superiority.—Entry of Heirs and Singular Successors.—Relief.—Composition.—Succession.—Entail.—Construction.—Charter of Resignation.—A fee-simple proprietor entailed his estate on A, B, and C, neither of whom were heirs of line to the entailor, nor were they related by blood in any degree whatever to one another. A, the institute, made up titles, and received from the superior a charter of resignation, whereby the lands were conveyed to the same series of heirs, as specially set forth in the entail, and a clause was inserted in the charter, declaring that the granting thereof was not to exclude the superior and his successors from any claim they had at law to a full year's rent of the subjects, "whenever the heirs of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered and infeft." On his entry the institute paid a composition to the superior of a full year's rent as a singular successor. After his death, and also that of B, who had entered with the superior in the lands, the succession opened to C, who was not the heir of line of B, the vassal last infeft.—Held by a majority of the whole Court, that the superior was bound to enter C as an heir of the investiture, on payment of the ordinary casualty of relief exigible from an heir: The ground of decision apparently being, that the superior having received the composition of a full year's rent, on the change of investiture, from the first member of entail, he had thereby recognised the entail as the investiture, and was bound throughout to deal with, and give effect to the destination in it, as the rule of the investiture in regard to succession; and consequently to receive the whole series of substitute heirs, without distinction of one from another, as the line of succession opened to each in the express character, and as entitled to all the privileges and rights of heirs of the investiture.

The late Miss Grizel Ewart, who was a fee-simple proprietor, executed an entail of her lands of Allershaw on

"William Cosnar, my second cousin, residing at Middlegill, in the parish of Moffat, and the heirs-male lawfully to be procreated of his body, in fee; whom failing, to David Williamson, Esq., advocate" (afterwards Lord Balgray), "and the heirs-male lawfully to be procreated of his body; whom failing, to the heirs whomsoever to be lawfully procreated of his body; whom failing, to Robert Ewart, grandson of Dr Robert Ewart, physician in Jamaica, my brother, and the heirs-male lawfully to be procreated of the body of the said Robert Ewart, my grandnephew; whom failing, to any person or persons to be named and appointed in any nomination or other writing to be granted by me at any time of my life."

The tenendas and reddendo clauses were expressed as follows:

"To be holden, the lands and others above disposed, of me, my heirs and successors, immediate lawful superiors thereof, for the yearly payment of the sum of eighteen merks Scots money, at two terms in the year, Whitsunday and Martinmas, by equal portions, in name of feu-farm, as a proportional part corresponding to the said lands of the sum of twenty merks, formerly

* Omitted of its proper date, 14th February 1842.

in use to be paid for the said lands, and for the foresaid two-merk land of Whiteholm, and for the double of the said feu-farm duty the first year of the entry of each heir to the said lands, as use is of feu-farm, with this special provision, that the non-payment of the said feu-farm duty for the space of two, three, or more terms running into one, without payment being made, shall be no cause of reduction or nullity of the foresaid feu-farm grant alienarily, but it shall be lawful for me, the said William Stirling, and my successors, to poind the readiest moveable goods upon the said lands for the said feu-farm duties, and failing these, to appreciate and adjudge the ground-right and property of the said lands to the amount of the said feu-farm duty and double thereof due for the time; and likewise the said William Ewart, and his foresaids, attending at all the courts to be held within the lordship or barony of Crawford-Douglas when required thereto, and these for all other burden, exaction, demand, or secular service whatever."

Cossar the institute, on the death of the entailor, made up a title to the lands by resigning on the procuratory, and he thereafter obtained a charter of resignation from the then superior, which conveyed the estate to Cossar and the series of heirs, as specially described in the procuratory and deed of entail. The precept of seisin, in the charter of resignation, contained the following clause:

"Saving always our own" (the superior's) "right, and the right of every other person as accords, and declaring that by granting these presents, we shall not exclude ourselves, or our heirs and successors, from any claim which we or they may have at law to a full year's rent of the lands herein contained, whenever the heirs of entail to whom the succession shall open shall happen not to be the heirs of line of the person who was last entered and infest by us or our foresaids."

On his entry, Cossar, who was not heir of line to the entailor, paid a full year's rent of the estate, viz., £486, to the superior as a singular successor. The institute having died without leaving heirs-male, the estate fell to Lord Balgray, and his Lordship made up a title by infestment on the open precept contained in the charter of resignation; and on his death, without issue, the succession opened to the defender, who was the eldest son of the Robert Ewart designed in the entail, and he was accordingly served heir of tailzie and provision to Lord Balgray, to whom, however, the defender was not related by blood in any degree whatsoever.

A question now arose as to the terms on which the defender was entitled to demand an entry with the superiors, the pursuers; who insisted in the present case for their respective interests of liferent and fee in the superiority. The latter maintained that the defender was bound to enter as a singular successor, and to pay a composition of a full year's rent; while the defender insisted that he was entitled to an entry as an heir, and was merely bound, in terms of the tenendas and reddendo in the charter, to pay a duplicand of the yearly feu-duty of 18 merks Scots. The present action of declarator of non-entry was therefore brought for the purpose of determining the question.

The pursuer argued—That at one time, according to practice in feu-holdings, no vassal could be forced upon a superior, if he was not the heir of the person in the investiture; and any other wishing to enter could only do so on the terms and conditions prescribed by the superior. Though this practice had been departed from, and modified by Statute to a certain extent, feu-holdings were still to be considered as of *stricti juris* interpretation, so that a feu could not be altered or

affected by the act of the donee alone. By certain Statutes (1469, c. 36, 1669, c. 18, 1681, c. 17, 1690, c. 20,) it had come to be provided that superiors should receive creditors, and enter them as vassals; and the principle of feus had further been encroached on by the 20th Geo. II. c. 50, which provided, that any one holding a conveyance containing a procuratory of resignation, might force an entry by horning against a superior, but reserving to the superior right to payment of the relief due by heirs, and the payment of one year's full rent of the subjects, as composition by a stranger demanding an entry. The Statute 1685, c. 22, as to entails, did not directly limit the rights of superiors as to their casualties. The leading object of that Statute was to authorise clauses against alienation, without reference to the terms of entry with superiors; and as regarded them, it provided that nothing in that Act should prejudice superiors of the casualties arising out of the tailzied fee. Indirectly it limited the rights of superiors by compelling them to recognise a destination to perpetuity, which, as the old law stood, could not have been the case, without the united act of superior and vassal. Still, however, the superiors' rights of casualty were strictly reserved to them by the Statute. But a superior, though now bound to enter an heir of entail, was not told in what way it was to be done, for the Statute was silent as to the mode and terms of entry. The Statutes also, which compelled superiors to receive and enter creditors and other singular successors, were equally silent on this point; and accordingly, as neither the Act 1685, nor any previous Statute, interfered with rights of casualty, &c., competent to the superior, and existing at common law prior to such Statutes, they still remained; and these Acts were only passed for certain objects, which they attained without encroaching on the rights of superiors farther than was necessary to carry out their object, and in no way lessened the rights of casualty. According to strict principle, the sum payable by a singular successor, on obtaining an entry as an acknowledgment of vassalage, was held to be a casualty of superiority differing, as to its amount, from the sum payable by an heir as the relief for his entry. The one, as a stranger to the feu, paid a full year's rent of the subjects, while the heirs paid only a duplicand of the yearly feu-duty: Stair, II. 4. Bankton, II. 4. Ross's Lectures, 302. Ersk. II. 5. 1 Bell's Com. 24. Thus, an institute under an entail, who was not heir of line to the vassal last infest, paid composition as a stranger to the feu, and it was impossible to maintain that a party in the situation of the defender, who was not heir of line to the last vassal, could be in any more favourable position: D. of Argyle v. Lord Dunmore, 19th November 1795; M. 15,068. Bell's Com. I. 25. In this case, however, there could be no doubt; for, besides what the pursuer now argued to be the correct principle, viz., that the defender, who was not heir of line to the vassal last infest, should only be entitled to an entry on payment of a year's rent as a composition, the charter, which recognised the entail and destination, expressly provided that an heir in that situation should pay a full year's rent: Lockhart v. Denham, 10th July 1760; M. 15,047. M'Kenzie, 4th July 1777; M. 15,053, and 2 Hailes, 760. Hill v. Merchant Company, 17th January 1815, F.C. D. of Hamilton v. Baillie, 22d

November 1827. *D. of Hamilton v. E. of Hopeton*, 8th March 1839.

The defender *argued*—That it was of no consequence whether he was heir of line to the vassal last infest or not; because, the superior having received payment of the composition of one year's rent from Cossar, the institute, and by granting the charter of resignation to the series of heirs in the entail, was bound to deal with the entail as the investiture, and the destination contained in it as the rule of the investiture throughout; and accordingly, that having received the heirs there mentioned as heirs, they were entitled to all the rights and privileges of heirs of investiture, whether related or not to one another; consequently, as the defender was one of those heirs of investiture, he was entitled to an entry on payment of the usual casualty of relief from an heir: *Stair*, II. 3, 12; II. 4, 6; and II. 4, 32. *Ersk.* II. 3, 18; II. 5, 47; II. 7, 5. The saving clause in the charter could not receive effect, for a clause of precisely a similar nature occurred in the case of *Lockhart v. Denholm*, M. 15,047, which the Court overruled; and the superior there, as in this case, had recognised the party as an heir by granting a charter recognising the entail. Neither was the party in that case heir of line to the vassal last infest; and the ground of the judgment seemed also to be, that the claim of a year's rent was not exigible at common law by the superior; and accordingly, as that was not the case, and the entail itself, which was confirmed by the superior, did not warrant it, the superior had no right to insist for it after he had granted a charter of resignation according to its terms and conditions. Relief was the casualty proper to a renewal of the investiture already acknowledged by the superior. Composition was due where the entry was compulsory under the Statutes: *Stair*, II. 4, 32.

The Lord Ordinary appended the following note to his interlocutor making *avizandum* with the case to the Court:

"The Lord Ordinary reports this case as involving a question long agitated between superiors and heirs of entail, and which is now prepared for the consideration of the Court, on papers of great research and ingenuity.

"The pursuers are undoubtedly superiors of the estate of Allershaw. This estate belonged in property to Miss Ewart, who, in 1802, executed an entail, whereby she destined it under strict fetters, *first*, to William Cossar and the heirs-male of his body; whom failing, to the late Lord Balgray and the heirs of his body; whom failing, to the defender, Robert Ewart, and his heirs-male.

"Miss Ewart died in 1811, and was first succeeded by Mr Cossar, who got a charter in 1813 from the superior; but as he was neither heir-male nor heir of law of Miss Ewart, Cossar paid a full year's rent for his entry. The charter was qualified with the *reservation*, inserted, it is believed, for upwards of half a century in the greater part of tailzied fees, that the superior, by the grant then made, should not be excluded from any claim 'which we or our forefathers may have at law to a full year's rent of the lands herein contained, whenever the heirs of entail to whom the succession shall open, shall happen not to be heirs of line of the person last entered and infest by us and our forefathers.'

"Mr Cossar did not take infestment on his charter, and having died in 1817, Lord Balgray was infest on the precept still unexhausted in the first charter. On Lord Balgray's death, without issue, in 1837, the succession under the tailzie opened to the present defender. It is admitted that the defender is not an heir of line, nor in any way lawfully connected either with Lord Balgray, or even with the entailer Miss Ewart.

"In these circumstances, the tailzied fee having become vacant, and the succession having opened to a stranger heir and dispoonee, the question arises, whether the superiors are entitled to demand a casualty of a full year's rent from the defender? It is not a little remarkable that the present should be the first instance in which this question has been presented, free from any specialty, for the consideration of the Court, since the well-known case of *Lockhart and Denham* in 1760. Now that it has occurred, it is entitled, from its importance in practice, to the most deliberate consideration.

"On a deliberate consideration of the whole case, the Lord Ordinary must own that he finds it difficult to resist the argument of the defender, and the various authorities by which it is supported. That, indeed, appears to be founded chiefly on the view of the same question taken by Lord Corehouse, in a very learned note attached to his interlocutor in the case of the Duke of Hamilton *against* Baillie, reported in 1827 (6 Shaw, p. 94), though a specialty occurred in that case sufficient for the disposal of the superior's claim, his Lordship delivered his opinion on the abstract question as to the superior's claim in general, under a tailzied investiture, in terms which showed that he had very anxiously considered the point. The views briefly indicated in that valuable note, are elaborately enforced in the revised case for the defender, the fullness and length of which are amply atoned for by the able and satisfactory exposition of the argument and authorities that it contains. The Lord Ordinary shall now explain, as shortly as the nature of the question admits of, the grounds on which he has come to the conclusion that the defender's plea is well founded in law.

"It does not seem necessary in the present inquiry to enter into any disquisition on the original or early history of feus. Although the general tradition is probably correct, that feus were originally granted by military adventurers to their followers, at first for life only, and afterwards to their heirs-male, it is notorious that with us, feus have for many centuries been descendible to heirs whatsoever. *Reg. Majest.*, B. II. sec. 25, &c. &c.

"When rights of property became thus fixed and inheritable, the superior was of course obliged to enter the heir of the investiture on payment of the ordinary relief duty. Hope, in his *Minor Practicks* (tit. 4, sec. 21), describes the course which was competent to the heirs of vassals to compel subject-superiors to give this entry. A *retour* was expedite, after which a precept issued from Chancery to compel the superior to enter the heir, and if he refused, the vassal was entitled to apply to the Crown for an entry.

"While these provisions, however, were early fallen upon for securing the descent of feus to the heirs of the vassal, the superiors had influence to preserve in force restraints on the alienation and transmission of land altogether prejudicial to the improvement and prosperity of the country. Although these limitations evidently arose from the original destination and purpose of feus, the reason for them ceased when these became hereditary in the families of vassals; but as their maintenance increased the casualties exigible by superiors, it is not extraordinary that they were continued in the earlier periods of our legislation, when the interests of commerce were of little importance and ill understood. But at length, in 1469, the Statute was passed allowing land to be comprised by creditors for debt, and obliging superiors to give an entry to the appraisers for payment of a year's rent. This (as explained in the *Minor Practicks*, tit. v. sec. 16,) indirectly enabled purchasers to change the old investiture and to complete their title, because they always had it in their power to comprise the lands for the price, and so to bring their case under the Statute. It is true that superiors had an option, by the Act 1469, to take back the feu on paying the whole debts of the vassal; but when the debts were large, or where the price was adequate, a superior had no object, and often was not able to exercise the option. In practice it does not appear ever to have formed any serious obstacle in the attachment and transmission of land, when appraisers were willing to account fairly to the superiors for the year's rent.

"When creditors or purchasers raised and obtained a comprising under this Statute, it is supposed that they could competently assign it to such persons, or their heirs and assignees,

as they chose. No authority is to be found for holding that a new vassal appriser could not make the new investiture in favour of such persons as he chose. More especially, there appears to be no example of the superior being entitled to name the heir of an appriser, and no principle of law was in force in the fifteenth century, or after it, establishing that apprisers could be limited in the selection of their heirs, or forced to take a charter to heirs whatsoever instead of heirs-male, or to the latter instead of heirs of provision voluntarily selected by him. The contrary is strongly indicated by Stair, B. II. t. 3, sec. 43.

"It is true that the remedies and rights of *creditors* and *purchasers* apprising do not apply to the case of stranger heirs claiming under *mortis causa* settlements and tailzies of a deceased fiar. But it is probable that such settlements, without some arrangement and agreement with superiors, were not of very frequent occurrence for many years after 1469. It was only in 1540 that the practice of authenticating deeds by seal, without the subscription of the party, was abolished, which shows that skill in writing was not before very generally diffused; and though it certainly appears from Balfour's Practicks (finished about 1580), that *tailzies* or destinations of a certain description were known in his time, the inference deducible from what he says is, that superiors, in general and in practice, accepted of new heirs without any hard exaction—probably from the consideration that the casualties payable by a new set of heirs would be as lucrative to the superior as the casualties from the old series.

"But, as the country advanced, the Supreme Court assumed such powers as were necessary to give effect, as far as possible, to all rights of property. Hence the process of adjudication before this Court seems to have been introduced at an early period, by *usage* alone, without the authority of any Statute. Accordingly, the Statute 1621, cap. 7, refers to adjudications against heirs lying out for debt, as a proceeding then in common use in the Supreme Court; and it gives all co-creditors of the proprietor, as well as to the first adjudger, a right to redeem or require possession in the order of their adjudications. At the same time, this process before the Supreme Court was not limited, even at an early period, to adjudications for debt, but came to be sanctioned for the enforcement of irredeemable conveyances. The earliest example of such an adjudication seems to be the case of Johnston v. Carmichael in 1611, mentioned by Lord Stair, in treating of dispositions (B. III., t. 2, sec. 53), and various other cases occurred soon after, as appears from the Dictionary (p. 54, *voce* Adjudications), in which the Court gave decrees of adjudication in favour of parties holding absolute and irredeemable conveyances to lands. Accordingly, at the time that Sir George M'Kenzie wrote his Institutions, he mentions adjudications as in general use before the Supreme Court, and especially refers to adjudication in *implement* for making dispositions effectual; and adds, that 'the Lords will adjudge the lands disposed to belong to the pursuer a *remedium extraordinarium*, there being no other remedy competent. This adjudication extends no farther than to the thing disposed, and *hath no reversion*.'—Institutions, B. II. t. 1, sec. 2.

"In that way, stranger disponees and heirs of provision had a compulsitor for obtaining infeftment from superiors, without being liable even for a year's rent, by giving them a charge to enter disponees on decrees of adjudication taken before this Court; and as the Act 1469 applied only to parties following the ancient course of *apprising* before the Sheriff, and not to adjudgers before this Court, the superiors for a long time had no authority for exacting a year's rent. This, however, was remedied by the Act 1669, c. 18, which declared, that superiors should be entitled to a year's rent for entry of all adjudgers as well as apprisers; and from that period, adjudication, both for debt and in *implement*, before the Court of Session, as well as *creditors* and *purchasers* apprising under the old form, were held liable for a year's rent and no more. This is clearly stated by Lord Stair as the rule, when his Institutions were first published in 1681. As he says (B. II. tit. 4, sec. 32),—'The Statute (1469) was by custom extended to adjudications, being the same in effect, but different in form from apprisings; for the design of the Statute being to satisfy creditors by judi-

cial alienation of the debtor's lands *ex paritate rationis*, it was extended against the debtor's appearand heir, who being charged to enter heir, did not enter; and therefore lands were adjudged from him, to which he might have entered, either for his predecessor's debt or his own; whereupon the superior is decerned to receive the creditors-adjudgers, whether for sums of money, or for *implement of dispositions and obligements to infeft*.' 'But the custom allowed not a year's rent to superiors for receiving adjudgers, 21st July 1636, Grier, till the year's rent was also extended to adjudications by Act of Parliament, Dec. 3, 1669,'—See first edition of Stair, Vol. I. p. 305.

"Thus, in practice, all vassals were enabled, long before 1685, to change the old investiture of their estates, and to establish a new investiture under the superior, by paying him a year's rent. That high composition was the utmost extent of the superior's claim for changing the investiture, and there is no indication in any of our authorities, that superiors, after the rights of property and inheritance were well understood, had any control over vassals in the destinations they made, or in the number of substitutions under which they chose to settle their fees. The limitation necessarily imposed on vassals consisted in this, that substitutions (which truly are special assignments) fell all to be fixed *before infeftment*.—See Stair, B. II. t. 3, sec. 5.

"Indeed, the ancient custom and the right of vassals to alter subsisting destinations and tailzies, and to make new ones, is mentioned very clearly by Balfour in a chapter before referred to (pp. 173, 174.) It is well known, also, that the same doctrine has been confirmed by more recent cases of unquestionable authority, as in those of Captain Johnstone *against* the Marquis of Annandale in 1759 (Dict. p. 4356), and in that of the Magistrates of Aberdeen *against* Burnett in 1808 (App., *voce* Superior and Vassal, No. 5), both referred to in the papers in the present case. And therefore, when a fee was once settled, and an entry given for the usual composition under a new investiture, the substitutes became heirs of provision, and in fact *members of the investiture*, and the superior could demand no more for the entry of any succeeding substitute than the ordinary relief duty exigible from heirs of investiture.

"These views are not inconsistent with the doctrine of Craig and others, that tailzies could only be made with *consent of the superior*. In one sense this was correct. Heirs of tailzie not *alioqui successuri*, certainly could not demand an entry as *ordinary heirs*, without the consent of the superior. But some time elapsed in the early history of the law, before the operation and effect of the process of adjudication, whereby heirs of provision and disponees could compel an entry from the superior, under a new institution, on an absolute and irredeemable disposition, were well ascertained. Craig (whose treatise was published in 1692,) expressly states that that process was unknown to his predecessors; and Lord Stair observes (B. III. t. 2, sec. 45), that 'adjudications being but recent in his (Craig's) time, and few decisions thereupon, the nature and effect of it was but little known, but is now in course of time farther illustrated.' When it was afterwards found, therefore, that adjudgers had it in their power to obtain an entry by payment of a year's rent, it is not strictly correct to say that a tailzie could not, at least *by due process at law*, be made effectual without the consent of the superior. Indeed, the competency of an adjudication by heirs of tailzie is distinctly explained by Lord Stair (B. II. t. 3, sec. 43).

"The Act 1685, giving validity to entails, certainly did not extend the rights of superiors. The object of it was to secure and render permanent the tailzied destinations in previous use, by giving effect to prohibitory, irritant and resolute clauses; but while it declared that superiors *should not be prejudged* of their casualties, it did not enact that any new casualties should be leviable from heirs of tailzie, which could not have been demanded from heirs of investiture according to the former practice.

"It would appear, however, that superiors and their agents, very soon after 1685, took up the notion that they might set up a claim for a composition from every substitute of tailzie who was not heir-at-law of the preceding possessor of the estate. Accordingly, a clause to that effect was inserted in a charter granted soon after 1711, by Mr Lockhart of Carnwath

to Sir Archibald Denham of Westshiel (the first substitute under the tailzie), though on every occasion the superior got a composition from the vassal as a singular successor. That charter was reduced on a ground immaterial in the present question; but the next substitute, Sir Robert Denham, got a new charter in the same terms—the superior being allowed to retain the *old composition*. Then, when a third renewal of the investiture was required in 1760, in favour of the substitute who then succeeded, he not being the heir *aliouqui successurus*, the superior demanded a second composition, which the Court repelled, 'in respect the pursuer had acknowledged the entail by granting charter and infeftment thereon to the late Sir Robert Denham.'

"It rather appears to the Lord Ordinary, that the real meaning of the Court in the preceding decision has been sometimes misunderstood, perhaps because the *ratio* set forth in the interlocutor is not expressed with due accuracy and precision. It is not easy to understand how a superior could be said to have acknowledged an entail, merely by granting a charter containing the very express reservation, which appears on the face of both the charters in the Westshiel's case; but when it is attended to that the superior had, prior to granting the first charter, received the *composition of a singular successor* for the entry and acknowledgment of the first heir under the tailzie, he was thus properly barred from claiming a new composition from a succeeding heir of the *investiture*, which he had already acknowledged for the highest legal consideration that the law gave him a right to exact. In other words, he had acknowledged the entail for an onerous consideration; and no reservation could give him any farther claim, as it was on its face a reservation of a demand plainly illegal and unjust, and not effectual against heirs of entail, as they did not represent the party who had acquiesced in its insertion in the primary charter. In that view, the case of Denham is an authority decisively in favour of the defender in the present case.

"It is obvious, also, that the late cases are not opposed to the preceding decision. In the case of *M'Kenzie* in 1777, the heir of entail who demanded an entry, being the heir *aliouqui successurus* of the party deceased, refused to pay the composition of a singular successor; and the Court held that he was entitled to an entry for the ordinary relief duty of an heir, 'reserving to the superior and his successors in the superiority, any right which they may have to a year's rent on the entry of any future heir of tailzie not an heir of investiture prior to the tailzie.' It is almost implied in this reservation, that the payment of a composition by any substitute of entail as a singular successor, would exhaust the claim of the superior, as the tailzied destination would then be acknowledged by him for the legal consideration exigible on a change of investiture. Accordingly, in the deliberations on the bench, in *M'Kenzie's* case, Lord Braxfield made this important observation, that 'the granting of the first charter is an enfranchisement of all the subsequent dispoonees.'

"The case of the *Duke of Argyle v. Lord Dunmore* in 1798 (Dict. p. 15,068), was certainly different from the preceding; for there the institute of tailzie who demanded an entry was confessedly a *singular successor*; and having offered the year's rent, he was entitled, according to the view of the law now taken, to insist on an unqualified entry of the whole tailzied destination; but as Lord Dunmore, who then demanded an entry, had a family of his own to succeed him, he was probably advised that the superior's contingent claim might never arise, and therefore he declined to try the question, farther than to insist on the superior's future claim being *reserved*, in case it should ever emerge; and the Court found that the superior was not entitled to demand more at that time, in consequence of which the determination of the question which here occurs was of course superseded.

"The late case of the *Duke of Hamilton against Lord Hope-toun* (8th March 1839), is also referred to in the present question; and certainly there are some expressions in the opinion of the consulted Judges in that report, which at first sight might afford an inference in favour of the superior's argument here; but truly the plea now raised was altogether unnecessary in that instance. The superior had granted a charter in the ordinary terms to a purchaser, and his heirs and assignees. No

special substitution was set forth in the charter; but the vassal having got the charter in the preceding general terms, assigned it, in his son's contract of marriage, to his heirs-male and other heirs of tailzie, excluding heirs of line. As the superior was not a party to the assignation, it was contended that he had given no consent to the new investiture, and was not bound to give a new investiture under it without a new composition. But it was held sufficient for the determination of the case to state, that in any view of a superior's rights, a purchaser was entitled to substitute all his own heirs in any order he chose, without the superior's consent. The question, whether he could not have insisted on a new investiture being granted to any series of heirs of provision he chose to substitute, at the very time the charter was taken out, was of course not decided by the Court, but was reserved for consideration when the case should occur.

"Now, however, that the question arises under circumstances which render its decision unavoidable, the Lord Ordinary, on the grounds already detailed (perhaps at too much length), is humbly of opinion, that the superior having already received a composition for the entry of the first dispoonee under the present tailzie, and having thereby acknowledged the entail for an onerous cause, is bound to enter the defender as an heir of the subsisting investiture, for the ordinary relief exigible from an heir.

"The Lord Ordinary has the less hesitation in coming to this conclusion, when it coincides so entirely with the opinion expressed by Lord Corehouse in the case of *Baillie* in 1827, before referred to. His Lordship remarked, most properly in that case, that if superiors were entitled to a casualty in every transmission of a tailzied fee to a stranger substitute, 'it would make a tailzie greatly more preferable to a superior than a fee-simple.' It may be added, that when a proprietor, by following out implicitly the directions of the Act 1685, may make the tailzied fee perpetual in his own family, or to his own kindred, by a destination to the vassal, and his heirs whatsoever, always secluding heirs-portioners, it is very difficult to see how the condition of the superior can be made worse by any special substitution of stranger heirs, any more than it would have been by the perpetual inheritance of the heirs at law.

"It deserves notice, also, that the Act of Geo. II. enabled vassals to change their old investitures, by executing procuratories of resignation in favour of such dispoonees as they thought proper, on which they were entitled to give a charge to the superior to enter them on payment of the customary casualties exigible from the heir or purchaser. If the charge was in favour of a singular successor, and a specified series of substitutes in *fee-simple*, it never was supposed that the superior could object or claim a new composition from any of the substitutes allowed to succeed under a simple destination unenclosed with irritant and resolute clauses. There appears to be no pretence for such a claim under the ancient law of Scotland. Is the claim, then, the more maintainable that the institute under a tailzied investiture, purchased from the superior, has succeeded by the protection of irritant and resolute clauses? There appears to be no room for any distinction.

"This certainly raises the question suggested towards the close of Lord Corehouse's note in *Baillie's* case, whether the superior is not entitled to 'an equivalent for admitting a condition into the charter which destroys the chances of singular succession in future.' While his Lordship most naturally adds, 'that it is very difficult to put a value on that chance.' It humbly appears to the Lord Ordinary, that any claim of the superior on this ground is altogether inadmissible and contrary to principle. It is established by the writings of all the great lawyers of the seventeenth century (including Hope, *M'Kenzie* and *Stair*), that tailzies, at least with prohibitory clauses, and often with irritant and resolute clauses, were known long before 1685. These conditions laid the vassals under a certain obligation, in honesty and good faith, to respect the tailzie, and they were effectual against gratuitous alienation, though possibly not sufficient to exclude the claims of creditors; the superior was also bound to insert these prohibitions in his charter, —it being remarked by Lord Braxfield in *M'Kenzie's* case, that a superior 'was always obliged to grant a charter with *prohibitory clauses*.' This being the case, it would be alike anomalous

lous and unusual to give superiors a compensation to any extent, merely because a law was passed making prohibitions long sanctioned, and held obligatory *inter hæredes*, more operative and secure,—it being quite clear that vassals were previously entitled to frame such prohibitions, and that superiors *ab antiquo* were bound to repeat them in their charters. Indeed, when an investiture of old was once established under a superior, the principle and bearing of the feudal system was, rather to retain the vassal and to maintain the rule *de non aliendo*, than to enable the superior to make a profit by its violation.

"This point was briefly adverted to in the opinion delivered by the Judges in the late case of the Duke of Hamilton against Lord Hopetoun, already referred to. The consulted Judges stated, that they were 'not aware of any ground on which a superior can be held bound to admit clauses irritant and resolute into the investiture on payment of a composition or casualty of one year's rent, or on which he can claim such a casualty on account of having admitted such clauses.' But it was added, that the claim of the superior on that ground was excluded by the form of that action, and if so, it is equally incompetent in the present case.

"In every view, therefore, if the Lord Ordinary had given his own decision in this case, he would have been disposed to sustain the pleas of the defender."

The case was in the roll for advising on 26th May 1840, but the Court,

"in respect of the general importance of the question raised in this cause, and of the opinions of the whole Judges consulted in the late case between the Duke of Hamilton and the Earl of Hopetoun, ordain the cases for the parties to be laid before the whole Judges of both Divisions and permanent Lords Ordinary, for their opinion thereon."

The following opinion (concurring in by Lord Cockburn and Lord Murray) was returned by Lord Ivory:

"We are of opinion that the pursuer is bound to enter the defender upon the terms offered by the latter, viz., on payment of a year's *feu-duty* in name of relief, as in the ordinary case of the entry of an heir; and that he is not entitled to demand a year's rent in name of composition, as in the case of the entry of a singular successor.

"We come to this conclusion upon the general ground, that where the superior, as in the present case, has already received, upon the change of investiture, the composition of a year's rent at the entry of the first member of entail not being heir of the previous investiture, he is bound throughout to deal with the entail as the existing investiture of the estate, and to carry out and give effect to the destination therein contained, as the rule of that investiture in regard to succession,—and consequently, to receive the whole series of substitute heirs (without distinction of one from another), as the line of succession thus fixed respectively opens to each in the express character, and as entitled to all the privileges and rights of heirs of the investiture.

"In other words, we adopt unqualifiedly the doctrine of *Erskine* (II. 7. 7), as a correct statement of the rule of law applicable to this question, that 'though singular successors, whether adjudgers or voluntary purchasers, are liable in payment of a year's rent to the superior for changing the former investiture; yet, where a proprietor entails his lands, the superior is not entitled to the composition of a year's rent from every successive heir of entail who is not heir of line to him who stood last infest, on pretence that he is a singular successor. The heir of the last investiture cannot be called a singular successor, and he is founded in a right to demand an entry, upon payment to the superior of the sum due to him by law in name of relief, upon the entry of an heir.'

"Accordingly, had it not been for the clause of reservation, which the superior in the present case inserted in his charter of resignation, it is altogether indisputable that every successive heir of entail, whether heir of line to him who stood last infest or not, must have been received and entered upon this footing. The pursuer himself concedes this. It was for the express purpose of avoiding such a result that the clause of reservation was resorted to. And it had been the same in all the former cases: For example,

"In *Lockhart v. Denham* 10th July 1760, (Dict. 15,047), the Court, even in the face of an express clause, which, if the report be correctly stated, had been embodied in the charter, 'that every heir of entail shall be obliged to pay a year's rent for his entry, unless he be at the same time heir of line to the person who died last vest and seised': 'Found, that in respect the pursuer had acknowledged the entail by granting charter and infestment thereon, he was obliged to enter the defender as heir of entail, and not as singular successor.'

"So, in *M'Kenzie v. M'Kenzie*, 4th July 1777, (Dict. v. Superior and Vassal, Appendix, No. II.), the Court doubting, it is true, whether the judgment in *Lockhart's* case might not perhaps have gone too far in refusing effect to the clause just quoted (which, in one sense, it might be contended, was made a positive condition of the new investiture, and as such, while it remained unreduced, ought to have received effect against all claiming right through that investiture), had still no hesitation as to the general doctrine,—That were the entail once to be embodied in any charter to be granted by the superior, without some express clause qualifying this recognition, and reserving the superior's rights, the whole series of substitute heirs—no matter how much strangers in blood to each other—must become from that moment heirs of the investiture, and qua such would be entitled to an entry, not as singular successors, but as heirs. In point of fact, in this case nothing was decided; and in order to solve the difficulty, the question was kept open for future discussion. But a reservation—saving the legal rights of both superior and vassal—was inserted in the judgment, just because the Court felt that otherwise an unqualified charter would, by force of the law itself, 'entitle a stranger to enter without paying a composition.' Indeed, nothing can be more instructive on this head than the words of *Brazfield*, as they are reported by *Hailes*. 'QUERY—May not the superior throw in a reservation? If he does not, he cannot afterwards claim; for the granting of the first charter is the enfranchisement of all the subsequent dispoonees.'

"The case of *Duke of Argyle v. Earl of Dunmore*, 19th November 1795, (Dict. 15,068), is to the same effect. The superior there insisted, that it should be made an absolute condition of the entail-investiture, 'that he should not be obliged to enter such of the substitutes as were not heirs-male or of line to the vassal last entered and infest, without receiving a year's rent from them as singular successors also; and he did this, 'because' as he argued, 'after acknowledging an entail, by granting a charter upon it, although it contained the reservation proposed by the defender' (one similar to that in *M'Kenzie's* case), 'he would be precluded from making his present claim.' But the Court refused what the superior thus demanded; and in respect the reservation proposed by the vassal leaves the question entire when it shall occur,—ordained the charter to be given upon that footing.

"At last the precise question occurred under a charter which had been granted, without any special clause either of reservation or obligation in the superior's favour; *D. Hamilton v. Baillie*, 22d November 1827, (6 S. and D., 84). The superior endeavoured to shake himself rid of the implied recognition, by pleading that the charter had been granted a *non habente potestatem* to that effect, and that he did not represent the grantor; but this again was met by the answer, that the investiture had since stood unchallenged for more than forty years, and so was fortified by prescription;—and the Court had to dispose of the point immediately before it, as if the charter had been validly granted from the first. It was held that the entail having been simpliciter recognised, and embodied into the investiture, the superior—who had 'refused to receive as his vassal a party claiming entry as an heir of entail under the charter—except in the character of singular successor, and on payment of a year's rent,—was bound to enter him as heir.'

"Whether, therefore, the superior may at first refuse to grant a charter embodying a tailzied destination,—or whether, granting it, he may be entitled so to qualify the right, as to leave it open to him afterwards to insist on a departure from the direct lineal line, for all that he might competently have demanded, had he originally refused,—may or may not be made a question. But it is settled law as regards every charter wherein the tailzied destination shall once unqualifiedly have been embodied,—

that under that destination, all are to be received as *heirs*, and that no distinction whatever can be taken among those heirs, as being, some *heirs of line*, and some *strangers* to the vassal last infeft—the investiture alone affording the rule of succession in the face—and all being alike *heirs of the investiture*.

“Without proceeding farther, then, we think this sufficient of itself to expose the whole fallacy of the pursuer’s reasoning, inasmuch as his argument appears to assume throughout, that whoever is not an *heir of line*, must of necessity, in the eye of law, as applied to the constitution and construction of feudal rights, be regarded and dealt with as if he were a *singular successor*. The truth is, that in feudal succession, the very question, who is *heir of line*? can never to any practical effect arise, unless where the *feu-right* itself is conceived in favour of heirs of that class. The essential question always is, who is *heir of the investiture*? Indeed, even where the investiture is in favour of heirs of line, it is only as being heirs of the investiture thus conceived, that the heirs of line themselves succeed.

“Nor is it out of place here to remark, that this view of the matter seems also to dispose of the pursuer’s argument, upon the supposed reservation of the superior’s rights as connected with the present question, contained in the Statute 1685, introducing and authorising strict entails. For, if it were indeed *vi statuti* that the superior’s rights were saved, it could require no special clause of reservation *ex pacto privato* to be engrossed in the tailzied investiture in order to work out that end. In such case, a clause of this kind would be mere supererogation. The entail itself, as it is constituted into a legal right only by force of the Statute, must of necessity have carried the statutory reservation along with it as parcel of the right, if not indeed an express condition of its existence. Since, therefore, the law holds that, notwithstanding the statutory reservation, there is nothing whatever saved to a superior who simply obeys the Statute by giving a charter unqualified in *græmio*, it follows that it is not by force of the Statute, but by force of some express clause embodied in the writ,—in other words, by the positive private stipulation of the parties *inter se*,—that the superior’s rights in this respect are to be saved, if, indeed, he have any legal rights belonging to him in the matter.

“This brings the whole question to the point,—Is or is not the superior entitled to refuse a charter, where the vassal demands an investiture entailing the *feu*?

“In the first place, there is nothing in the mere circumstance of the estate’s being settled under the fetters of a strict entail, which entitles him to refuse. The entail may be fenced in the most effectual manner with all the clauses authorised by the Act 1685, and provided the destination do not extend beyond the body of lineal heirs, the superior has no choice. This the pursuer concedes; and it is the necessary consequence, besides, of all those cases wherein the superior has been ordered to embody the tailzied destination, with no other reservation but one affecting the succession of substitutes, who appear to be *strangers* to the direct line. As laid down by Braxfield in *M’Kenzie’s* case, ‘strip the deed of substitution to *strangers*, and the superior might be obliged to grant a charter, even with prohibitive clauses, &c. The superior does not suffer by the line of succession being continued.’

“Nor is this the case only, where the direct lineal line of succession is preserved. The destination may even be broken in favour of *strangers* to this line,—and still, if the destination thus broken and interrupted in favour of strangers was also the destination of the prior investiture, it may be changed from a fee-simple to a strictly-fenced entail destination,—and (as was substantially decided in *M’Kenzie, supra*) the superior be obliged to grant a charter *in terminis*, and to receive even the stranger substitutes as the *heirs* of investiture, notwithstanding the change effected through the fees being now constituted into a proper tailzied fee.

“But, if it be thus true that the superior’s right of refusal in no respect depends upon the circumstance that the estate has been tied up from future alienation by the fetters of a strict entail, it must be upon some ground wholly apart from the operation of the Statute 1685, that that right, if such indeed there be, must rest. In other words, it must rest upon some ground applicable not less to an ordinary destination in favour of *heirs*

of provision before the Statute, than to the most strictly-fenced and protected destination in favour of *heirs of entail* since.

“This would, indeed, give a very large and indefinite operation to the principle contended for by the pursuers. For it would just come to this, that wherever—no matter whether by strict entail, in fee-simple, or under clauses merely prohibitory, and therefore defeasible at pleasure—the legal order of succession should come to be in the slightest degree broken in upon, the superior might reject the destination as an encroachment on his feudal rights, and refuse a charter.

“It is difficult to conceive that so very broad and wide-spreading a principle as this should have been the law, and a question for the first time come to be stirred in regard to it, under the Statute 1685. Conjunct fees,—destinations to heirs of a marriage,—the succession of heirs of provision generally,—in short, every case where land came to open in favour not of the *hæres natus*, but the *hæres factus*, must equally have raised the question under this more general aspect. But we are not aware of a single instance, among all these classes of cases, where a mere departure in the destination from the direct lineal order of succession was ever set forward as a ground entitling the superior to refuse a charter.

“The principle, indeed, is excluded by that very case of *Duke of Hamilton v. Earl of Hopetoun*, 8th March 1839, with reference mainly to the bearing of which the present consultation has been thought necessary. It was there expressly laid down in the opinions, that, ‘a purchaser of land from the vassal of a subject-superior is entitled, on payment of a casualty, or composition of one year’s rent, to obtain from the superior a new charter, and a precept of sasine of the fee. This charter and precept, we think, he is for that composition entitled to demand, shall be granted in favour of himself and all his heirs of law, in any order of these heirs he pleases, provided only he shall not in this destination go beyond his heirs of law to strangers. He may equally name to the superior, heirs of law simply, or heirs-male, whom failing, heirs-female, or any other arrangement of the body of his heirs of law.’

“It is very true that the opinion thus delivered is qualified by the proviso that the vassal ‘shall not in this destination go beyond his heirs of law to strangers.’ But this, it is thought, must be held to have been introduced merely to save and keep open a case which was not at the moment before the Court. The particular destination there to be dealt with was one which did not go beyond the body of the heirs of law, and it was of course right to confine the judgment to the individual destination on which the question had arisen.

“The important consideration, as regards the judgment actually pronounced, is, that it completely negatives the pursuer’s main position in the present case, viz., that the superior is entitled to refuse a charter, wherever the destination calls the substituted heirs in other than the *direct line of blood*,—and this upon the general principle, that every one who would not take as an *heir* in the common order of law, must of necessity be dealt with as a *singular successor*.

“In this respect, indeed, we can recognise no distinction whatever, in point of principle, between a departure from the legal order of succession within ‘the body of heirs of law,’ and a corresponding departure by going out of that body. If the pursuer be right in his argument, that a substitute heir, who is not heir of line to the last entered vassal, must be held a singular successor, because the destination in such case substantially operates a conveyance from the last heir, and is not in the proper sense to be dealt with as at all a legal succession,—this applies in its full force, wherever the order of law is broken in upon in the least degree. If a father convey to a second or any younger son,—or one of several brothers to a sister,—the donee, in such case, must enter and pay composition as a singular successor, although ‘within the body of the grantor’s heirs of law.’ So, if a father or brother, in the two cases supposed, take a grant to himself in the first instance, whom failing, to the second or other younger son in the first case, or to the sister in the second,—the substitute in this destination could not, of course, though within the general body of heirs of law, take as heir of line to the last entered vassal; and the legal order of succession would just be as much defeated,—and the necessity (but for the destination in the investiture) of a fresh deed of conveyance

to carry the estate over the proper heir of line would just be as palpable,—as if the destination in its second branch had been in favour of a total stranger to the blood. But had this departure from the line of blood been effected by conveyance, instead of being brought about by the operation of the investiture, as a destination once for all, the superior must have had his composition as from a singular successor; and so on to the end, wherever the direct line was at all or to any effect departed from. Now the judgment in Lord Hopetoun's case authoritatively excludes this, in every possible variety of case, but the single one of introducing a stranger. The superior's right, therefore, cannot turn upon the distinction of *heir* and *singular successor* in the sense that the pursuer contends for. Yet, putting aside that distinction, what legal principle is there which discriminates between a singular successor *within* the line of blood, and a singular successor *out of* that line?

"Accordingly, we have the authority of Lord Stair, where he treats of tailzied destinations, such as they were known before the Statute 1685, for holding, that the superior could not protect himself against them by refusing a charter. Indirectly, and by force of adjudication, any destination whatever could be forced upon him. If 'the debt and decret whereupon the same proceeded, be conceived in favour of heirs of tailzie, in that case the appraising or adjudication, and infestment thereon, must be conform' (Stair, II. 3, 43.) And again (§ 59), 'It is a general rule that *quisque est rei sue moderator et arbiter*, every man may dispose of his own at his pleasure, either to take effect in his life, or after his death, and so may provide his lands to what heirs he pleaseth, and may change the succession as oft as he will, which will be completed by resigning from himself and his heirs in the fee, in favour of himself, and such other heirs as he pleaseth to name in the procuratory, whereupon resignation being accepted by a superior, and new infestment granted accordingly, the succession is effectually altered; yea, any obligation to take his lands so holden, will oblige the former heirs to enter, and to denude themselves for implement of that obligation, in favour of the heirs therein expressed; and if the superior refuse to accept the resignation, or to give confirmation, there will follow an adjudication for implement of the disposition, which is ordinary, and thereupon the superior must receive the adjudger; so that the first constitutor of a tailzie, or any heir succeeding to him, may change it at their pleasure.' That this did not mean heirs of tailzie merely within the line of blood, is made clear by another passage a little farther on in the section last quoted, where his Lordship speaks of 'a tailzie of a sum of money, lent in these terms, 'to be paid to the creditor and the heirs of his body; whilks failing, to the father and heirs of his body; whilks failing, to a person named, and his heirs and assignees whatsoever.'

"We are therefore of opinion—1st, That independently of the Statute 1685, the superior was not entitled to refuse a charter, though demanded in favour of heirs of provision, or such tailzied destination generally as the law then recognised; 2d, That the introduction of strict entails by that Statute, made no difference in this respect, the superior not being entitled, where he would otherwise have been compelled to embody the destination in his charter, to refuse doing so merely because of the fetters of entail; and 3d, That from the moment the destination came thus to be embodied in the charter, and thereby became the rule of that investiture *quoad* the succession, every substitute within the destination became thenceforth an heir of the investiture, and as such, whether heir of line of the last entered vassal or not, was in all cases alike entitled to an entry, not upon payment of composition as a singular successor, but upon payment of relief merely, as in the case of a proper heir."

Lord Cuninghame :

"I concur in all the views expressed by Lord Ivory on this question; and beg to add, that it humbly appears to me that his Lordship has obviated satisfactorily the argument founded on the reservation of the superior's rights, inserted in the charter granted to the first vassal, who was entered under the present tailzie, after the form suggested by Lord Braxfield in the case of M'Kenzie, and allowed by the Court in the case of Argyle, and adopted in practice in other modern instances.

"It is clear, as observed by Lord Ivory, that such a clause cannot have any other or more extensive effect than to reserve the rights of the superior, as they stand reserved by the saving clause at the end of the Act 1685, which provided, that 'nothing in this Act shall prejudice his Majesty, or any other lawful superior, of the casualties of superiority which may arise to them out of the tailzied lands.'

"This reservation it is thought imported no more than a saving of such rights as superiors had prior to the Act. No new right was given to superiors. Their subsisting and ancient right, as it existed before the passing of the Statute, was recognised. But the whole authorities prior to 1685 concur in declaring, that old vassals could at that time, by adjudication, if not by the acceptance of the voluntary composition by the superior, establish the validity of any new investiture he chose to make of the fee, by paying a year's rent to the superior. Still, in order to preserve that casualty, the reservation at the close of the Act 1685 was proper. As tailzied investitures were then expressly sanctioned and declared to be effectual by Statute, a plea might possibly have been set up, that superiors were bound to acknowledge tailzied investitures even when the first entry under them was demanded, without payment of the casualty previously exigible. The reservation in the Act 1685, effectually excluded that plea. But when no new additional privilege or casualty was given to superiors by the Statute, it follows that they were not entitled to demand more subsequent to 1685, than they could have legally exacted by the previous law and practice, for the entry of heirs under tailzied substitutions and investitures."

Lord Mackenzie :

"I think that the pursuer is entitled to demand from the defender a year's rent, as for the entry of a singular successor. The clause of reservation prevents the defender from founding on the rule, that all destinies of investiture must be admitted to enter as heirs,—a rule which in itself I fully recognise, but which is excluded from governing this case, which depends on the general question, whether a superior in landed property is bound, on offer of one year's rent, to grant new infestment to a disponee or singular successor of the vassal, with a destination of heirs of investiture, including not only all the heirs of law of the disponee, but including as many strangers as the disponee chooses to have made heirs of investiture in the fee by the act of the superior. Now that question, I think (though not without difficulty), must be answered in the negative.

"The general rule of feudal law in Scotland was, that a superior could not be forced to admit into a feu any persons but the heirs of the vassal to whom he had given infestment. By the Statute 1469, c. 36, an appriser got right to demand from the superior infestment in the feu on payment of one year's rent. And so purchasers of the estate were enabled to force an entry by becoming apprisers. Nothing is said in the Statute regarding the heirs of the appriser; but by fair interpretation, it was evident that the appriser or purchaser must obtain infestment to himself and heirs, not in liferent only, but in heritage. But there exists not in the Statute the least shadow of foundation for holding that the appriser or purchaser, on payment of one year's rent, had right to demand from the superior infestment in favour, not only of himself and all his heirs, but of other persons who were not his heirs at all, but wholly strangers to his blood. By other Statutes, adjudgers in implement, and other adjudgers and purchasers at judicial sales, were in like manner entitled to obtain from the superior infestment, on payment of one year's rent. And, lastly, by 20th Geo. II., the superior was bound to give infestment in the feu to any disponee or singular successor having a procuratory of resignation in his favour. These Statutes, in like manner, as 1469, c. 36, say nothing of the heirs of the adjudger or singular successor; but on evident grounds of rational interpretation, these parties had right under the Statutes to infestment in favour of themselves and their heirs. And in reference to these Statutes, it is just equally clear, that they afford no grounds whatever for holding that the adjudger or disponee had any right to demand from the superior infestment in favour, not only of himself and of his heirs, but farther in favour of other persons, who were not his heirs at all, but mere strangers. A superior might, if he chose, add such strangers to

the destination of heirs granted to his new vassal, and if he did so, he made them heirs of investiture. But there exists not in the Statutes any ground whatever for saying, that the superior was bound, for payment of one year's rent, to admit strangers in this way.

"And the superior, besides the right, had a strong interest to object. For anciently the feu reverted to the superior himself on failure of the vassal and his heirs. And after the Crown's right as *ultimus hæres* prevailed, still the Crown's donatory paid one year's rent to the subject-superior for an entry. *Vide* Erskine, B. III. tit. 10, § 1 and 2; *Jur. Syles*, Vol. I. p. 346. This interest was indeed comparatively weak, until fetters against alienation, &c., were added to destinations of succession; because, if the vassal obtained a destination reaching to mere strangers nowise connected with his heirs by blood, without any fetters, it was highly probable that, by alienation or alteration of the succession, the tailzie would be put an end to before they succeeded; and therefore, when there were no fetters, the right of the superior might often not be rigidly insisted on. But when fetters were added, the interest of the superior became certain and important.

"There are, however, conditions on which it might reasonably be held that a superior ought to grant a destination in favour of strangers. These are, that the charter shall bear a provision that each stranger, who thus, being in truth no heir but a singular successor, should obtain infeftment for himself and his heirs as destinees of investiture should, for that infeftment, pay one year's rent; or, what in truth is equivalent, in the view that the superior's claim is good in law, a provision that the superior's claim for a year's rent, as a composition for giving infeftment to each stranger, should be reserved. Under these conditions, accordingly, I believe it has been usual in practice to grant infeftment to singular successors, with destinations including strangers as well as their own heirs. But without such clauses I do not believe the practice has prevailed; and still less has the right of the singular successor been recognised, either in conveyancing or in judicial opinion. On the contrary, all the authorities our decisions afford lie the other way.

"In the case of *Lockhart against Denholm*, decided 10th July 1760, both Sir Archibald and Sir Robert Denholm, in the early part of the last century, took charters from the superior, with a clause 'that every heir of entail shall be obliged to pay a year's rent for his entry, unless he be at the same time heir of line to the person last vest and seised;' and Sir Archibald accordingly paid £200 to Mr Lockhart as a composition for a year's rent,—pretty good evidence of the understanding of conveyancers on the subject. True it is, that, notwithstanding this provision, the Court, on some reason that is not explained, found that 'the pursuer (i. e. Lockhart) had acknowledged the entail, by granting charter and infeftment thereupon to the late Sir Robert Denholm, he was obliged to enter the defender (a substitute, not heir of line) as heir of entail, and not as singular successor.' This decision has since been declared by the Court, and universally understood, not to be good authority on the point decided. But it is material to observe here, that it does not rest at all on any right the entailor originally had, to have obtained, on payment of one year's rent, new infeftment to himself and heirs of investiture, not being his heirs of law, though that was argued; but solely on this, that being actually admitted into the investiture by the superior, they must have entry as heirs, not as singular successors,—the clause of reservation being, on some ground not explained, held not to be effectual.

"The next case, *M'Kenzie against M'Kenzie*, 4th July 1777, is thus abridged in the Dictionary, (p. 15,053).—"The Lords found that a superior of entailed lands was obliged to enter the heir of entail, who in this case was likewise the heir of the former investiture, and lineal successor in the lands, on receiving a *duplicando* of the feu-duty, and was not entitled to demand from him a year's rent or other composition; reserving to the superior, and his successors in the superiority, any right which they may have to a year's rent or other composition on the entry of any future heir of tailzie, not an heir of investiture prior to the tailzie." It is plain from this, that the Court were not satisfied that the superior, though bound to admit M'Kenzie and his heirs, was bound to admit strangers as heirs of investiture, without payment of a year's rent for that admission. From the fuller report

of the case in the Appendix, it rather appears that the entailor had been himself vassal before the entail, and so was not under the necessity of paying one year's rent for new infeftment to himself and his heirs of law, and of the former investiture. But if it was so, that makes little difference, since there is no doubt in practice, nor was it denied, that a vassal resigning may, without payment of any casualty, demand new infeftment to himself and his own proper heirs of law and of the former investiture. The demand of the superior, therefore, in M'Kenzie's case, was rested, and the reservation admitted, solely in reference to the introduction of a stranger as heir of investiture. In this case, it is said 'the Court seemed very much inclined to get complete information concerning the practice; but the practice was discovered to be various.' That is exactly what was to be expected, on the understanding that the superior's right in law was good. Still there were many considerations which would, in many cases, induce the superior not to insist on that right.

"The next case is that of the Duke of Argyll *against* the Earl of Dunmore, 19th November 1795. In that case 'the defender' (who was the institute or disponent) 'was willing to pay a year's rent for his entry as singular successor; but the pursuer further insisted that the charter should contain a declaration, that he should not be obliged to enter such substitutes as heirs of investiture, or of line, to the vassal infeft, without receiving a year's rent from them as singular successors also.' The defender offered to take a charter, with a clause reserving the superior's claim to a full year's rent, on the entry of an heir of the tailzied investiture who was not heir of line to the last infeft; and he contended, that while he made this admission, 'it was an unnecessary hardship on the defender to oblige him to discuss a general point of law, the decision of which cannot affect the interest of himself or of his descendants.' And on that ground evidently, the Court, holding the case of *Denholm* to be wrong decided, and that the reservation was effectual, adhered to the finding of the Lord Ordinary in favour of the Earl of Dunmore. Their interlocutor was—'In respect the reservation proposed by the Earl of Dunmore leaves the question entire when it shall occur,' (unanimously) 'adhered.'

"Next is the case of the Duke of Hamilton *against* Baillie, 22d November 1827, S. and D., Vol. VI. p. 94, which is thus summed up:—'A superior possessing under an entail, having granted a charter of resignation in favour of a vassal, embracing an entail containing a series of heirs; and sasine having been taken, and possession enjoyed for forty years; and an heir of entail having succeeded to the superiority, and refused to receive as his vassal a party claiming entry as an heir of entail under the charter, except in the character of a singular successor, and on payment of a year's rent—Held that he was bound to enter him as an heir.'

"The opinions of the Court are brief and clear:

"*Lord President*.—In this case the superior, by granting the charter, has agreed to give the heirs of tailzie an entry as heirs; and this has been acted on for forty years. It may be another question, whether a superior is bound to admit of an entail by a vassal.'

"*Lord Gillies*.—This case will not decide the general question.'

"*Lord Balgray*.—There have been forty years' possession, which is sufficient.'

"I have not yet noticed the case of the Magistrates of Aberdeen *against* Burnett, 17th June 1808, *Fac. Coll.*, because I do not consider it at all in point here. It is thus abridged:—'A singular successor of the vassal in a feu, on payment of one year's rent to the superior (a royal burgh) has a right to demand a charter to himself and heirs whatsoever, though the charter of his author was to heirs-male, burgesses of that burgh, with a clause in the reddendo, that they should perform burgh services, and that the fee should not devolve on the feminine sex.' Your Lordships know, that the words 'heir whatsoever' in a charter, have no meaning different from 'heirs,' or 'heirs at law.' The vassal disponent in that case made no demand of a tailzied fee at all, or any admission of destinees beyond his own heirs of law.

"Lastly, I may notice, though not as a decision in point, the case of the Duke of Hamilton *against* the Earl of Hopetoun, 8th March 1839. In that case, too, the present question was not

presented for decision. The expression, in the opinion of the Court touching it, is but accidental in giving a general exposition of law. Still I cannot say it was not their opinion. It was the opinion of myself, who wrote it, and I cannot doubt was so also of the other Judges who signed that opinion.

"I may only add, in reference to recent practice, that I have made some inquiries among conveyancers, and believe the practice to have continued to this day, of superiors refusing to grant a destination beyond heirs of law, unless upon condition of a clause of reservation in favour of the superior's right, to have effect in case the stranger destinies shall succeed, and so often as they shall succeed.

"In these circumstances, I am not able to think, that there is any thing like sufficient authority for rejecting the fair and reasonable interpretation of the Statutes, giving to the singular successor, for his one year's rent, right to obtain new infeftment to himself and his heirs of law, but not to other persons wholly strangers to his blood, as destinies of investiture. And if I be right in that opinion, then it is not, I think, denied, and at any rate is clear, that the superior must be successful in the present case.

"It only remains for me to notice a passage in Stair's Institutions, B. II. tit. 3, § 43, which appears of importance at first sight, but I think very little so on examination. For (1.) Stair does not speak expressly of infeftment to strangers in addition to the heirs of the appriiser or adjudger. He speaks of 'a tailzie;' but that may, and properly does, mean a tailzied (or cut) destination of heirs of law, not extending at all to strangers. (2.) Stair ends by saying, 'or at least, if the appriiser or adjudger craves the infeftment to himself and the heirs of tailzie, the superior ought not to refuse it; for the apprising or adjudication being assigned to a stranger, he behoved to be infeft; much more the alteration of heirs is allowable.' Stair is plainly considering only the alteration of heirs, not at all the extension of them, so as to include an indefinite number of distinct unconnected stirpes and their heirs. (3.) Stair does not say that the tailzie must be admitted on payment of one year's rent, or on what condition. Indeed, he seems still to have held the doctrine, that by adjudication in implement, a superior might be compelled to admit singular successors without any payment at all, by force of the judgment. He says (B. II. tit. 4, § 6), 'The cause of this confusion is, that superiors are not obliged to receive the singular successors of their vassals, even though they should offer a year's rent for their entry; which privilege of superiors, by law and practice, is now evacuated, because superiors may be compelled to receive strangers upon apprising or adjudication for a year's rent; yea, if the vassal disposes the fee, and oblige himself to infeft upon the obligation, and adjudication is competent against the vassal, so as to oblige the superior to grant the infeftment, which, though frequently practised, yet there is no express law allowing the superior a year's rent. There was indeed a law made for a year's rent, upon adjudication, when apparent heirs did renounce to be heirs, as well as upon apprisings, which doth not bear adjudications for implement of dispositions.' Now, if Stair thought that by an adjudication in implement on a disposition, a stranger disponee might force an entry for himself and his heirs, without payment of casualty at all, he might well think that the superior need not make difficulty about the ulterior heirs of investiture. But in truth Stair does not appear to have at all contemplated the point now in question. And accordingly, this passage does not seem to have been cited in the case of Lockhart, or any of the other cases in which the point was argued, and certainly could not possibly have been the regulator of any practice of conveyancing down to the time when these cases commenced, and still less since that time."

Lord Jeffrey:

"I concur entirely in this opinion of Lord Mackenzie. Only I give much more weight than he appears to do, to the recent decision in the case of the Duke of Hamilton and Lord Hopetoun, of March 1839; which, though it does not find in express or direct terms, seems to me necessarily to imply, that while a vassal might require his superior to grant an investiture to the whole of his natural heirs, in whatever order he might choose to arrange them, his right, at all events, went no farther; and that it was an indispensable condition in any series of heirs

so sought to be enfranchised, that they should all hold that character *jure sanguinis*, and not *provisione hominis*. If the judgment did not proceed upon this assumption, or rather fundamental principle, I really do not know upon what it proceeded; and cannot perceive any connection between the reasoning, so ably deduced in the unanimous opinion of the consulted Judges, and their conclusion. For myself at least, I can say that I conceived this limitation of the vassal's right to be as distinctly fixed by the decision, as its extension to the case more immediately in question; and that I could not now adopt the views of the defender without feeling that I was going directly against the authority of that most deliberate decision. In strictness of principle, indeed, and especially in reference to the genius and history of feudal holdings, what we now call an heir of provision (if he has no other or additional character), I conceive not to be an heir at all, but a disponee or singular successor merely; and it does not appear to me, that the mere circumstance of such a person, if once named in any investiture or substitution, being entitled to make up titles by service and retour, ought to have any effect whatever on the independent rights of a superior, who has not bound himself, directly or indirectly, to renounce these rights."

Lord Gillies:

"I concur in the opinions of Lord Mackenzie and Lord Jeffrey."

Lord President (Boyle):

"I concur in the opinion of Lord Mackenzie, with the addition made to it by Lord Jeffrey, though I was not present when the judgment in the case of the Duke of Hamilton against the Earl of Hopetoun was pronounced by the Second Division of the Court."

Lord Fullerton:

"I agree in opinion with Lord Jeffrey and Lord Mackenzie, that in this case the pursuer is entitled to demand from the defender the ordinary composition as for a singular successor. And I may be permitted to add in explanation, that I think the conclusion thus come to, stands quite clear of certain other points, on which the defender seems to consider it to be dependent, and which I should think it quite hopeless to maintain. Thus, in the first place, I think it clear, that when a superior has once admitted, without qualification or reservation, a certain line of descent into the investiture of the vassal, that series of persons, however unconnected by blood, must be dealt with by the superior as heirs. That is the consequence of the consent implied in the superior's own act. Though not heirs by blood of the original vassal, or of each other, he has made them heirs of the investiture. 2dly, I think that the imposition of fetters, and the consequently diminished probability of alienation, does not import such an encroachment on the superior's interest, as to warrant him to demand any higher terms of entry than if the investiture were free. That point was fixed in the case of *M'Kenzie v. M'Kenzie*, 4th July 1777, and evidently assumed as so fixed in the subsequent case of the Duke of Argyle against the Earl of Dunmore, 19th November 1795; and from the combined operation of these principles, I think it must follow, that if a superior has once granted, without qualification, an investiture to a series of substitutes, strangers in blood to the institute and to each other, he would not be entitled to refuse a renewal of that investiture, under the fetters of a strict entail.

"But these propositions do not touch the present question; because, here, the superior has never absolutely acknowledged the investiture. He has never, either expressly or by implication, agreed to hold the stranger substitutes as heirs. On the contrary, though granting the investiture in favour of a particular line of descent, as he was bound to do by the decision in the case of the Duke of Argyle against Lord Dunmore, he has done so only under the reservation, also sanctioned by that decision, as well as that of *M'Kenzie v. M'Kenzie*, that his right should be entire whenever the contingency happened to which the reservation applied. No doubt, if the case of Lockhart against Denham were understood to fix the law, there would be an end to the question, because there a reservation much stronger and more express was entirely disregarded. But the

authority of that decision was superseded by the clearest of all implications in the cases of *M'Kenzie* and the Duke of Argyle; as it is impossible to suppose that the Court could either insert in their interlocutor, as they did in the first case, or appoint to be inserted in the charter, as they did in the second, a reservation in itself utterly nugatory.

"Here, then, the superior having reserved all his rights, in the event of the succession opening to an heir of investiture, not the heir by blood of his immediate predecessor, the question arises, what those rights are. If a vassal is in every case entitled, as a matter of absolute right, to demand, and a superior bound, as a matter of absolute obligation, to grant an entry, not only to the individual seeking an entry and his heirs, but to any number of stranger substitutes, then, of course, the reservation would lead to no consequence. It being clear that an heir of investiture must in the ordinary case be treated as an heir, it would follow, that if the superior has no option, but must admit into the investiture as many stranger substitutes as the vassal chooses, he can have no legal right to stipulate for a composition on the entry of any of those substitutes. But, on the other hand, if the superior lies under no such obligation,—if, in the general case, he is not absolutely bound to admit stranger substitutes into the investiture, or to do more than grant the entry to the individual craving it, and his heirs, then of course he is entitled to reserve, and to reserve with effect, his right to claim the ordinary composition when the succession opens to a stranger substitute. And in regard to the composition, the Act 1685, authorising entails, has just as little effect against the superior, as the imposition of fetters in terms of that Statute could have in creating a claim for a composition to which he was otherwise not entitled. If, in the case of an unfettered investiture, the superior was entitled to stipulate that each stranger substitute to whom the succession opened, should be dealt with by him as a singular successor, that legal right is sufficiently protected by the general reservation in the Statute, of all rights of superiority.

"The question, then, truly comes to be simply this, whether a superior is absolutely bound to renew an investiture in the case of a vassal in possession, or to grant a charter to a singular successor, on payment of a year's rent, not merely in favour of the heirs of the party applying, but in favour of any given number of substitutions which the party so applying chooses to insert, or whether the superior, though admitting these substitutions into the investiture at the requisition of the vassal, and thus enabling them, in form, to take as heirs, is not fairly entitled to stipulate that, *quoad* him, they shall be dealt with, as they substantially are, as stranger dispoonees.

"But it does not appear to me that there is authority for the affirmative of the first proposition. It is undeniable that the obligations of superiors in this matter, are the creatures of Statute. The whole of the Statutes, from the Act 1469, c. 36, regarding the entry of appraisers, to the 20th Geo. II., relating to singular successors, are limited to the entry of the appraiser, or adjudger, or purchaser. They were passed for the sole purpose of compelling the superior to admit a stranger vassal, which, at common law, he was not bound to do. No doubt, as the subject of the right was heritable, the entry of such appraiser, adjudger, or purchaser, necessarily implied the descent of that right to his heirs, so that the obligations of the superior to enter the first acquirer, necessarily included the obligation to enter the heirs of such acquirer as the heirs of the new investiture. In strictness this was applicable only to the heirs-at-law of the vassal, but in practice, the particular class of the general body of heirs to whom the original right was to devolve, seems to have been left to the option of the vassal; and accordingly, in the case of the Duke of Hamilton against the Earl of Hopetoun, it is laid down in the opinion of the majority of the Court, that the vassal, in getting the entry, 'may name heirs of law simply, or heirs-male, whom failing, heirs-female, or any other arrangement of the body of his heirs-at-law.' But that is stated under the qualification immediately preceding,—'he shall not go beyond his heirs-at-law to strangers.'

"I cannot doubt that this was the deliberate opinion of the Judges who expressed it—and the distinction seems to be well founded. Strictly speaking, indeed, the only right of succession necessarily implied in the right of the original vassal, is that of

his heirs-at-law. But every person who takes as heir, whether heir of line, heir-male, or heir-female—every person, in short, who takes under a character admitting of being established by general service, may be said to take in right of the original vassal. The character, at least, in which he takes, is the act of law, not of the original vassal. On the other hand, a substitute who is called in none of these characters, is truly nothing but a dispoonee. Not only his right, but the character in which he takes the right, is the pure act of the dispooner.

"It is true the superior may have in general very little interest to object to such an extension of the destination, particularly when it is unfettered: because, in such circumstances, the probability of alienation, with its attendant benefit of a composition, is rather increased than diminished by it. But in many cases easily supposable, a superior may have a very clear interest. For instance, in the case of a purchaser who has no family, and beyond the age admitting the probability that he ever shall have any, or an entered vassal in the same situation,—could the one demand an entry, or the other resign for new infestment in favour of himself and the heirs of his body, whom failing, an entire stranger? Could a superior be bound to grant such an entry without a reservation of his rights? and would not that reservation entitle him to demand the composition on the estate devolving on the substitute, nominally called as heir, but *quoad* the superior, and in every fair view of the case, nothing but the dispoonee of the vassal? I think these questions would be answered in favour of the superior, and the contrary pretensions on the part of the vassal, in such circumstances, would neither be supported by the Statutes, nor, as I understand, by any usage which has followed on them. Indeed, the principle necessarily involved in the argument for the defender, carries the matter still farther. In these cases it is supposed that the entry may have been demanded, in form at least, in favour of the heirs of the vassal himself, whom failing, the substitute; but that argument would be equally good, although the heirs were left out, and the entry demanded in favour of the vassal, and failing him by death, whether leaving heirs or not, to a stranger. For the argument of the defender necessarily involves the proposition, not only that the heir of investiture shall take without paying composition, but that any individual or number of individuals, can be rendered heirs of investiture, entitled to that benefit, by the mere act of the vassal himself, or, which comes to the same thing, by an act of the vassal which the superior is compelled to give effect to.

"Now, it does appear to me that this view cannot be supported,—and that, on the contrary, the rights of these parties fairly extricated according to the other principle, namely, that although the vassal claiming the entry may have an interest, and has the right particularly under the Statute 1685, to create any number of substitutions, and thus to render the parties so called, in form, the heirs of investiture *quoad* the form of succession, still the superior has as clearly an interest and a right to stipulate, that in relation to him, the substitutes shall be treated in their character of dispoonees, taking by the pure act of the vassal himself, directly operating at each successive opening of a new substitution. For it appears to me, that in regard to the superior, each successive substitution can be considered in no other light than a dispositive act of the original vassal, postponed and contingent indeed, but still his dispositive act, operating as a conveyance to a stranger, on each occasion when the contingency is realized.

"While I conceive this to be the sound construction in principle of the conflicting rights of superior and vassal in this matter, I am not aware that it is contradicted by any practice or authority. The decided cases, with the exception of that of Lockhart, which must be considered as superseded, leave the question entirely open. In fact the reservations authorised in the cases of *M'Kenzie* and the Duke of Argyle, were intended for no other purpose than that of saving it. The Act 1685 is equally inconclusive. The sole purpose of that Statute was to enable parties to secure the descent of their lands to any extent of substitution, by clauses preventing alienation, adjudication, or alteration of the order of succession. It expressly reserved the rights of superiors; and the most conclusive inference against the supposition of any contemplated interference with the rights of superiors, is afforded by the consideration, that at the time

of its being passed, superiors were under no direct obligation to alter existing investitures at all—it could only be done by the circuitous form of adjudication; in all which particulars the rights of superiors were left untouched until the Act 20 Geo. II.

“With regard to the passage in *Stair* (B. II. t. 3, § 43), it is so obscurely expressed, that I do not think that it affords any very conclusive authority, or even any clear indication of the author's own opinion upon the point now under discussion. And indeed, if it has any bearing upon the point at all, I think it affords an authority in favour of the pursuer. At the time when it was written, the superior could not be called upon to alter the existing investiture without his consent. The object was to be obtained only indirectly by means of an appraisement or adjudication. After stating this, the passage proceeds:—‘So neither in that case is he obliged to constitute a tailzie, but only to receive the appraiser or the adjudger and their heirs whatsoever; unless the debt and decree whereupon the same proceeded, be conceived in favour of heirs of tailzie, in which case the appraising or adjudication, and infestment thereupon, must be conform, unless it be otherwise by the consent of parties.’ Here it certainly appears to be implied, that if the debt and decree be conceived in favour of heirs of tailzie, the infestments must be conform, i. e., granted to the same series of heirs. But this opinion is qualified by what follows—‘at least, if the appraiser or adjudger crave the infestment to himself and the heirs of tailzie, the superior ought not to refuse it; for, the appraising or adjudication being assigned to a stranger, he behoved to be infest, much more the alteration of heirs is allowable.’ It rather appears to me that in this passage, the author was considering the question, whether the superior could be compelled on any terms to receive heirs of tailzie through the means of adjudication—whether, in short, the superior could effectually stand out against admitting, on any terms, any heirs excepting the heirs of the adjudger. This question, put in the last form, he decides in the negative, but without taking into view the other question which arises here, viz., the particular terms on which the demand could be enforced against the superior. The opinion, such as it is, is given with great hesitation, ‘at least, if the appraiser or adjudger crave the infestment to himself and the heirs of tailzie, the superior ought not to refuse it.’ But it is important to look at the reason given for this opinion, ‘for the appraising or adjudication being assigned to a stranger, he behoved to be infest, much more the alteration of heirs is allowable.’ Here the opinion, that the superior ‘ought not to refuse’ the admission of heirs of tailzie, is rested on the ground, that if the appraising or adjudication were assigned, it ‘behoved’ the superior to admit the assignee. And the reason is perhaps satisfactory, in so far as regards the matter of the admission of heirs of tailzie; but, on the other hand, it seems to me to imply that the superior, though obliged to admit the assignees of adjudgers, and by analogy, the heir of tailzie was only obliged to admit the latter, on the terms which he was entitled to from the former, viz., the ordinary composition. The passage, though certainly not very clearly expressed, seems to mean no more than this, that as the superior was obliged to admit assignees of the adjudication, so he could have no reasonable ground for refusing to admit heirs of tailzie, i. e., heirs different from the heir whatsoever; an inference or analogy which could only be true, on the supposition, that in regard to the interests of the superior, the heirs of tailzie and assignees were to be dealt with on the same terms. If this be the true construction of the passage, it is evidently an authority not in favour of, but against the argument of the defenders. When so construed, it coincides exactly with the view which appears to me the correct one, viz., that although the superior is obliged to admit substitutes, as he is obliged to admit singular successors, he is obliged so to admit them only, because he is entitled, if he pleases, to affix the same terms to their admission (Lib. VI. t. 6, § 7). According to this view, the superior—to use the very appropriate expression of *Stair*—‘ought not to refuse’ because in reality he has no legal interest to object. Being obliged to admit singular successors on payment of the composition, he cannot be permitted to refuse any number of substitutions, if each substitute, not an heir by blood of the predecessor, is to be held *quoad* him as a singular successor, taking by virtue of the dispositive act of the original vassal.

“As to the passage from *Erskine*, the opinion there given in

such broad terms, rests entirely on the case of *Lockhart* there referred to, which, since the late decisions in the cases of *M'Kenzie* and the Duke of Argyle, can no longer be considered as an authority.”

At advising of this date,

Lord Justice-Clerk.—The great difference of opinion in the Court on this question of feudal law, and the importance of that question, involving great pecuniary consequences to such an extensive class of persons, rendering it, perhaps, a matter of as wide application as any question which was ever stirred, will account for the anxiety with which I approach the point awaiting judgment, although it is one in which my opinions have been long matured. It is very necessary to consider the question on strict feudal principles, else we might do great injustice to a class of rights just as much legal property of the highest kind as the rights of vassals. But in examining what the feudal principles are which should govern judgment, I cannot concur in a remark in one of the opinions before us, that the relation of superior and vassal has received no modification whatever, except from the direct and immediate operation of special Statute.

The defender has raised an objection to the summons as not the proper action to try the question. In the case of *Lord Hopetoun*, the objection was stated in reply to an argument that the general precept granted by the Duke of Hamilton had been unwarrantably and incompetently used by one not entitled to the benefit of it; and in that case the consulted Judges held the reply to be good, viz., that in an action of non-entry, calling the party who is the heir under the existing investiture, completed by a precept granted by the superior, and the infestment following on it, the superior cannot say to the heir that the infestment was inept under which he calls on him to enter. He ought to disregard the infestment, or reduce it if he held it to be bad. But as it is not disputed by the superior in this case, that the investiture containing the destination in question was correctly made up, the declarator of non-entry is a competent, and, I think, the proper action to try the question, on what terms the entry is to be given.

I may also say, that I cannot enter into the argument founded on a misapprehension of the ground of decision in the case of *Lockhart v. Denham*, viz., that the reservation is not sufficient to preserve the claim of the superior, if he could have originally refused to sanction the destination which the vassal's procuratory contained. There is a somewhat metaphysical argument stated, to the effect that the reservation necessarily merges, and is absorbed in the sanction of the investiture, so that the defender can plead the very charter containing the new grant against the superior's reservation, which qualifies it as to this matter. But I am of opinion, that the reservation keeps the question completely open, if the claim is well founded, and that this argument rests on a misapprehension of the ground of judgment in *Lockhart*. Whether such a claim is consistent with the character of heir which the investiture bestows on the parties called by the substitution of heirs of provision, is another question. But I do concur with the defender in the complaint, that there is considerable vagueness and obscurity as to the precise plea which the pursuer means to maintain. His plea on the record seems to be intentionally as general and obscure as it could be stated. It is, ‘that, in the circumstances condescended on, the pursuers, as superiors, are not bound to give an entry to the defender as their vassal, except on the condition of his making payment of the usual composition of a year's rent of the lands; and as he has refused to pay that composition, they are entitled to decree against him in terms of the conclusions of the summons.’ Now, one of the ‘circumstances’ prominently stated in the condescendence is, that the vassal's deed contained the prohibitions and fencing clauses of a *strict entail*, prohibiting sale or alteration of the order of succession. But still I must take this plea to be that contained in the reservation of the charter, which granted warrant for infestment on that deed:—‘Saving always our own right, and the right of every other person as accords, and declaring that, by granting these presents, we shall not exclude ourselves, or our heirs and successors, from any claim which we or they may have at law to a full year's rent of the lands herein contained, whenever the heirs of entail to whom the succession shall open, shall happen not to be the heir of line of the

person who was last entered and infeft by us or our forefairs.' This plea is not rested on the ground that the destination is protected by the clauses of a strict entail. To enforce that plea, I understand the argument to be directed; and although there is manifestly an attempt in various passages to derive benefit somehow from the fact that this deed contains an entail, yet the claim truly is founded on the destination not being to the heirs of line of the last vassal entered by the superior. There is no other plea avowedly stated in the case. (See p. 29 and p. 31). The same is truly the ground taken in the opinions of Lords Mackenzie, Jeffrey and Fullerton, which necessarily extend the claim against every heir of provision not being an heir-at-law, without any reference to the fact that he is called in an entail. I hold it to be quite essential to settle clearly in the mind, that the question at issue in no respect whatever depends upon, or ought to be affected by, the fact, that the destination is protected by the clauses of a strict entail. In all the cases, except those of Lord Hopetoun's and Lockhart's, it is manifest that the views stated by the Court, or a portion of them, were much more affected by mixing up these two matters, wholly distinct, than they were themselves aware. A great portion of the pursuer's reasoning is founded on the alleged encroachment on, or injury to, the superior's rights, caused by the prohibitions of an entail, and by the loss, as it is said, of the benefit to the superior of alienation, of that very act which originally was considered a fault against the superior of the vassal.

I humbly conceive, that the prohibitions against alienation or alteration cannot in any logical or legal manner affect the question, and that the question is precisely the same as if it had occurred under an ordinary simple destination, or when such was first presented to the superior, a view of the case which, often as it occurs, has never yet been mooted by any superior. True, the motive of the superior may be stronger to try the question in the one case than the other, because the fee-simple destination, if not in favour of heirs of line, will infallibly be altered wherever the vassal has only heirs-female, and not heirs-male of his body. But, in principle, the question is, in my opinion, the same in both cases.

A great point, however, is made when this is distinctly brought out and kept in view, not merely in avoiding the risk of undue impression on the mind from matter not relevant to the inquiry, but still more from the legal view opened up as to the rights of superior and vassal, when the proper effect of the Act 1685 is considered. To the effect of that Statute on the present question, I must particularly invite the attention of your Lordships, for I own I have ever thought that its operation has not received in this question the consideration due to it. The pursuer's plea is, that, by the common law of Scotland, he can claim a composition from every party who is not the heir of line—of line, be it observed, under his clause—of the person last entered as vassal by the superior under the existing investiture. That, he says, is and always was the law—the law as to every heir of provision, not being the heir of line—long before entails were introduced, and continued, and preserved under the system of entails;—the law, therefore, equally as to a common destination, or tailzied destination. Then, observe, the Statute expressly gives the lieges power to substitute heirs in their lands by tailzies, and to enforce and perfect them. What is the meaning of the power so granted? It is to substitute heirs, granted without any limitation; and all those substitutes are called by the Statute heirs, and must be held to be heirs, as your Lordships were all satisfied in the case of *Anstruther v. A.* The substitution of other heirs than the heirs of line could not be overlooked. That it would be absurd to suppose. Entails originated in the preference of other heirs over heirs of line. The term tailzie is derived from the usual and common effect of all such entails, though, doubtless, the direct succession might also be often fenced. Hence, the Statute was necessarily framed with reference to the selection of parties by the lieges to be their heirs. It has been said by high authority, in the case of the Duke of Hamilton v. Baillie, that the Statute is throughout very ill framed. I venture to differ from that remark. I think the Statute is most skilfully drawn for all the objects in view, if attention is paid to its terms rather than to preconceived theories, which are attempted to be supported by it. But, at all events, so plain a matter as the frequent substitution of others than the heirs of line could not be overlooked in framing it.

Let us follow the power given to its consequences. Either superiors had, before that Statute, the right to refuse to enter any heirs other than heirs of line—to reject heirs-male for instance—or they had not. If such was the right of superiors before that Statute, did it remain after that Statute? The power given to substitute heirs is unqualified—co-extensive with the right to lands. Opposition by the superior is neither alluded to nor reserved. Accordingly, on this part of the Statute the superior founds no argument. Any plea he makes on the Statute is founded on the special clause of reservation of certain rights at the end of the Statute. What that reservation imports, we shall afterwards consider; but, at all events, the very plea founded on the reservation admits that the power to substitute heirs is given even against superiors (if they had any right inconsistent with it), though it is said that their interests are protected by the clause of reservation. But is not the Statute very important evidence as to the common law respecting the substitution of heirs? I believe the preservation of the rights of superiors in 1685 was just as great an object as any desire to legalize entails. Rights of superiority were regarded as the most valuable species of property. Feu-duties were thought the best income, as they could not fall in value. The various dues paid were sums of ready money when money was scarce, reckoned of great value; and, accordingly, we know that the great lawyers of that and the former generation were very fond of the acquisition of superiorities. Great political influence arose from the possession of such, and any encroachment on the rights of superiors, I believe, never was contemplated or intended by the Legislature. This remark requires, no doubt, full effect to be given to the clause of reservation, so far as its terms can go. I regard the Statute as important evidence of the common law of Scotland as then understood. If, however, the superior had the right contended for before that Act, then it made, *ex concessio* a most sweeping change, whatever is the practical benefit of the reservation.

What is the fair meaning of the leading provision of the Statute? That it shall be lawful to the lieges to 'tailzie their lands, and to substitute heirs in their tailzies.' It is admitted as the condition of the argument, as I before stated, that the superior cannot object to the prohibitions and fencing clauses of an entail, and that the Statute does not protect him as to that matter. Is that a loss to him? It is said to be so. That is stated in the close of the able note of the Lord Ordinary in *Duke of Hamilton v. Baillie*, and it is thought that it was only an oversight that the superior's right was not protected from the loss of benefit by alienations. I incline to differ, 1st, because I do not believe that the high aristocratic Parliament which passed the Act 1685, would have touched on so plain a point as the rights of superiors, which they all held as important parts of their own rights; and 2d, because I am satisfied that, on feudal principles, the superior never could have objected to his own grant to the vassal and the heirs called (who they could be is another question), being protected from alteration and alienation. On the contrary, I hold the prohibitions and fencing clauses of an entail to be exactly in conformity with the strictest principles as to the relation of superior and vassal, precisely because it secured the continuance of the grant to the vassal and the heirs called. The decision in the case of *Hill*, and the old case as to corporations, does not rest on the ground that the superior must receive compensation for losing the chance of alienation; but (see opinions in *Hill*) because a corporation cannot be a vassal in the proper sense of the term—there being no succession of heirs,—and hence the ordinary course of feudal tenure and the leading casualty of relief could not obtain. I regard, then, the right to tailzie lands as unqualified and absolute, so far as the superior is concerned, and that there either had not existed, or was not left, the right to object to the perpetuation of the estate in the heirs called. But if that was the law on this point, either under common law or under this Statute, observe the great importance of this fact, (viz., that the fetters of the entail cannot be objected to,) on the next part of the clause, viz., declaring that the lieges, in making tailzies of their lands, may substitute heirs in their tailzies. If the perpetuation of any one line of succession—if prohibitions against sale and alteration—cannot be objected to by superiors, then how very different the interest to object to the selection of one set of heirs rather than another. What-

ever the order is, it may be completely fenced, and all benefit from change wholly excluded, so long as these heirs do not fail; and the case of the Duke of Hamilton and Lord Hoptoun has settled that the vassal may call his legal heirs in any order and way he chooses, protecting their succession by the clauses of an entail. But, again, what is there to lead one to suppose that this second and very important, nay, necessary part of the clause, is less general and unqualified than the former—"may substitute heirs in their tailzies?" This is put as co-exclusive with the right to tailzie lands. It is declared to be the right of all the subjects of the country. All these substitutes are made and declared to be heirs—heirs in every sense of the word—all equal heirs by force of the nomination in the tailzie; and no distinction is pointed at as to the separate character of legal relations or not. I see one opinion declares that all heirs of provision, if they have no other and additional character, viz., that of blood relationship, are disponees or singular successors on feudal principles.—(His Lordship referred to the opinion of Lord Jeffrey, *supra*.)—I hold just the reverse. I hold that the heir of provision is the character to which feudal law looks, and no other; that any other and additional character which the party possesses is of no moment, and never looked to, and is altogether irrelevant; that if the party is the heir of the grant or investiture, his right and character as such is exactly the same, whether he is a stranger in blood or the eldest son. Indeed it is entirely new to me to hear, that in a question with the superior, there is any other character looked to than that of the heir of the investiture, or that one heir of the investiture is, in respect of the quality of blood relationship, by which he is not called at all, the proper heir, and all others in that investiture singular successors. And under this Statute, and after the opinions in the case of Anstruther as to collation, I cannot understand how that proposition can be maintained; and accordingly, in the opinion by Lord Fullerton, he, in the very outset, most anxiously disclaims that view. But, then, his Lordship's opinion in two passages, the foot of p. 20 and top of p. 22, lays down the very same point, though differently expressed, where it is said that every substitute who has not in law a character of heir which he could have established by service, independent of the deed, is a disponee. But whatever might be held as to this point on general speculation, surely any such notion is utterly banished out of this case in the most complete manner by the Statute 1685, which enables the vassal to put all substitutes on the same footing as heirs, whatever claim may be reserved to superiors. Now, when it is said that parties may substitute heirs in their tailzies, is that, or is it not, a power to make them heirs—heirs of investiture—heirs in every sense of the term? That cannot be disputed, and is not disputed by the pursuer; for his plea is, that while that is the undoubted effect of the Act 1685, the reservation at the close of it reserves the claim of the superior exactly as if they were not made heirs. But before the object and effect of the reservation can be adequately considered, we must settle what is the legal import and operation of the provision that the lieges may substitute heirs in their tailzies, and, having settled that, must give full effect to it consistently and steadily—recollecting that the plea on the clause of reservation admits of necessity the force of this first provision. I am humbly of opinion, that by that provision the holders of all property obtained, if they had it not before, or now possess, a right to substitute any heirs they choose in their tailzies, and that all substitutes are legally heirs of investiture—heirs in every sense of the term—to the party making the tailzie. The more the object and meaning of this part of the Statute is considered, the more clearly does this appear to be the necessary result of this provision. That this is any change in the law, or that a vassal could previously have been refused an investiture to any set of persons whom he chose to name as his heirs, I am far from holding. But whether the law was so or not, it appears to me to be the undoubted operation of the Act 1685, that all persons substituted in any tailzie, or destination of an estate, are heirs, in every sense of the term, to the entailor—heirs also to the person last infeft—but without, by Statute, the consequence of representation, whatever benefit or right may be reserved to superiors by any after clause.

What, then, is the import of the reservation? It is as follows:

"It is farther declared, that nothing in this Act shall prejudice his Majesty as to confiscations or other fines, as the punishment of crimes—or his Majesty, or any other lawful superior, of the casualties of superiority which may arise to them out of the tailzied estate; but these fines and casualties shall import no contravention of the irritant clause." The words are very peculiar. It seems to me to be very clear, that the reservation is to secure the payment of all casualties *out of the estate*, if not paid by the individual, and that such shall not be held debts included in the prohibition and clauses authorised by the Act, for the purpose of protecting the estate against debts. To that object I think the clause is confined. It might have been contended that the casualties of superiors arising out of the estate, being also debts of the vassal, could no longer be enforced against the estate, which was protected against all debts; and hence, for that object, to preserve the superior's rights and the protecting clauses of the tailzie, I think the reservation was introduced. Of course, taking that view, I cannot concur in the explanation given of this clause by Lord Cunningham. The pursuer's argument on this clause is founded on three views—1st, That superiors had the right previously to refuse to receive as heirs any whom the vassal chose to name; and hence that the right to demand a composition, as from a singular successor, was to be reserved: 2d, That the composition for the entry of a singular successor is a casualty of superiority: 3d, That by the above clause, a distinction, undefined indeed but fundamental, was intended to be drawn by implication between one class of substitutes and another, viz., those who are also heirs-at-law, and those who are not—a distinction of which, certainly, there is no other trace or indication in the Statute, and which is only obtained by guess out of this reservation. These three views are all essential to the plea founded on this reservation. The pursuer's argument on this clause, I must repeat, admits that the Statute gave the subjects right to destine their lands in any way they choose, and to name or substitute heirs to themselves. That is admitted in the plea founded on the reservation; and hence it follows, that if the reservation has not the effect contended for, in drawing such a remarkable and singular distinction between the substitutes of an entail, the pursuer's claim wholly fails.

In the first place, I hold it to be quite clear that the composition demandable on the entry of a singular successor is not a casualty of superiority, and cannot, by any use of legal phraseology that is at all correct, be included within these casualties. The casualties of superiority are enumerated by the text-writers. They existed long before the Act 1469, c. 36. That Act introduced the year's rent as a compensation for the loss of the existing vassal, and the introduction of a new party into the fee. But such a compensation is not a casualty arising out of the estate—was never enumerated or accounted among the casualties of superiority, whatever looseness there may be in modern language on the subject; and in 1685, before the Act of Geo. II., could not have been used with reference to the obligation on superiors to receive singular successors on payment of a certain fee, for such obligation, generally speaking, did not then exist. There was no general right on the part of the singular successors, taking by procuratory, to demand entry on payment of a composition. Hence, if the heir of entail could not claim entry as heir under the first part of the Statute, he could not obtain an entry *invito domino* at all. But the reservation of the casualties, if he is heir, cannot apply to him, for the composition has no reference to him. This is the meaning of President Dundas's remark as to *existing* casualties in Hailes's notes of the case of M'Kenzie. Accordingly, from the time that superiors first wished to raise the question under the Act 1685, as to their claim in the event of an heir of entail not being heir of line, the composition has never been acknowledged to be a casualty in any of the cases. This appears remarkably from the terms of the charter in the Westshield case in 1720. See Session Papers reprinted in Lord Hoptoun (the casualties are first reserved, and then the claim for a year's rent). Accordingly, in the case of Lockhart, one ground firmly taken by that great lawyer, Sir Thomas Miller, is, that the composition on entering a singular successor was not a casualty of superiority, but a separate right not arising out of the relation of superior and vassal, but given by Statute

as a compensation for an invasion of that right; while the superior's counsel tried to make out that the composition was the casualty of relief. The composition is not *debitum fundi*; the superior can neither enter into possession nor poid for it. It is only a personal claim. The clause of reservation, on the contrary, clearly is intended to save to the superior, as debts against which the estate was not to be protected by the entail, the proper casualties arising out of the tailzied estate. This is clearly the view taken of the matter by the annotator on Stair, and was the foundation of the judgment in the case of Lockhart.

At page 35 of the pursuer's case, it is broadly stated that Stair and all the authorities class composition among the casualties of superiority. This is a great mistake. I observed that, curiously enough, no particular passages are given in the reference either to Stair, Erskine or Bankton, but whole titles are referred to. And, accordingly, on examining these titles, all that can be said is, that composition is treated of by Stair and Bankton in the same long title, which also includes and treats of, but *separately*, the casualties of superiority. In Erskine it is not treated of at all in the title referred to. I was much astonished at the reference to Stair, knowing that title, the 4th of the 2d Book, most intimately. The examination of it leads necessarily to the very opposite result. Like every other part of that most methodical and systematic writer, the title must be considered attentively with reference to its plan. It commences, first, with the superior's own right of superiority, the proof thereof, and certain limitations thereof; then as to the relative position of the vassal, the effect of subinfeudation, and the duties of the vassal under the reddendo. Then it treats of the change of the vassal, and of the mode in which an entry may be forced upon the superior, at that time limited more than Lord Stair wished. And after having shown how a stranger may get an entry upon payment of the composition of a year's rent, the title then proceeds to take up the relative position of superior and vassal, after a vassal has been received, and in reference exclusively and solely to the entered vassal and his heirs. This distinct and separate portion of the title begins at section 18, and Lord Stair then treats of the proper casualties of superiority due by the entered vassal or his heirs. Then are all these specially treated of; and first, "of the most common casualty of superiority," non-entry, its remedies and its consequences; under which, in title 24, he explains the general declarator of non-entry for neglect, and the special declarator for contempt, and this is wholly applicable to the heirs of entered vassals, giving right to the retoured duties or to the full duties, according to circumstances. Then the relief is treated of, or, as he says, immediately subjoined to non-entry, being due to the superior by the vassal for entering him in the fee as the lawful successor of the vassal. Then, in section 32, he mentions what it is to be paid under the statutory composition, and points out *how it differs* from relief in several particulars. Then he resumes the casualties, and goes through them, and in no place does he ever confound the composition with the casualties. This might have been expected in so accurate and clear a writer,—the casualties being the rights arising by common law out of the relation of superior and vassal,—composition being, as its term imports, a bonus or compensation to the superior for being obliged to do something directly against the original rights of superior and vassal, by an infringement of the same introduced by Statute. In no one passage is the composition ever called a casualty or enumerated. The very same remarks may be made on the corresponding title, B. II. tit. 4, of Bankton, written on a more methodical plan than usual, and plainly on the model of Lord Stair's title. There is one passage in which the composition seems to be called a casualty in the sixth paragraph; but this is obviously loosely used, for he has a separate section in that title, beginning at article 13, with a distinct heading of the casualty of non-entry, another of relief; under which he certainly treats of composition, but in such a way as to show, that as it comes in place of relief, so it differs widely from the same; and he never terms it directly a casualty, though he specially calls the relief a casualty. He mentions the remarkable distinction, that the adjudger cannot be excluded from possession till he pay a composition and enter. The title of Erskine, B. II. tit. 5, is still

more distinct. The casualties beginning at the 5th section are all separately treated of in reference to the original and proper relation of superior and vassal, including recognition; and he then resumes the enumeration of them, as modelled by our customs, in the 29th section, viz., non-entry, relief, disclamation, purpresture, and liferent escheat. I particularly refer to the very accurate and distinct sections on non-entry and relief, perhaps the very best of Mr Erskine's work. Take the definition of non-entry in the 29th section, as well as the full explanation of it, into the 46th, inclusive. Take the definition of relief in the 47th section, and the explanations of it on to the 50th, inclusive, and it will be found, that under neither of these is there a word which brings in, as a casualty, the composition. Nay, with such rigid accuracy and propriety does Mr Erskine limit himself to the casualties, when treating of these, that even under the section which mentions that the casualty of non-entry is excluded if sasine has been once given to a corporation, he does not allude to any arrangement as the condition of receiving them. Then he finishes the whole subject of casualties, and the composition is never mentioned at all. Accordingly, in the 6th title, Mr Erskine begins separately to consider of the right which the vassal acquires by getting the feu, and of the extent and import of the grant made to him; then of the protection to his tenants; after which, forgetting rather his object, he wanders into the relative rights of landlord and vassal, which are treated of plainly out of place in the remainder of this title. Then, in the 7th section, he resumes the subject of the rights which the vassal acquires by getting the feu, and treats of the transmission of the right; and it is under this separate subject, and in a *totally different title*, that he treats of the question of composition, and of the effect of the Act 1685. What the pursuer means, then, by the positive reference to the 5th title of the 7th Book of Erskine, I really cannot understand; for that title is wholly framed upon a plan which utterly excludes composition from the very notion of being a casualty—is limited exclusively to the old casualties,—and in that title composition is not mentioned; while, on the other hand, the manner in which it is introduced in a subsequent title draws the distinction even more distinctly than Lord Stair. I have stated my views on this point fully; for I have always held, that if the composition is not a casualty—was not so held in 1685—then the claim of the superior, excluded by the first part of the Statute, and not saved by the reservation, is clearly repugnant to the enactments of that Statute. In the second place, I apprehend that the clause is not such as would have been introduced if the object had been that for which the pursuer contends. I think that the clause would have expressly referred to the case of the heir of tailzie not being an heir-at-law, considering that the former part of the Statute bestowed the character of heir equally on all substitutes; and I do not think we are warranted to hold that so plain and important a limitation on the power given to substitute heirs was to be left to implication, and implication also out of a clause which, in its obvious purpose, has reference to the effects of the protection of the estate against debts, if the casualties of superiorities had not been specially mentioned. The object of the clause is, on that view, clearly satisfied and exhausted. In the view, then, which I take of this question, I think it is decided by the operation of the Act 1685.

In this view of the matter I am confirmed by a careful examination of the case of Lockhart, which, at all events, I regard as a decision on the point, and a decision of the highest authority, pronounced, as President Dundas says (Lord Advocate, and in the highest practice at its date,) with great unanimity in the notes by Hailes of the case of M'Kenzie. That decision was understood at the time to decide the question. Erskine, the professor of Scots law, says so expressly. Mr Erskine's authority is not confined to the passage noticed by Lord Fullerton, (though it certainly is not the less authoritative that it rests on a decision of the Court.) He gives his opinion distinctly in the 6th section of 7th title of book 2, on the general point as to the effect of the Act 1685, to the same purport; and then, in a separate passage, he mentions the case of Lockhart as a clear authority on the point, that a substitute has all the rights of the character of heir.

The decision, then, was held to be of great and direct as-

thority at the time. It is said in one of the opinions, that this decision has been declared by the Court since not to be good authority. I know not where it was so declared. The point was again mooted in *M'Kenzie*. But in that case the vassal expressly said, as he was not a stranger, "the superior (I quote the words of his paper) was welcome to a claim of reservation;" and, on Lord Braxfield's suggestion, that was adopted,—one Judge only, by Hailes's notes, not questioning the authority of the case of *Lockhart*, (for, in Covington's first opinion, he agrees with it), but saying that one decision, to be sure, will not make law, so as to bar reconsideration of the point. Again, in the case of the Duke of Argyle, the vassal offered expressly a clause of reservation, not being the party struck at by the claim. These two cases do not in any degree appear to me to invalidate *Lockhart v. Denham*. They only show what harm is done by attempts to avoid the decision of a point when once raised. But what is the pursuer's claim? It is, that every heir of tailzie must pay who is not heir of line. The case of Lord Hopetoun, as I understand, lays down expressly at least this, that the superior has no such right, and that an heir-male must be entered, though there are numerous heirs of line excluded altogether or postponed. Hence the plea fails to the extent stated, and to the extent of the reservation in the charter. But if there is any principle at all in the point, the claim ought not to be made applicable to the heir of line of the vassal last entered, but to a party not the heir of the investiture prior to the tailzie. This was the way the reservation was put in *M'Kenzie v. M.* by the express terms of the judgment, — (Mor. Dy. 15,053),—a very remarkable fact not sufficiently noticed. But this is a wholly different point altogether. Such a reservation raises the question, whether the superior can be obliged to receive a new set of heirs, even of the body, e. g. heirs-male, if heirs of line were heirs by the prior investiture, or goes on some notion of the loss of compositions by the prohibitions against sales? The reservation, again, in the case of the Duke of Argyle, was directed to the succession of a party who was not heir of line to the person last entered and infeft. These two reservations are accordingly different, and would depend on totally different views of the law. No two views can be more different. The cases were arranged in a way to save the discussion of the question. But if the Court is thought to have taken in each the view of the subject in which the terms of the several reservations point, then it is plain that the views were fundamentally different; yet these two cases are always mentioned as going on the same ground. I hold that the Court gave no opinion in either. The pursuer has chosen the latter form of reservation. Then he must maintain, contrary to my view of the Statute 1685, that he can deny to certain classes of substitutes named by the entail, and in the investiture, the character of heir. That is the true meaning of the ratio of the Court in the case of *Lockhart*; for no heir of provision can be a singular successor. And here I must observe, that great weight is due to an argument in the able paper for the vassal (*Sir J. Denham v. Lockhart*), by Sir Thomas Miller, to this effect. This question does not occur in an original grant of feu. If a superior, when he first separates out his estate by feuing, shall stipulate that every heir of entail, to be afterwards appointed, shall enter as a singular successor, that, as a part of the superior's property reserved by the original contract first feuing out the land, might be effectual as much as a clause tripling the feu-duty, or stipulating for two years' rent on the entry of every singular successor and the like, on the ground of being an express compact, by which alone the feu was ever separated from the *dominium directum*. But when a feu is once granted without any such matter of special contract and condition, not so restrained by any condition when the feu is created, and a vassal exercises his power to substitute heirs in his tailzie, is a substitute in a deed of provision so executed by a vassal, not an heir, as much as if the grant had been first to A, without mention of heirs, and an entry had been claimed by the heir of line? I own, in that distinction taken by Sir T. Miller, I think there is great weight.

Holding that the question in no degree depends on the claim for entry being by a substitute under a strict entail, in respect of the operation of the fetters, the next point is, what, then, is really the pursuer's plea? I apprehend it comes to this, that every heir of provision (no matter under what deed) who is not

heir of line, is a singular successor. No doubt, the question has been raised in cases of entail, because the motive and interest of the superior is greater in bringing forward the claim in cases of entail; and some advantage is supposed to be derived to the superior from the alleged hardship to him of the entail. But the claim is equally applicable to every heir of provision. On that view of the case, it is now admitted that an heir-male is not a singular successor, according to the unanimous decision in *Hopetoun*. It is said that, in the opinion of the consulted Judges in that case, the Court held as a ground of judgment that the vassal's power of nomination and selection extended only to heirs-at-law. Two of the Judges who signed that opinion entirely disclaim any such view, and so, I understand, does one of your Lordships. Again, if that expression in the opinion was deliberately considered by all as an opinion on the limitation of the vassal's power of nomination, I have three remarks to make,—1st, It was entirely obiter, for it was in no degree necessary for the case of Lord Hopetoun, who was only an heir-male of the body either of the first vassal, or of the assignee before infeftment; 2d, The parties did not understand the opinions to imply, of necessity, that every substitute who was not heir-at-law must pay a composition; for all that the Duke of Hamilton (after the decision) asked in the Outer-House, was a clause of reservation, which was also to reserve all objection to the claim, if ever made against a stranger; and 3d, The passages in the opinion in Lord Hopetoun are, with deference, very unfortunately expressed, if intended to be a definition, as it is now said, of the law; for it is not stated whether the limitation of the vassal's power of nomination is confined to selection among the heirs of the body, or among all heirs-at-law, however remote. The opinion speaks of his heirs-at-law generally, or natural heirs. That would seem to apply to all relatives by affinity. Well, then, how far does it go? May a man call his brother before his sons or his daughters, or a hundredth cousin living, say the chief of a clan, before his daughters or his sons? or (to take the Seaforth entail) "call the descendant of Colin Fitzgerald, my progenitor, who lived in the reign of Alexander the Third," before his sons and daughters. The opinion, which is now said to be a definition *ex proposito* of the law, really leaves the matter as to heirs-at-law wholly loose; or, if it is intended to mean all his heirs-at-law, and any order among them he chooses, then it must go to the length that a twentieth cousin or hundredth, may be called in before a man's own sons and daughters. I own I do not know what was intended to be in view by that alleged definition; neither do any of the three Judges, who allude to this point, explain this, unless it be Lord Fullerton, p. 20, who seems to go the length I have now stated. But on what ground can it be truly held that the superior cannot object (laying aside the Act 1685) to the entry, say of a fiftieth cousin, in preference to a son or daughter? Is that party not in substance a complete stranger, though in name a cousin? The contrary is carrying the notion of Scotch cousins rather far. I can see no other reason, except that the superior has no *delectus* at all in those whom the vassal is to name as to his heirs. When feus reverted to the superior on the failure of heirs, the superior had a clear right to limit the heirs to be included in the grant, and he had a *delectus* as to those by whom service was to be rendered, and his lands held in return for fidelity to the liege lord. But even then it was not blood relationship which constituted a party heir. It was then, as now, the choice and designation of the party as heir of provision in the deed settled between superior and vassal. The very principle of *delectus* originally imports that. But a feu of land is now a sale, with certain reserved right. When, therefore, a person has granted a feu, and the vassal sells, the purchaser must pay, as a singular successor, for an entry; but I am of opinion that the entry must be given in favour of any successors he names as heirs, and who are to take by succession from him under his deed. So far from concurring in the doctrine that blood relationship is the legal quality descriptive of heirs, I am of opinion that it is the nomination and substitution of parties in the deed of the person whose succession is to be regulated, and who has right to the feu, and that whoever appears before the superior nominated and substituted by a proper deed to the succession, is an heir in every sense of the term. In short, the right of succession under the deed, and not blood relationship at all, is

the only quality that was ever looked to in the law, at any period.

Either the vassal has the right to regulate his own succession, or he has not. If he has not, then every heir-male not also of line ought to pay as a singular successor. The contrary is found, and found, I understand, to the extent of the most sweeping preference of collateral to heirs of the body. If the vassal has not full right to regulate his succession, how happens it that in no instance whatever, of a stranger succeeding under a *simple destination*, was a claim for a composition ever dreamt of or preferred? The point never even was mooted except as to a tailzied destination, and palpably from the influence of some notion that the fetters of the entail aided the claim. But if the vassal generally has the power to regulate the succession to the feu, it seems to me to be only stating the same proposition in other words (for they seem to be convertible), when I say that he has right to name those who are to succeed. Observe, all take as heirs under a deed of succession. Where a party was named by the superior's consent, the only character which the law ever looked to at any time, was the nomination in the investiture, that made him heir equally whether he had the additional character of blood relationship or not;—that an heir of provision is a donee or singular successor merely, I consider to be a contradiction in terms, or a legal impossibility. Now, when a vassal came to have the full right of feu, without reversion to the superior, and the right, generally speaking, to regulate the succession in that feu, I am of opinion that substitution in his deed gives the character of heir, which the superior cannot refuse.

Farther, the reservation in this case is a very singular one, for it seems to me to be founded on no clear principle whatever. It is to claim from any party *not heir of line of the person last infeft* under that grant. But all the heirs under a branch of substitution to A B, a stranger in blood to the original grantor, are equally strangers in blood to the grantor with A B himself.

Then, on what ground is a distinction taken between A B, the present Mr Ewart, and his heirs of line—all being equally strangers to the grantor or to Lord Balgray? It seems to be thought that each substitute who begins a new branch of the substitution, is to appear like a purchaser, and to get a new grant for himself and his heirs. That view is manifestly repugnant to the Statute 1685, as to the power to substitute heirs. But how is he a purchaser? He can enter only by service. The last vassal got no benefit by his succession, and he has no character of a singular successor whatever. Nay, he is heir of the grantor in every sense of the term—fully as much as Lord Balgray—and incurs representation *ad valorem* to him. But, farther, the heir of tailzie who is so to pay, has no power to get an entry including all his heirs. Nay, his heirs of line may be wholly excluded, and all his collaterals, if the tailzie is limited to the heirs-male of his body. So he would have to pay without the benefit of a general grant, and would be worse off than a common purchaser; and the result will be, that the rights of superiors are infinitely improved by entails, for they will get a composition on every new substitution, and for a far more limited class of heirs than at common law. This certainly would be a whimsical issue of the effect of entails on the situation of superiors. But it is said it is only his heirs of line who can be admitted. Then the reservation is clearly against law, and fails beyond all question, according to the case of Hopetoun.

It seems to be a point not undeserving of grave consideration, whether, when the reserved claim fails, as it confessedly does in the opinion of the whole Court, and is bad according to the *terms and object of the reservation*, the superior is entitled to maintain that he can form and mould that clause into a different reservation, applicable to a totally different case. He has no claim, because the succession has opened to one who is *not the heir of line* of the vassal last entered. On that ground he has no claim. Every heir-male, if the destination was broad enough, in whatever order, however capricious, could enter. Now, if the ground of exclusion is bad in law, it is matter of grave doubt whether the clause can be carved into a different and special reservation, not founded on the principles stated in the clause, but on another and separate point. I am unwilling, however, at this stage of the case, to press a point not started by the defender.

I am more anxious earnestly to request the attention of your Lordships to the distinction which seems to be taken between the first party in a new substitution, and the heirs under that clause of substitution. For instance, turn to record, p. 20, "whom failing, to Robert Ewart, grandson of Dr Robert Ewart, physician in Jamaica, my brother, and the heirs-male lawfully to be procreated of the body of the said Robert Ewart, my grandnephew." Take the substitution to the defender. This might have included those who were not heirs to Robert Ewart. But, even with Robert Ewart and his heirs-male, what difference is there between the character in which Robert Ewart presents himself and his heirs-male? I can see none. There may be no blood relationship to the original grantor. Each takes equally by service. Each takes by force of the nomination in the deed. Each takes independent of the other. Each takes as heir of provision, and as heir of provision only. Accordingly, in the only opinion which humbly appears to me to approach this very difficult point in the argument of the pursuer, this is admitted in one passage, and the person first named in a new branch of substitution is put precisely on the same footing with all those called in that substitution. For, after disclaiming very anxiously the doctrine of Lord Jeffrey as to blood relationship, Lord Fullerton, p. 20, not only reverts to it, but follows it out to the extent of putting every substitution called upon the same footing, whether he is the first of a new branch or not. (Read p. 20). Now, upon that principle, it is quite plain each substitute in a *new branch* must be viewed as a donee or singular successor, if he has not in him the separate quality of blood relationship as much as the first member, called *nominatim* of that new branch. Lord Fullerton here holds that you must only look to relationship to the original grantor. But the pursuer's claim is rested upon the different ground, that the defender is not the heir of Lord Balgray. But, with great deference, the principle stated, if I understand another passage, is not adhered to, and it seems to be thought that the claim opens only when the succession devolves upon a *new branch* of substitution, giving a right to a composition only from the first substitute in that new branch,—a view which draws a second distinction between substitutes, not consistent, as I conceive, with the Act 1685. (Read passage, foot of p. 21). If this means that each new substitute is to pay upon the ground of being a donee, taking by the act of the original vassal, then it is quite consistent; and on the same principle on which Robert Ewart pays, so will each of his heirs-male. Is that the principle which is to be laid down? In that case, again, superiors will have got a great benefit by entails, for every substitute who is not the heir of line of the original vassal must pay as a donee, though he succeeds his own father, and most consistently and necessarily, upon any view I have been able to take of the general argument of the superiors. For what difference is there between the case of A B, in a new substitution in an entail, if he is to be viewed as a donee, because he takes by the act of the original vassal, and the case of A B's sons. They are donees as much, beyond all doubt, as A B, on the principle stated by Lord Fullerton; and if the principle is to be adopted, it must be carried to that length. I have ventured to notice this point in the opinions of my brethren, for I candidly own, that if these opinions had ruled, I could not as yet have been able to propose any interlocutor to your Lordships, not knowing whether only the first substitute of a new branch of the substitution, or each heir in each branch must pay, if not heir of line. But how does the general view as to the substitute being a stranger, if he could not take otherwise by service to the entailor, support the claim of the present pursuer? He rejects the principle of relationship to the *original* vassal, and he claims because the defender is not the heir of line of *Lord Balgray*. Now, on what ground is that claim founded? Lord Balgray was not the maker of the entail. His act did not call Mr Ewart. He got no benefit, surely, by the destination in favour of Mr Ewart; and I cannot see how the reasoning here applies at all. Farther, Mr Ewart is asking for no new grant. He does not ask for the admission of any heirs of his own—he cannot exclude them,—he cannot benefit them. His entry gives them no right; on the contrary, it only postpones their succession. Then, if he is to pay because not a relation of Lord Balgray, on what ground are the heirs-male of his body not equally to pay? They

do not succeed by his act or as his heir; they succeed because they are so called *descriptive*, to be sure; but as Lord Fullerton says, by the act of the maker of the entail; and any claim competent against Robert Ewart ought to apply equally to the heirs-male of his body. According to one view of the opinions they would pay, and I see no intelligible principle on which they could be exempted; for Mr Ewart asks nothing from them, and can give them nothing by his entry.

Such are the results and the inconsistent operation of the principles of the superior. Two remarks only in conclusion: 1. It appears to me that there is some error in the inferences drawn from the Statutes respecting the entry of adjudgers, and appraisers, and latterly purchasers. These were cases of compulsory changes of the vassal *invito domino*, often against his interest as superior, against the bargain and contract subsisting between superior and vassal, and against the fundamental obligation on the vassal of keeping the feu. Hence, as the superior could not be called upon to change the investiture once constituted, a bonus was to be given to him. But I do not think that these Statutes, and the rights which they recognise in superiors, bear very materially, if at all, on the question as to the vassal's power (having paid for his entry) to name his own heirs in the investiture that is to be completed, and by which he proposes to hold the feu without the power of sale: 2. I am surprised to find reference made to practice, which, however, is said only to exist to the extent of requiring reservations when entails are executed. No one need object to that, for the effect of such was future and undecided. But the important practice to look to is this. Is there a single case of any superior demanding a composition when a stranger succeeds under a fee-simple destination of an estate? Neither has notice been taken of the important practice of the prime superior of the whole land in the country, and attention has not been paid to the alarming claims which could open to the Crown against the subjects. On the argument of the superior, the Crown would have a claim for a year's rent in every case in which the heir asking for an entry had no other character than that of heir of provision, whether in fee-simple or tailzie destination. It is a great mistake to suppose that the rights of the Crown were not very deliberately and thoroughly investigated, after the institution of the new Court of Exchequer on the Union. On the contrary, the opinions in the State Paper Office, and the Advocates' Library, by the Scotch Crown counsel, show that every point was most narrowly and vigilantly looked into. It is stated in the case of *Lockhart v. Denham*, and I believe is the fact, that the Crown first raised the question after the Union, that a superior was not bound to receive a corporation. Many instances might be given of the vigilance with which all questions respecting the rights of the Crown were considered after the Union. Yet in no single instance has a composition ever been asked from any party named as heir or substitute by the vassal—that vassal having paid his own composition if a stranger. On the contrary, one composition, and one composition only, has hitherto enabled the Crown vassals, in obtaining right to their lands, to name any heirs of provision or tailzie they chose, and from no heir of tailzie has a composition ever been demanded, at least up to the date when I was a law officer of the Crown. On this point, I have a distinct memorandum from the office of Presenter of Signatures, obtained in 1829, when I was Solicitor-General. I must say that I attach the greatest importance to this practice on the part of the Crown. They have never even attempted, generally speaking, to reserve the claim for composition, although regularly exacted in every case of a proper stranger not entering as substitute, but as purchaser. It would be with great reluctance that I should feel constrained to open up to the Crown a new claim that would operate so severely and so extensively on the principles contended for by the pursuer.

On the whole, I am of opinion that the claim of the superior to one year's rent of the lands in question should be repelled, being the form of the interlocutor in the case of Lord Hopetoun, and the cause remitted to the Lord Ordinary to proceed further as he shall deem just. Whether a ratio should be added or not, in this case, may be a matter of question. If so, and I rather think the ground of judgment should be stated, I would propose that the finding should be, that "the defender, being an heir substituted in the deed granted by the vassal, and in the investiture,

for which a composition was previously paid, is entitled to be entered as an heir, on payment of the casualty of relief."

Lord Medwyn.—This is certainly a very nice and difficult question. The Court, ever since the case of *Denham*, 1760, have waived the determination of it, and the diversity of opinion among our brethren, now that it comes before us for decision, shows its difficulty. I have given the case the most careful consideration, more especially since I have had the benefit of the opinions of my brethren; and the opinion I have formed, I now submit with all deference to that delivered by your Lordship.

I consider this declarator as the proper mode of trying the question, upon what terms the defender is to obtain an entry to the lands of Allershaw; neither do I think it of any importance in this case, that he is called into process as heir of entail. The question is, since the defender is unquestionably not the heir of the person last infest, but is an heir of provision merely, is the composition of a year's rent due for an entry, or is he to be received simply for a duplicand of the feu-duty?

When the first heir of entail, who was not heir of line of the maker, obtained an entry and was infest under the entail, he paid a year's rent to the superior, and a clause was inserted, that the superior was not to be excluded from any claim there might be at law for a full year's rent, when the future heirs of entail shall happen not to be heirs of line of the "person last entered and infest." The question, then, is open, and now comes for decision, as the defender is not heir of line but heir of provision only of Lord Balgray, the heir last entered under the composition paid; it is of no consequence whether it be under a strict entail or a simple destination. It will occur when the heir of provision comes to enter, although, by the unfettered nature of the property, he might have been excluded by the prior heir having changed the destination.

The question seems to me to depend much on the effect which the Act 1685 had on the right of superiors previously existing, which necessarily involves the inquiry as to how these rights stood at that period. "By the genuine principles of the feudal system, no vassal had a power to transfer the right of his feu to another without the superior's consent, and the superior was not bound to receive any person in the lands other than the heirs to whom he himself had limited the descent by the investiture, though the greatest sum should have been offered him in the name of entry,"—*Erskine*, B. II. t. 7, § 5. And he quotes the case of *Cleland*, 24th February 1685, for this,—decided the very same year in which the Act concerning tailzies was passed,—where it was held that it was arbitrary for a superior to receive, or not to receive, a vassal. An important right was originally connected with this, that when the heirs of the investiture failed, the superior succeeded as *ultimus hæres*. There is a case in *Balfour*, p. 484, c. 5, to this effect in 1506, where the grant had been to a man and the heirs-male of his body; on the failure of these it was held that the superior was entitled to take them even from the heirs-female of his body. See also *Balfour*, p. 232, c. 38. *Craig*, B. II. d. 17, § 17, mentions this also as the right of the superior, but says that some thought the Crown should succeed. The opinion in favour of the Sovereign gained ground, so that in *Dirleton*, p. 119, he resolved the question by a reasonable distinction, that if the fee be limited as to heirs-male, on their failure the superior should have right; but if the grant be to heirs whatsoever, the fee is simple, and the granter having given every right away, the superior had reserved nothing, and can pretend no right to the same.

But this distinction was not followed out, and the right of the Sovereign prevailed, and was enforced. In 1680, *Fountainhall*, Vol. I. p. 97, mentions two cases where the Crown, as *ultimus hæres*, excluded in the one case, daughters, and in the other, a brother; and in *Tenant*. July 1688, "The Lords found, that either in an original feu or posterior infestment of tailzie, where the provision is in favour of heirs-male, and not the heirs whatsoever, that the heir of line cannot succeed, but that the right does devolve on the King as *ultimus hæres*." Now, although the superior's right was here abridged, yet the donator of the Crown necessarily could obtain an entry on no other terms than any other singular successor. The donator is liable for the debts of the last possessor coming in

place of the Crown, who, as Dirleton says, cannot succeed but by way of representation and as *ultimus hæres*; and he also must be liable in a composition like any other grantee. It would be different in the case of forfeiture for treason. A donator, on forfeiture, does not pay a composition for an entry. Blair, 1680, p. 15,045; Duke of Gordon, 1771, p. 15,050. The Sovereign did not take as an heir but by escheat, and therefore was not liable for the rebel's debts till 1690, c. 33.

The superior's right to refuse an entry to a stranger came to be abridged so early as the fifteenth century; for by 1469, c. 36, superiors were forced to receive creditors' appraisers as vassals, on payment of one year's rent of the lands; and although this was only intended for the case of judicial sales at the instance of creditors, and for their behoof, yet it came to be used as a device to compel the entry of a purchaser, by which, as Craig says, Lib. 3. D. 1, § 13, this right of refusal "*hodie pene subvertitur magno dominorum damno*;" and yet he says he never heard such appraisings set aside *sub pretextu aut collusionis aut simulationis*. Superiors, it may be presumed, were generally satisfied with obtaining a year's rent for the transference, and this came to be fixed as the price for foregoing his right to refuse an entry, which might thus have been enforced upon them circuitously, more especially after the example set by the Sovereign; for the Act 1578, c. 66, mentions, that, by several acts of the Priory Council, purchasers were secure of being received as vassals by the Crown upon their reasonable expenses, i. e., on a composition to be paid to the Treasury, which practice fixed at a moderate rate one-sixth of the valued rent. The favourable manner in which the Sovereign has always treated vassals as to their entry, makes the circumstance that the Crown makes no such claim as the superior here does, which your Lordship says is the case, of less weight than it might otherwise have. A subject-superior is entitled to, and exacts a year's rent from a purchaser, although the Crown only claims a small portion of the valued rent. That, then, will not affect an ordinary superior's rights.

By 1669, c. 18, adjudications were put on the same footing as comprisings, with regard to payment of a year's rent, so that the superiors of lands, annualrents, and others adjudged, shall not be holden to grant any charter for infefting the adjudger, till such time as he be paid and satisfied of the year's rent of the lands and others adjudged; for although the Act 1621 had treated of adjudications against the heir lying out unentered, following out the Act 1540, c. 106, when a creditor, either his own or his ancestor's, wished to pursue for his debt; and although custom had also introduced adjudications in implement of disposition and obligations to infeft, yet to these the payment of a year's rent had not been extended.

When adjudications were substituted for appraisings by 1672, c. 19, the payment of a year's rent was still the condition; and finally, purchasers at a judicial sale were, by 1681, c. 17, entitled to an entry on the same terms.

Now, these relaxations of the superior's right were all, except the last, in favour of creditors, and the last, which was in favour of purchasers, was on account of its bearing on the interest of creditors. It was to give them payment of their debts that these statutory regulations were introduced. No change was made in the case of an ordinary purchaser, still less of a proprietor wishing to make a tailzie of his lands, cutting off the right line of heirs. These Statutes, accordingly, speak only of the superior receiving the appriser, or adjudger, or purchaser at the judicial sale, and never even mention heirs, far less heirs of provision. This would have been going beyond the object in view, which was simply to prevent the privilege of the superior absolutely to refuse a new vassal standing in the way of a creditor obtaining payment of his debt. If he wished to acquire the lands themselves, and destine them to heirs different from his heirs of line, I see no provision in any of these Statutes which could compel the superior to receive a series of strangers substituted to him. This, it appears, must have been still the subject of treaty with the superior.

I am quite aware that it was common for proprietors of land to tailzie their estates, sometimes more strictly and sometimes less so, by simple destination, with prohibitions, and finally, with irritant clauses, but they were not favourites of the law, and with great difficulty sanctioned. That this was so, is apparent from our Statute book. Thus James III., by 1476, c. 70, re-

vokes all "tailzies maid in his tender age fra the richteous aires;" and Craig, Lib. 2. D. 16, § 12, says, that tailzies confirmed by subject-superiors, when minors, might be reduced by them. James IV., in like manner, by 1493, c. 51, revokes "all tailzies maid fra the aires-general to the aires-maill of anie landes in our realm,"—plainly implying that scarcely any other tailzie was then known; and in the revocation by James VI., by 1587, c. 31, of all tailzies made by him in his minority upon resignations from the heirs-general to the heirs-male, "against the law and gude conscience," an exception is made as to conquest, "because it is not against conscience that onie person quho acquires the richt of onie heritable landes, may take the same to sic aires as he pleises." This merely imports that a person acquiring lands might make them to descend to heirs-male, or perhaps stranger heirs, without being held to proceed against good conscience, but it by no means imports that the superior must receive these extraneous heirs, as he must the acquirer and his heirs of line. It is true Craig (Lib. 2, D. 1, § 13,) maintains that such entail is neither against law nor conscience, and mentions that they were supported by the Court in the case of *M'Lachlan v. Lamont*, 1st March 1548, and accordingly this decision is reported by Balfour, p. 173, as the first case supporting that view of the law; but in the very next year an opposite judgment is given, p. 174, c. 3; and from a case also noticed by Balfour, decided a few years afterwards, where the term heirs of tailzie in general was extended to all such, as well in the right line descending as in side line or collateral—*Campbell v. Grahame*, 18th June 1566, p. 174,—I infer that these heirs of tailzie were heirs-male, and certainly could not be stranger heirs. Craig distinctly restricts the term heirs of tailzie to heirs-male, to the exclusion of heirs-female of the maker. Accordingly, one of the reasons he gives (L. 2, D. 16, § 20,) why tailzies were not encouraged by superiors, (and he says, "*Tailliar feuda ex jure nostro non possunt, nisi ex consensu domini sui superioris*," L. 2, D. 3, § 43; and Stair lays down the same doctrine, that a "tailzie must be constituted by the superiors") is, that it excludes females "*cum majores multæ commoditates proveniant ex hærede femina, quam masculo*." This was no doubt the first form of entail; but when more distant relations came to be introduced into a substitution, Craig denominates them heirs of provision, giving them a new designation, as now first known to the law, in consequence of this enlarged exercise of the power of entailing.

But it may be that the form of apprising came at a later period, and nearer the date of the Act 1685, to be used not merely to procure an entry to a purchaser and his heirs or his heirs-male, but to strangers in their character of heirs of provision. But I see no proof of this, and I think there is no probability of it. When Craig complains, that under the Act 1469, purchasers, not creditors merely, compelled the superior to receive them on payment of a year's rent, and that he had never seen the attempt to resist this successful, I think it cannot be supposed that this was any thing else than the purchaser assuming the character of a creditor, but without any substitution of extraneous heirs. I do not believe that such substitutions were very common at that time; I rather suppose I may say that they were not; and I can scarcely doubt that, although the Courts of law were willing to abridge the rights of superiors, so as to admit a purchaser's entry on the same terms as if he were a creditor, they would have scrupled to allow of a substitution of stranger heirs, and compel the superior also to receive them by assuming a character totally alien from his true one, in order to accomplish such an object, at a time when the state of the country and of the law made so very intimate a connection between superior and vassal, and when it was almost essential that the superior should have a *delectus personæ* in his vassal.

The opinion of Stair on this point is noticed on both sides. One thing is very clear, that in neither of the passages is the learned author treating of the point at present in dispute—the composition for an entry. In the first passage referred to, (B. II. t. 3, § 43,) he states it as the law, when his first edition was written prior to 1685, that tailzies must be constituted by the superior, and that he is not bound to alter the tenor of an investiture, except where it is provided by law, whereby he is necessitated to receive appraisers and adjudgers. This of course would be presumed to include only these creditors themselves and their heirs, as all that was necessary for the object in view; and so it is,

for Stair goes on thus:—"So neither in that case is he obliged to constitute a tailzie, but only to receive the appriser or the adjudger and their heirs whatsoever." This is a very distinct expression of opinion; and I cannot help thinking, that when public opinion induced the courts of law to sanction the extension of the form of apprising to the case of purchasers, it would not go beyond the heirs whatsoever, or possibly heirs-male, and would not compel the superior to receive strangers not of his own selection for vassals, and to the loss of a composition for an entry. One case mentioned by Stair, which immediately follows the words last quoted, fortifies this view; for the superior is only to receive the adjudger and his heirs, "unless the debt and decreet where on the same proceeded be conceived in favour of heirs of tailzie, in which case the apprising or adjudication, and infestment thereupon, must be conform, unless it be otherwise by consent of parties." Certainly an adjudication on a debt must be in conformity with the destination in the bond constituting the debt, and unless by mutual consent this be altered, the decree must pass in these terms. This is merely following out the benefit conferred on a creditor, in order to recover payment from the lands of his debtor, for the remedy would have been incomplete if adjudication could not pass on a taillied bond for borrowed money. But it would not be often that securities for money would be taken in that form, so as to bring in a stranger, instead of simply to the creditor, his heirs and executors; and to admit it in such a case, is a very different matter indeed from allowing a proprietor to make an entail of his estate to a series of stranger substitutes, and adjudge either upon a bond or obligation to convey, so framed. As yet, Stair most clearly is treating of the case of a real creditor for borrowed money adjudging; and I farther think he is treating of the rights of a proper creditor, when he goes on to consider the case where the apprising or adjudication has been on a bond to heirs, and a taillied infestment is wished; for he says—"or at least, if the appriser or adjudger crave the infestment to himself and the heirs of tailzie, the superior ought not to refuse it." He is certainly not bound to do more than allow the lands to be adjudged in terms of the bond; but the reason why he should not refuse to give infestment in favour of heirs of tailzie, is, not that he has no right to do so, but this—"for the apprising or adjudication being assigned to a stranger, he behaved to be infest, much more the alteration of heirs is allowable." It is then only an alteration of heirs that is in view, as instead of heirs whatsoever, destining the lands perhaps to heirs-male, not the substitution of strangers; and the reason given shows, that even as to heirs, it is only one alteration of heirs that is contemplated, not a destination including as many strangers to himself and to each other as the maker of the deed may choose. For if an adjudication be assigned before infestment to a stranger, the stranger must be infest. But he will pay a composition just as the adjudger would have done. Nay, there is a case where an adjudger assigned to an assignee, and he again, without taking infestment, to another, and the superior was obliged to receive this second assignee, receiving only a single composition—(Colmslie, 12th March 1629, p. 200). But this only introduces the first stranger into the investiture; it goes no way to support the notion, that any number of stranger substitutes might be introduced into a tailzie, and the superior compelled to receive them on payment of a single composition, still less that a proprietor might taillie on himself or his heirs-male, whom failing strangers, and could force the superior by adjudication to grant him an investiture in these terms, when, of course, he must be received upon payment of relief as an heir only. Nay, I think I may draw this inference from it, that it could not then be held that an appriser even, far less a purchaser, under the form of an apprising, could compel the superior to give an investiture to him, and to a series of stranger substitutes, for a single year's composition, otherwise such a claim never would have been made, that each assignee, before infestment, must pay composition. This was plainly viewed as defeating a right to refuse such substitutes without paying a composition. But the claim was not sustained upon a principle quite apart from admitting the right of an appriser to force the superior to receive any heirs of provision the appriser chose to offer as vassals.

It will be observed that I use the term taillie in its original meaning, whether protected by irritant clauses or not. If they

be so protected, this gives the superior a stronger interest to enforce his right, but it arises under the other form also.

It is fit, too, that I should notice, that after the passing of the Act 1685, Stair made no change in the above passage of his work. He does not seem to think that the Act in this respect at all abridged the right of the superior. How easy and how natural would it have been for him to have noticed this, if it really had been his view of the Act. But it must not be forgotten, that if a purchaser did wish to destine his lands to a series of stranger heirs, there was a privilege which the superior had which would effectually prevent him, under the guise of an adjudger, from forcing upon him strangers as his vassals, so that it must still have been matter of treaty between them. For the Act as to apprisings authorised the superior to acquire the subject appraised by making payment of the debt; and the same privilege was extended to an adjudger in the case of Scot, 10th June 1671, where it was farther found that it was redeemable from the superior by the vassal within the legal, without paying a year's entry, because the vassal was thus not changed. (Stair B. 2, t. 4, § 12.) I may notice, in passing, that the same privilege was not given to the superior in the case of a judicial sale. (Kennedy, 6th February 1695.) Fountainhall says, "the Lords unanimously found the superior's right of redeeming took no place in their sales."

As to the other passage referred to from Stair, § 59, it seems to me to advert merely to this, that if a superior does not accept of resignation voluntarily, he will be obliged to admit the adjudger in implement; but it says nothing as to stranger heirs being forced on the superior by this form of proceeding. I wish finally to remark, that in neither of the cases last mentioned, is there the least appearance that the destination was other than to the adjudger and his heirs; nor can I discover in our books a single instance of an adjudger forcing an entry for stranger heirs. There are abundance of instances in the Dictionary *v.* Superior and Vassal, of adjudgers claiming an entry, and also of superiors suspending such a charge on various grounds, but not a single instance on the ground that it was to introduce stranger heirs. All bear that the entry is for the adjudger simply, which, I must say, satisfies me that no greater relaxation of the superior's right to refuse a change of vassals was sanctioned beyond the statutory enactment compelling him to receive an appriser or adjudger. I cannot hold that it was so extended in practice, that it was vain for even the most determined stickler for a superior's privileges to urge this plea. I think the legitimate conclusion, from the absence of decided cases, is, that no adjudger believed the Court would sustain such a claim, and therefore, that, as in the case of a voluntary purchaser, he knew he must transact with the superior, if he wished the subject adjudged to pass to stranger heirs, and that he could only acquire this privilege by treaty with the superior.

Upon the whole, then, I do not see that it has been made out that a superior was bound, prior to 1685, in granting an investiture to an adjudger, or to a purchaser in the form of an adjudger, to go beyond the ordinary style to him and his heirs-male or heirs of line, but not to strangers whom he might wish to substitute; and as the superior could always exclude him by taking the adjudication to himself, this was an additional power he had to make him purchase a destination such as he wished, by paying what could only be matter of treaty and contract between them.

The Act 1685 was then passed, and as it is the main ground of the vassal's plea in this case, it is of great importance to attend to its object, and its enactments for carrying out that object. I presume it will not be disputed, that its sole object was to legalise the irritant clauses of an entail so as to make them effectual against creditors and purchasers, and to do this in such a way as to protect the interest of future heirs of entail, at the same time doing as little injury as possible to any other members of the community. Hence, when the Legislature enacted, that it should be lawful to tailzie estates, and to substitute heirs in their tailzies, with such provisions as they think fit, and to affect them with irritant and resolute clauses, it was necessary to provide some mode of informing the public of what tailzies were allowed, that creditors and purchasers might know they were dealing with a person who could not bind his estate. This was done by production of the entail to the Court of Session,

and its insertion in the Register of Taillies. In case it might be thought that, by implication, the superior's rights might be affected, which was the only other interest to be attended to, this was done by an express reservation thrown in at the close of the Act, that nothing in this Act shall prejudice "his Majesty, or any other lawful superior, of the casualties of superiority which arise to them out of the tailzied estate." I must say, this is just what I would have expected from the aristocratic Parliament which sanctioned tailzies. I never could have conceived that they would have made so total a change on the rights of superiors, as to make any Act compelling them to receive any series of heirs the vassal chose. This was not necessary to secure their estates for the welfare of their family, which is always the inductive cause of entails. I am aware that Erskine says (B. II. t. 7, § 6), that a method of obtaining an entry, which was universally considered as a new limitation of the superior's rights, was established by the Act 1685, so that the superior is not left at liberty to refuse the entering of those heirs whom the vassal hath named under the authority of a public law; and, moreover, that the superior is not entitled to a composition for every heir of entail who is not heir of line to him who is last infeft. These views of the law are rested on the case of Denham, and the opinions of lawyers which led to that decision; and certainly they would have been entitled to the greatest weight, and, indeed, could hardly have been got the better of, if the credit of that decision had not been shaken by subsequent judicial procedure. The right of the superior was, in that case, held so much altered by the Act 1685, that it was not competent for the parties even to stipulate, that in the event occurring of a stranger heir succeeding, he should pay a year's rent, at least he could not bind an heir of entail in this payment. But in the subsequent cases of M'Kenzie and the Duke of Argyll, the Court disclaimed this view, and allowed a clause of reservation to be inserted in the superior's charter, to allow the right to be determined when the case should occur. We are now called upon to do so; and I cannot discover any thing in the Act 1685 to abridge the superior's prior rights, even had there been no reservation in his favour. The powers of the proprietors alone was the subject of the Act, so as to make an entail effectual against creditors and purchasers, putting it out of the power of heirs of entail to deal with any such to the prejudice of future heirs. It had no other object. It does not enact that the superior must grant an investiture to such heirs as the maker chooses. It left the entry, as before, to be the subject of adjustment between them. But if possible to make this more clear, the superior's right to the casualties is declared not to be prejudiced. This surely as clearly applies to composition as it does to relief.

Your Lordship has examined with great minuteness the character of this payment, and the place it holds in our law books. You also mention, that in the clause of reservation in the Westsbie case, the payment of composition is distinguished from the ordinary casualties of superiority; and you conclude that the reservation in the Act does not apply to the composition for an entry of a singular successor, but only to the relief for an heir. As already said, I cannot believe that the Parliament 1685 wished to abridge a superior's rights, without even any express notice that they were doing so, or that, in the reservation of these rights, they did not intend to include this most important one,—the right of not having a vassal forced upon him, not the heir of the person entered. I know very well that the composition for receiving a singular successor could not originally be reckoned among the superior's casualties, because it was not matter of right in the stranger, but of purchase and composition from the superior, whence its name, and whence also its place in our institutes of law; but when it could be enforced by an appriser or adjudger, it becomes of the same nature as any other of the casualties; it truly became a casualty; and in truth I think the reservation more expressly referred to it than to any other of the feudal casualties. What effect could the entailing clauses have upon ward, marriage, or recognition? The last it more effectually prevented; the other would occur as before. Moreover, an entail would not exclude irritancy *ob non solutum*. In fact, it was the introduction of strangers into the series of heirs of entail which would affect the superior's casualties, and therefore this probably alone called for the express reservation.

And this, I think, was effectually done by the Act; so that whatever privilege the superior had before the Act, as to agreeing or not agreeing to receive strangers as heirs of investiture, he continued to have after it; and the entailing powers only operated in favour of the vassal, when he paved the way for it, by receiving the superior's consent to the admission of strangers as heirs of the investiture, and adjusting the composition due on an alteration of heirs.

To say, because the Act authorises the lieges to substitute heirs in their tailzies, that this gave these substitutes, in all respects, the character and right of heirs of line to the maker, in a question with the superior, so as to convert a mere stranger into any other heir than an heir of provision, does not seem to me a sound inference. The term heir, I think, will never solve the question. Each substitute is an heir of entail, and has his rights and character as such in reference to the maker, and the heirs before him, and the heirs substituted after him under the entail, which is the charter and measure of his rights. But *quoad* the superior, he is still an heir of provision, and, if a stranger to the former investiture, he will remain so under the entail, until it is acknowledged unreservedly by the superior, and an investiture in his favour made up under it. But till then, though called as an heir in the entail, he is a stranger to the superior, and must be dealt with as such by him.

I may remark, that the insertion of the clause in the superior's confirmation of the entail of Westsbie,—that every heir of entail should pay a year's rent for his entry, unless he was heir of line to the person last vest and seised,—is very strong proof that our lawyers at that time did not hold such an heir entitled to an entry merely by paying the relief. It appears that the clause was twice introduced in 1726, and again in 1737, when the judgment which forfeited the estate was reversed, and the appellant took an entry. The composition paid had been £200. I cannot conceive a stronger illustration as to the understanding of the law at this time of both superiors and vassals than this; and it is important to observe who were the counsel who advised the parties at that time. From the appeal cases it appears that, besides others on one side, there was Duncan Forbes, and on the other, the last President Dundas and Lord Grange, during the period of his return to the bar, after resigning his seat on the bench. These were great lawyers, and we may presume that, at the suggestion of the one, and with the approbation of the others, this clause was introduced as a due exercise of the reservation in favour of the superior, of his rights in the Act 1685. I may notice, in passing, an illustration arising out of this case. The entail which Sir William Denham made in 1711 was not feudalized by him. Sir Archibald Stewart Denham was the first heir who made up a title under it, having irritated the right of a prior heir, and as he was not heir of line to Sir William, he paid the composition as a singular successor. This title was set aside, and the prior heir, Sir Robert, was found entitled to the estate, the composition being allowed to Sir Archibald, as if paid to the superior by Sir Robert, and the same clause was again inserted. It was held in 1760, that having thus acknowledged the entail, the superior was not entitled to a year's rent when Sir Archibald succeeded to Sir Robert, as he did, not being his heir of line. But suppose that Sir William Denham had, at the date of the entail, applied to the superior to give him an investiture under this entail to himself and the heirs-male of his body; whom failing, to Robert Baillie and the heirs-male of his body; whom failing, to Mr Archibald Stewart, and the heirs-male of his body, would the superior have been bound to do so on payment of relief as an heir? The entail was made in 1711, and the entailor was an old man without heirs-male. He died next year. The superior was not, if he confirmed the entail in favour of Sir William, entering a singular successor, so that composition was not then due as for a singular successor, while it was very clear that it must be due at no very distant period. The superior surely was not bound to acknowledge the entail? That the interlocutor in 1760 implies, as it holds he had excluded his claim to refuse, and this must have been by a voluntary act of his own. The vassal could not surely force a renewal of the investiture, as if it had been simply to Sir William Denham, and his heirs or his heirs-male? Therefore, I think it must be held, that it was still a matter of transaction between the parties, as they clearly viewed it at the time, although effect was

not afterwards given to it by the Court. Sir William Denham could not be called on to pay composition as a singular successor, as was found subsequently in the case of M'Kenzie; and if I am right in holding that the superior was entitled to a composition when Baillie took an entry under this entail, which really seems not questionable, on what principle can it be said that if he, having possessed the estate, should die without heirs-male, and Archibald Stewart, not his heir of line, came to succeed, should not be liable for a composition on his entry? It might be held that an heir of entail was not entitled to bind a future heir in payment of this; but if a reservation of the right to demand it be inserted when the case occurs, I am unable to see on what ground it can be resisted as often as it occurs.

Considering that there is so much difference of opinion upon the point among us, I am happy to fortify my own views by referring to the opinion of Lord Balgray, in the case of the Merchant Company, 17th January 1815. He observes, "a third encroachment arose from the Statute 1685. It empowers all men to entail their lands; and by that Act, the rights of the Crown and of all superiors are reserved. Yet the superior was bound to receive the heir of entail, if he were also heir of line, though he succeeded as a disponent, and he could not object to do so;" that is, when he received him, he was bound to receive him as an heir, and paying relief only. "But whenever the entail went beyond the heir of the original investiture, or called others than the heir of line, it was considered that the superior's right to impose an entry revived under the reservations in the Act." He then refers to the cases of M'Kenzie and the Duke of Argyle, "and the cases of the Earl of Dalhousie and the Earl of Breadalbane, decided in Exchequer, where the parties found caution, that, upon the succession opening to the fourth son, they would pay a year's rent." This I must consider an opinion of very great weight.

The same observation applies to the last change made on the rights of superior and vassal by the Act 20 Geo. II. A purchaser may obtain an entry from the superior under a title containing an unexecuted procuratory in his favour. He was no longer to act as an adjudger; but then it is expressly provided that the vassal must pay such fees or casualties as the superior is entitled to "receive on the entry of such purchaser." The case here is simply the reception of the purchaser as vassal, and the superior's casualty on his entry is to be paid before he can obtain his title. This Statute, in this respect, shows a due regard to the superior's rights; its object was to take from him a privilege inconsistent with the advanced state of the country, and the altered condition of superior and vassal, in relation to each other; but it went no farther, and it did not say that the payment then made would cover any series of heirs of investiture that might be introduced into an entail. To extend a vassal's right so far, and so far abridge the superior's, was not necessary for the object in view, and was certainly not expressly enacted. The utmost that can be said for it is, that it is inferentially deduced as the result of the two acts, granting an authoritative right to the entry of such heirs as the vassal chooses, without expressly declaring that no casualty is to be paid on a change of heir. The view of the Legislature seems to have been all along the very proper one,—to grant a privilege to vassals, trenching as little on the superior's rights as possible, when both are compatible. It is quite compatible to allow the entailing on a series of heirs, and not defeat the right of the superior to a composition as often as a stranger succeeds as heir of provision; and therefore, upon the whole, I concur in the views of the majority of the consulted Judges.

Lord Moncreiff.—This is undoubtedly a question of importance. It was once decided in *Lockhart v. Denham*, 10th July 1760; and, notwithstanding all that has since occurred, I still think that case rightly considered—an authority of very great weight. But if the discussions which have since taken place, have the effect of rendering the material question still an open point, subject to the force of all the authorities together, though in none of the later cases, except that of Baillie, did the facts require or admit of a judgment on the point,—at the least I cannot hold it to have been determined in opposition to *Lockhart*, and the express authority of *Erskine*, by anything which took place in the case of the *Duke of Hamilton v. Lord Hopetoun*, which appears to me to have been different from the present

case in the essential facts on which it depended, and which did not admit of any judgment on the question which the Court are here called upon to resolve.

On principle, I can find no solid distinction between the case of one heir of an investiture and that of another; between one series of heirs, not the heirs of the old investiture, who are once established in the superior's charter, and any other series so established. Whether they are natural heirs to one another or not, they are all heirs of the investiture, and enter as heirs of provision.

The case is, that there is an entail by Miss Ewart (who was fully entered) to herself in liferent, whom failing to William Cossar, &c., with a procuratory of resignation. He resigned, and got a charter engrossing the entail, on paying the composition of a year's rent. This was right. But once done, the entail was sanctioned as the ground of the investiture, and all the heirs as heirs of provision under it. The superior had no power to refuse the charter in these terms. He was bound by the Statutes to grant it, the composition being paid. He could not refuse, on the ground that the granter exercised the statutory power of imposing the conditions of an entail. This is not the question argued. The superior would not have been allowed to insert a clause binding the heirs of tailzie, who might not be heirs of line of their predecessor, to pay a year's rent on entering; not such a clause as that which occurred in the case of *Lockhart*. All the decisions together import that the utmost admissible was a mere reservation of such a question, leaving it open on both sides. (See clause of reservation in this case, p. 28 of record). Cossar might have taken infeftment. But he held on the open charter. Still Lord Balgray took the estate as heir of provision to him by service. He was no assignee of Cossar, to whom the charter was granted; a fact very material with reference to the case of Lord Hopetoun. He was the heir specially, and *nominatim* recognised as such in the charter. Lord Balgray was infeft on the charter as the vassal of investiture, taking not as assignee, but as heir. No composition could be due then on any supposition. Yet it must be said, that as he was not an heir of line or heir-male of Cossar, he would have been bound to pay it if Cossar had taken infeftment; his not doing of which was a mere accidental circumstance. Lord Balgray dies without issue. The defender is heir of the investiture *nominatim*; and the question arises, Is he bound to enter as if he were a disponent or singular successor paying a year's rent, because he is not the *heir of line*, or an heir by blood of Lord Balgray?

The plea in law for the pursuer is very vague: That, in the circumstances condescended on, the defender is bound to pay a year's rent. It is not made precise in the pursuer's case, p. 29. He speaks of "*the heir of the last vassal*." He does not say the heir of line, nor does he exclude the case of *heir-male* general of the last. He leaves it doubtful whether his plea limited to total strangers or not. But I understand the pursuer to mean his ground to be, that the defender is not heir of Lord Balgray by blood; not that he is not heir of Cossar, the institute of the entail and the charter; nor, that he is not an heir of the entailer. It is put on his not being heir of blood to the *last person infeft* as heir, though that person was himself a stranger both to the entailer and to the first heir or institute. It so stands by the clause of reservation, which puts it on the heir succeeding not being heir of line of the last heir. There is another peculiarity in the conclusion of the pursuer's case, that the defender must accept of a charter with a similar reservation. But, suppose the composition were due by the first extraneous heir, it might be a question, whether that must be continuous. Yet I understand the plea to be that it must apply to every such heir successively.

In this state of the case, I look for the law necessary to support such a claim. And I may just observe, before going farther, that it appears to me to be a claim totally different in principle and character from anything to be found in the opinion incidentally delivered in the case of the *Duke of Hamilton v. Lord Hopetoun*, on which the chief reliance is placed by the pursuer.

It is not necessary to go into the ancient history of the law, the state of it now in the essential points being clear. 1. By the Act 1469, a superior was bound to enter appraisers on pay-

ment of a year's rent. 2. By the Act 1669, c. 36, he was bound to enter adjudgers on the same footing. It is unnecessary to observe, that thereby the investiture was fundamentally altered without the consent of the superior. 3. But by 20 Geo. II., he became bound to enter all disponees on payment of the usual "dues and casualties," which provision has been understood to mean the composition of a year's rent in the first instance, and the casualties afterwards falling due. Entries or renewals of the investiture, under the force of these Statutes, are totally different from an original grant. But, 4. By the Statute 1685, c. 22, all proprietors became entitled to make tailzies of their lands and estates to any series of heirs that they pleased, and under such conditions and clauses, irritant and resolute, as they might think fit, but with a provision that the Act should not militate to the prejudice of superiors of the casualties of superiority. I understand it to be undoubted law, that whatever reservations it may be competent to insert in the charter, the superior cannot refuse an entry upon such a title, or object to it on the ground that it contains clauses irritant and resolute. I do not understand that any point is here raised on this subject. But I may observe, that if the superior were entitled to object on account of the entailing clauses, the time for settling any such question ought to be when the charter is first granted constituting the new investiture. The Duke of Hamilton was in that position in Duke of Hamilton against Lord Hopetoun, and the opinion delivered in that case, whatever may be the effect of it, had precise relation to that position. If there were any equity for a consideration being paid to the superior, because of the effect of the entailing clauses, it could only be at first,—for something to be paid, besides the composition by the institute as disponee. If the entail has been acknowledged by the superior without any reservation of such a claim, the investiture is constituted, and has become, by the act of the superior, the law of the feu; and as to the clause of reservation in the Statute of the superior's casualties, I concur in the commentary of the Lord Justice-Clerk.

And, with reference to the present case, if the estate may be effectually entailed, so that no alienation can ever take place, what intelligible interest can the superior have in the particular nature of the destination? If the vassal may tie up the property for ever to any number of heirs, ending with the Crown, what is it to the superior whether these heirs shall be heirs of blood to one another, or successive serieses of strangers, but all called as heirs, one after another? I agree in the observation of Lord Kames, that if the superior suffers, it is by the inevitable effect of the power to make such an entail.

When I look to the law as it stands upon the authorities, I can see no ground for the present claim; and I think that, if it were sustained in the form in which it is maintained, it would introduce great confusion in the practical application of the principles which regulate the subject.

All the cases settle this generally, that persons who are heirs of the last infeft are entitled to enter, on payment of the relief, only as heirs, although they succeed in virtue of special destinations.

The case of M'Kenzie is particularly strong on this point. For the question arose with the first heir of tailzie asking, for the first time, a charter upon the entail: And he was found entitled to the charter as an heir, because he was the heir of the former investiture, with only a reservation of any claim against future heirs, but reserving also their defences. The reservation in that case was of a very peculiar nature; because not only the entail had never been acknowledged by the superior, but no composition had yet been paid for the change of the investiture. It was in like manner determined in the case of the Duke of Argyle, that the heir of entail was entitled to enter as an heir, though the superior was permitted to insert a similar reservation of the question as to future heirs. I shall again advert to these cases more particularly. But, though a question of this kind may stand reserved, it still remains to be considered, what the nature of that question is, and what the merits of the claim are, when the occasion arises for considering them. The Court have constantly refused to sanction any reservation directly recognising the validity of the claim. Accordingly, the reservation in the present case is merely, that the superior shall not be precluded, by granting the charter, from any claim which he

may have at law for a full year's rent, whenever the heir of entail succeeding shall not be heir of line of the last entered and infeft. It will be observed, that the pursuer does not venture to make a claim to this precise effect; and, as I understand the opinions which differ from mine, it is not held that the composition is due wherever the heir of tailzie is not the heir of line of the last infeft. The doctrine now maintained is much more peculiar and abstract,—that the question depends altogether on whether the heir of provision asking an entry, is in any manner related by blood to the predeceasing heir. This is a very different proposition from that advanced in the summons in this case: and I must own that it is a proposition for which I can find no authority in the law. It is in no institutional writer, and in no decision with which I am acquainted. Even the incidental opinion, in the case of the Duke of Hamilton against Lord Hopetoun, is, as I have understood that opinion, utterly at variance with it. That seems to intimate, with reference to the special case, that the heirs called by the charter claimed on by the assignee of the procuratory, must all be heirs by blood to him. It happened that it was so in that case, which excluded the point, and withdrew attention from the peculiar qualification of the opinion. I understood it merely to indicate, that a tailzie by the assignee to strangers would be a different case. But that is a very different matter from the plea in the present case.

When we look at the authorities, the first thing which presents itself is the express doctrine laid down by Erskine. The question reserved, even if the pursuer be allowed to rid himself of the peculiar conclusion above alluded to, is distinctly this, whether the heir of a special investiture already in the titles derived from the superior must enter as a singular successor, if he be not an heir by blood to the last entered vassal. Then, what says Erskine to that doctrine? (Ersk. II. 7. 7.) "Yet where a proprietor entails his lands, the superior is not entitled to the composition of a year's rent from every successive heir of entail, who is not heir of line to him who stood last infeft, on pretence that he is a singular successor. The heir of the last investiture cannot be called a singular successor; and he is founded in a right to demand an entry, upon payment to the superior of the sum due to him by law, in name of relief, upon the entry of an heir." Then as to Erskine's authority, it is true he refers to the case of Lockhart. I am not satisfied that that is not very high authority; but the first authority is in Mr Erskine's own work. He so held it; and to this hour there is nothing to contradict it. The utmost is a permission to keep the point open. Mr Bell is incorrectly referred to. He merely says that the question is undecided. Then consider the state of the cases,—1st, Lockhart v. Denham. I think it remains a decision of great importance. Divested of specialties, the heir of entail had taken a charter on a procuratory of resignation, with a very special clause of reservation. An attempt was made to decide the point on the charter, on the ground of the reservation being made a condition in the title. The real question there was, whether that was consistent with law. It was pleaded that the heir of entail could not be bound by the acceptance of the charter by another. But, besides, what power had the superior to insert the reservation if he was bound to grant the charter? Therefore, it could have no effect but as a reservation of the question. The idea, in the later cases, seems to have been, that the Court refused to acknowledge it even as a reservation, because they found, that in respect the entail had been acknowledged, the claim would not lie. But I doubt the correctness of this. I suspect that the idea was, that the imperative nature of the clause, once put in the investiture, should have been binding, being unrevoked. But it may have been otherwise. The Court may not have regarded the reservation. But surely, if with such a clause they still held, on the merits, that the heir of investiture was entitled to enter on payment of relief only, it is a judgment on the merits of that question, and, a fortiori in the present case, where clearly the clause does no more than keep the question open. For the effect of the clause is not to qualify the charter or investiture. The superior could not help granting the charter, and the clause is merely a salvo by permission, to avoid discussing a question which might be unnecessary. In the report of Lockhart's case, the pursuer argues on the reservation as barring the defender from objecting,

personal objections. The defender merely said it was of no weight, because he does not represent the taker of the charter. But he argues the whole merits on the footing of the question being open. In the later cases, all that can be said is, that the question was waived as unnecessary to be decided. In the case of M'Kenzie, it was a single composition that was asked, and it was found not due, though the entail had never before been recognised, because the heir asking an entry was the heir of the former investiture. The reservation allowed was only of the claim on the entry "of any future heir of tailzie, not an heir of the investiture prior to the tailzie." This is not at all what is maintained here; and it reserved also "to the said heirs all defences against the same." It is clear, that all that was contemplated was the question of one composition for the change of investiture. The opinions reported by Lord Hailes are not favourable to the pursuer. The Lord President evidently held the case of Lockhart an important decision. Lord Gardenston and other Judges held the same. Lord Braxfield says nothing against it, nor the Lord Justice-Clerk. The reservation was agreed to, to leave the question open.

In the case of Argyle, Lord Dunmore had offered to pay a composition, being *institute*. The pursuer required a *positive declaration* that he would not be bound to enter future heirs, not heirs-male or of line of the person last entered, without another composition. The defender offered a reservation of the question, and the question discussed was, whether that was sufficient? Plainly it decided nothing, but that the pursuer was not entitled to frame his charter in the way he required. The observation on Denham was, merely, that so far as effect was supposed to have been denied to a *similar* reservation as that offered, it must have been erroneous. But it does not appear that effect was so denied to it. It was only denied to the effect asked by the Duke of Argyle. In the case of Baillie the precise case occurred. But there was this specialty, that a charter had been granted without any special reservation, and it was pleaded the pursuer did not represent the granter of the charter but as heir of entail. It was indeed said it would not decide the general question. But the point of *right* was decided. Lord Corebouse's note is direct on the very question. I grant that the question is reserved here; but, though it is reserved, the question remains, how it is to be decided?—Duke of Hamilton v. Hopetoun. The judgment in that case was not meant to be adverse to the opinion in Baillie. But the case was very peculiar. There was a charter to Lord Hopetoun and his heirs and assignees. A composition had been paid. Then there was an assignment to a series of heirs in the marriage-contract of his son, Earl John, all heirs of the assignee's blood. There had been no acknowledgment by the superior of any special destination, and the question was simply, whether one composition was not due for the first acknowledgment of the destination in the deed of assignment? That was manifestly an entirely different question from that which here occurs. Lord Stair, in the passage which has been referred to, (B. II. t. 3, § 59, beginning "as to the first case, it is a general rule," &c.), contemplates strangers as well as heirs in blood being members in the constitution of the tailzies he is speaking of. And your Lordship reminds me, that, if the principle contended for were to be sustained, it would throw the whole matter of making up titles to entailed estates into confusion. At present it is impossible to say, whether it be necessary for every heir who is a stranger to the heir last infeft to pay composition, or whether the first substitute of a new series in blood should pay composition. It is difficult to say what would be the result, if the views of the defenders were to regulate the law; and as there are very few entails in which new members are not introduced, whether every substitute of a new series in blood is to be considered as a stranger, or whether only the first. The superior asks composition on the succession of the first member of a new series, but I do not well see whether every other member is to pay composition equally with the first.

Lord Meadowbank, who was confined by illness, communicated the following opinion:

"When this case originally came from the Lord Ordinary, the opinion which I had formed concurred generally in the views of that stated by Lord Mackenzie; but having since re-

considered the case, I have altered that opinion, and now concur in the result of that of Lords Cockburn, Cuninghame, Murray and Ivory. And having had an opportunity of very deliberately considering the notes of the opinion which has been formed by the Lord Justice-Clerk, I find the grounds of my own therein so clearly and luminously stated, that I am desirous that upon them mine should be understood to rest. My absence, therefore, from the deliberations of the Court can be of no importance to the parties, because it would have been impossible for me to have added anything in farther elucidation of his Lordship's judgment."

The Court,

"In accordance with the opinions of the majority of the whole of the consulted Judges, find that the pursuer is bound to receive and give an entry to the defender as an heir of the investiture, on payment of the ordinary casualty of relief; and remit to the Lord Ordinary to proceed farther in the cause as to his Lordship shall seem fit; and find no expenses due to either party."

Lord Ordinary, Cuninghame.—*Act.* Whigham, Cook; James M'Innes, S.S.C., *Agent.*—*Alt.* G. G. Bell, A. C. Dick; James Peddie, junior, W.S., *Agent.*—*F. Clerk.*—[G.D.F.]

14th February 1842.

SECOND DIVISION.—(G.D.F.)

No. 208.—HEPBURN, *Petitioner.*

Process—Bankrupt—Trustee—Bond of Caution.

The estates of a bankrupt having been sequestrated, the creditors were paid off by a composition contract; and the trustee thereafter applied to the Court, with concurrence of the bankrupt, and with consent of the cautioners in the composition contract, to obtain exoneration, and to have his bond of caution delivered up. The Court, on the report of the Lord Ordinary, remitted to his Lordship to exoner the trustee and to deliver up the bond of caution,—no balance appearing to be due by the petitioner.

Lord Ordinary on the Bills, Ivory.—[G.D.F.]

14th February 1842.

SECOND DIVISION.—(G.D.F.)

No. 209.—ESSON, *Petitioner.*

Process—Bankrupt—Judicial Factor—Bond of Caution—Statute 2 and 3 Vict. c. 41, § 14.—*The Lord Ordinary on the bills having, in terms of the 14th section of the Bankrupt Act, appointed a judicial factor to administer the estate of a deceased, in regard to which sequestration had been applied for, until it should be awarded, and the proper officer appointed, held entitled, where there was no balance due by the factor, to declare the factor exonerated, and to order his bond of caution to be delivered up,—the application for doing so being presented by the factor with concurrence of the trustee in the sequestration.*

The petitioner had been appointed judicial factor by the Lord Ordinary in the Bill-Chamber, in the sequestration of a deceased (Wilson), under the 14th section of 2d and 3d Vict. c. 41, until sequestration should be awarded; and with the concurrence of the trustee, he applied "for warrant to get up his bond of caution."

The Lord Ordinary, on a verbal report to the Court, suggested, that as the appointment had been made by him in the Bill-Chamber, he was entitled to declare the petitioner exonerated, and grant warrant to deliver up the bond, as his Lordship considered that the trustee's

concurrence in the application, and adoption of the accounts, was a sufficient warrant for the step.

The Court approved of this procedure, on the understanding that there was no balance due by the judicial factor; and the Lord Ordinary thereafter granted warrant for delivering up the bond as craved.

Lord Ordinary, Ivory.—[G.D.F.]

10th June 1842.

FIRST DIVISION.—(H. B.)

No. 210.—SIR WILLIAM FRANCIS ELLIOT and TRUSTEES, Pursuers, v. JAMES and GEORGE CLEGHORN, and JOHN WILSON, Defenders,—*Et à contra*.

Bona Fide Possessor.—Circumstances in which the purchasers of an entailed estate, afterwards evicted from them, were found entitled, under deduction of the annual payments affecting the estate, to appropriate the rents as bona fide possessors, up to the date when the decree of eviction was affirmed by the House of Lords.

Sequel of case, ante, 2d June 1837, House of Lords, August 27, 1839.

By a decision of the Court of Session, affirmed on appeal, the pursuers having succeeded, on the one hand, in evicting the lands in question from the defenders, and the defenders, on the other, in having claims to the amount of £12,715 constituted real burdens upon the entailed estate, it became necessary to determine the right to the bygone rents,—the pursuers demanding an accounting for the rents from Sir William Elliot's accession to the estate in 1812, or at least from the decree in 1825 restoring the lands to the heirs of entail, and the defenders claiming the rents (under deduction of the burdens and debts affecting the estate) as bona fide possessors up to 1828, when they renounced possession in consequence of the decree of 1825 having been affirmed by the House of Lords.

The Lord Ordinary pronounced the following interlocutor:

"9th February 1842.—The Lord Ordinary having heard parties' procurators, as well in the process of reduction at the instance of Sir W. F. Elliot, as in the process of declarator, repetition, &c., at the instance of James and George Clegghorn, and the trustees of the late John Wilson, upon the several points still remaining for decision between the parties, and having made avizandum, and having thereafter resumed consideration of both processes, and having had special regard to the previous judgments pronounced therein, conjoins the said processes, and Finds, *Primo*, That so far as regards the principal of all the sums specified in the judgment pronounced by this Court in the process of declarator on the 31st January (signed 2d June) 1837, and affirmed on appeal the 27th August 1839, and which were therein found and declared still to form real burdens on the entailed estate, it is *res judicata* that the said sums were constituted real burdens, as said is, to the full extent of their several amounts, as specified in the said judgment, and to the exclusion of all deduction therefrom, in respect of any intromissions had by the said James and George Clegghorn and others with the rents or fruits of the said entailed estate during the period of their remaining in bona fide possession thereof: *Secundo et separatim*, Finds, that even if the rights of parties in this respect had not been so fixed, the said James and George Clegghorn and others were entitled, in their character of bona fide possessors, and according to the rule of law, that 'bonæ fidei possessor fructus perceptos et consumptos suos facit, et non cogitur restituere consumptos quantummodo iis sit factus locupletior,' to appropriate and deal with the whole rents or fruits of the said estate accruing during the period of their bona fide possession as their own absolute and exclusive property, and were not bound to apply the same, either in whole or in part, in extinction of the said real burdens, and are not now

bound to allow deduction therefor out of the said burdens, or in diminution of the same, in any question between them and the said Sir W. F. Elliot, or the other heirs of entail, or the entailed estate itself: *Tertio*, Finds, however, as regards interest on the said sums, that the said James and George Clegghorn and others were bound, during the period of their said possession, to keep down and discharge the same, so far as their said intromissions with the rents or fruits of the estate afforded the means of so doing, and that they are not now entitled to hold the said interest, or to make effectual or enforce the same as a real burden upon the said estate, to any further extent than it may be made to appear that the said fruits or rents were insufficient to extinguish the same, nor at all, if it shall turn out that the said rents or fruits were sufficient, or more than sufficient, to extinguish the same: *Quarto*, Finds, that in the circumstances of this case, the said James and George Clegghorn and others are to be held and considered to have been bona fide possessors of the said estate up to the 2d May 1828, being the date of the judgment of the House of Lords, whereby (in affirmance of the previous judgment by the Court of 23d June 1825), the sales in their favour were finally reduced and set aside. With these findings, appoints the cause to be enrolled, that such further order may be pronounced therein as shall be found necessary for finally adjusting the accounting between the parties on the principles now laid down, and in the meantime reserves all questions of expenses, in so far as not already disposed of.

"*Note*.—There can be no hesitation, it is thought, upon two of the points disposed of by the interlocutor, viz.—1. That Messrs Clegghorn and Wilson are entitled (how long is a different question) to the character and privileges of bona fide possessors; and 2d, That, on the other hand, they are not entitled, even in this character, to appropriate the annual fruits of the estate, unless upon the condition of keeping down (so far as the fruits will go), its annual burdens. The last of these points was conceded in the debate by Messrs Clegghorn and Wilson themselves. The first was substantially decided by the former judgment of this Court (afterwards by the House of Lords), in the question of restitution—the unanimous opinion of the Court being, 'that on the faith of having obtained a good title to the lands, they paid the prices in the manner set forth in the records.'

"Another matter the Lord Ordinary holds to be scarcely less clear, viz., that Messrs Clegghorn and Wilson, in claiming the rights of bona fide possessors, are under no obligation to impute the rents in diminution or extinction of the principal of the debts. For, independently of the former judgment, which declares these debts, in their entire and unreduced original amount, to form real burdens on the estate, it is impossible, consistently with the principle on which the rule of bona fide perception and consumption rests, to arrive at any different conclusion. To decide otherwise would be indeed to say, that the bona fide possessor of an estate can have no benefit from his possession, so long as any encumbrance is left to exist connected with the estate. It would give a different operation to the law, where the estate sold was an estate free from burden, and where its real and intrinsic value was destroyed, or in great measure reduced by debt. But this would be to prevent all the equities of the case.

"In questions of this kind, the principle is, that the true proprietor, in revindicating his estate from the bona fide possessor, is entitled to have back only that estate which would have belonged to him, if the title on which the adverse possession has meanwhile been supported, had never existed;—the bona fide possessor, on the other hand, retaining and appropriating the intermediate fruits, and being bound to restore the corpus or stock of the estate, and no more, such and the same as that estate would have stood without reference to any fruits it may in the meanwhile have yielded. If the estate had been diverted from the true proprietor as a free estate, it must be restored free. But if, when so diverted, it was a burdened or a limited estate, the obligation to restore is satisfied, if it be restored the same burdened and limited estate which it was received.

"In fact, it is a mere fallacy in this question of restitution, to deal with the estate which is to be restored as a subject separate and apart from the burdens which affect it. An estate which is burdened to half its value, is substantially, and in truth but half of the nominal estate. And to say that the bona fide possessor, who has happened, for example, to possess for so long a period, as that the rents or fruits intromitted with are equal in cumulo

amount to the burdening debt, is bound to restore the estate free from burden, is just to say,—1st, That the possessor is to give back twice the extent of estate that he received; and 2d, That during the whole period of his possession, though he may have had nothing whatever but the surplus fruits to live upon, and though, as regards these fruits, the law expressly says that his *bona fide* possession entitled him *fructus suos facere*, he must yet give back, not merely the estate such as he received it, but along with it the whole rents and fruits which it may in the meantime have yielded.

"The force of these and other similar considerations were so far felt in the discussion, that the argument on Sir W. Elliot's side was rested rather on the *specialty* which occurs in the present case—that the debts, as they originally existed over the estate, had here at one time been *extinguished*, and were now and ought to be *revived* on principles of equity,—the heirs of entail, it was said, being in this way placed in a position which entitled them, in answer to the equity demand on the one hand, to plead as a counter equity on the other, that such *revival* should be allowed only to the effect of reconstituting, as a burden upon the estate, the *balance* of the original debt, after imputing in extinction or diminution the whole intermediate rents and profits. But this is just a repetition of the original fallacy, in a slightly altered shape. Indeed, if it could not be contended in the abstract case, that a *bona fide* possessor is bound to apply the rents, not only in keeping down the *interest*, but likewise in extinguishing, so far as they may go, the *principal* of the debt, it is difficult to see how the case can ever come, in principle, to be varied, merely because the debt which there was thus no *legal obligation* to extinguish, has happened, by some accident, to be for a time,—and this in appearance only—not absolutely—but in *form*—extinguished,—the *substance* all the while remaining untouched, and the debt being now at last revived *in statu quo*, just as if it had never been extinguished at all.

"Accordingly, the decision of the Court in the question of restitution went expressly 'to declare, that the several sums (of debt) shall subsist and be effectual as burdens on the estate and the heirs of entail, as the debts to the payment of which they were applied would have been, IF THEY HAD NOT BEEN PAID.'—(Opinion of the consulted Judges, p. 6.) In point of fact, several of the debts were actually kept up *in statu quo* by assignment; while, as to all the rest, they might equally have been kept up in that shape; and as it is, they not only stand replaced by the final judgments of the Court, but, 'although the same have not been kept up by assignment,' are declared, no less than those 'which have been kept up by assignment, still to form real burdens on the entailed estate, to the same effect (but no farther) as if they had not been so paid, and had still stood as outstanding debts of the estate, according to the terms of the deeds constituting them.'

"The only question upon which the Lord Ordinary has felt any hesitation, is as to the point of time when Messrs Cleghorn and Wilson's *bona fides* shall be held to have ceased. On reviewing the authorities, however, he has come to be satisfied that the interlocutor does not go beyond what the actual circumstances of the case justify, when it extends the privilege to the date of the judgment finally reducing their title in the *House of Lords*.

"In point of principle, the Lord Ordinary adopts implicitly the reasoning of Lord Mackenzie in his note to *Moir*, 16th June 1826. But if, from principle, he turn to the specialties of the individual case, he thinks it impossible to hold that Messrs Cleghorn and Wilson, in carrying the case to the *House of Lords*, were persisting in the litigation with a *mala fide* purpose, or, in short, that they did anything which ought more to affect their character or rights as *bona fide* possessors, than when in this Court they submitted the Lord Ordinary's judgment to the review of the Inner-House,—they having, in both cases alike, as their sole end, the perfectly reasonable and legitimate object of obtaining a reversal.

"After all, it is thought the present question has more of speculative than of practical importance to the parties. For, even taking the statement in Sir William Elliot's answers to Cleghorn and Wilson's minute, it is apparent that in the outset, and for a very long period, the rents of the property were insufficient to meet even the *interest* of the debts in question.

It is disputed whether they were *more* than sufficient to meet that interest down to the very end. But, granting there did come at last to be a surplus, it is thought this could only have been for a short period, and of no great amount, so that in all probability it must, in any view, have been more than swallowed up by the original deficit. Even supposing the period of *bona fides* to have ceased with the judgment of the Court in June 1825, if, as is said by Cleghorn and Wilson, their last intromission with the rents was at the Martinmas term of 1827, this would leave but a difference of two years, or two years and a-half, between the parties. It is not thought that any supposed excess of rents over the interest during this short period, especially if allowance be first made for the deficit of earlier years, can be such as to make it expedient for either party to continue the litigation."

The pursuers reclaimed, and the Court pronounced the following interlocutor:

"Recal the third finding in the interlocutor reclaimed against as unnecessary, in respect that Messrs Cleghorn and Wilson do not claim interest on the debts affecting the estate till after the term of Martinmas 1827: *Quoad ultra*, adhere to the interlocutor of the Lord Ordinary, and refuse the desire of the reclaiming note; reserving the question as to the expense of this discussion for subsequent decision."

Lord Ordinary, Ivory.—Act. Anderson, Neaves; Horne and Rose, W.S., Agents.—Alt. Rutherford, Putton; Robert Smith, W.S., Agent.—B. Clerk.—[H. B.]

10th June 1842.

SECOND DIVISION.—(G.D.F.)

No. 211.—THE EARL OF MORAY, *Advocator*, v. CHARLES PEARSON (*Forsyth's Trustee*), and W. H. PLAYFAIR, *Respondents*.

Jurisdiction—Sheriff Court—Heritable—Superior and Vassal—A superior feued out certain stances for street building in Edinburgh, according to a plan which delineated the size and position of the feus with reference to one another, and to the street and other buildings, but owing to some error, the line of street, as delineated on the plan, came afterwards to be shifted eight or ten feet backwards from the line drawn thereon; the consequence of which was, that if the feuar was obliged to build according to his agreement, his buildings would now encroach on, and stand eight or ten feet within the line of street as laid out and completed subsequent to the date of agreement, and before these particular feus had been built on. The superior brought an action in the Sheriff Court, under the penalty clause in the agreement for neglecting to build, to have the feuar ordained forthwith to erect his buildings, and he made offer to give the feuar the exact superficial area he had bargained for, by substituting an additional piece of ground behind—Held that the circumstances of the case raised a question of heritable right and title, which could not be competently discussed in the Sheriff Court.

The Earl of Moray and his commissioner raised an action in 1832 before the Sheriff of Edinburgh, in which it was set forth, that some time ago his Lordship feued out his lands of Drumsheugh under articles and conditions of roup, dated in 1822, by which it was provided that the feuars should finish their houses betwixt and the term of Whitsunday 1825, under a penalty of £100: That by missives entered into with Messrs George and John Forsyth in 1824, they feued the stances 88, 89 and 90, in Great Stuart Street, as marked on the feuing plan,—one of which, No. 89, was conveyed to Mr Playfair, architect,—and were taken bound to build the cellars, lay the drains and street pavement, &c., when so directed, all in conformity with designs to be furnished by his Lordship's architect: That notwithstanding

ing of the obligations incumbent on Messrs Forsyth, the same were not implemented, and the areas so feued out in Great Stuart Street were still unbuilt on by them, and concluding, accordingly, that the defenders "ought and should be decerned and ordained immediately to commence to erect dwelling-houses and buildings on the foresaid areas or stances, Nos. 88, 89 and 90, in Great Stuart Street," and "to proceed with and complete the said dwelling-houses and buildings on said stances or areas, within such time as I may fix, or within such time as may be reported by competent persons to be reasonable for completing the same in terms of, and agreeable to, the foresaid articles of roup, and relative missives of feu; reserving action at the pursuer's instance against the said defenders for all loss and damage sustained, or that may be sustained, by the noble pursuer, and penalty in and through the defenders' failure."

In the course of the procedure the pursuers made offer to give the defenders the exact superficial area which they had bargained for, which they were enabled to effect by arrangements with the neighbouring feuars, who had agreed to give up certain portions of their ground, but in this way the areas would have been shifted considerably backwards.

The respondents, who had hitherto paid no feu-duty, resisted this action, explaining, that while the pursuer required them to proceed to build upon the stances, he was not able to give delivery and possession of the different areas marked off on the ground plan as corresponding to their numbers, and which they had bargained for. A portion of these areas to the front, to the extent of several feet, from the negligence of the party employed by the pursuer to stake off the ground to the different feuars, had been occupied by the street in Ainslie Place and Great Stuart Street, and the pursuer was, from that circumstance, unable to give the particular feus by eight or ten feet; and they averred, that if they were now to build according to the plan, the front line of the houses would stand from eight to ten feet into the street or pavement of Great Stuart Street. But the feuing plan, in reference to which they contracted, pointed out the precise boundaries of the different areas or stances for the street houses, with the back ground of each, and also set off and appropriated certain stable ground behind, which, it was specially stipulated, should be applied to no other purposes than for stables, coach-houses and washing-houses, and that the same should be sold only to those who wished that accommodation, and to which the feuars were to have access from their back ground, along a lane four feet wide. It had been proposed, however, to substitute other areas of equal superficial extent, viz., by extending the feus backwards from the now street line into the ground appropriated by the plan for the stabling accommodation; but this, it was averred, could not be properly done without in the first place encroaching on the neighbouring feuars on the sides (whose permission, however, had been obtained), and also diminishing the stable ground and access thereto, which the feuars were entitled to resist. They accordingly *pleaded*, that they could not be compelled to implement their part of the agreement, since the pursuer was unable to implement his; and that they were not bound to take

a different area or areas from those for which they bargained.

The Sheriff remitted to Mr Grainger, civil-engineer, to make out a plan, and report,

"1st, Whether the said feuing plans and articles of roup professed to exhibit to intending feuars, the precise boundaries and dimensions of the areas and back grounds, and of the stable ground referred to? 2dly, Whether the defenders have obtained these precise boundaries and dimensions of areas and back grounds, and whether the pursuer has allotted the stipulated extent and boundaries (if there were such) of stable ground besides the stipulated lane, or to what extent they differ, or are deficient? 3dly, Whether the pursuers can still give the stipulated areas, back grounds, stable ground, and lane, in terms of the feuing plan and articles of roup, and generally to report on the facts in dispute between the parties, in articles 2d, 4th, 5th, 9th, and 10th of the defenders' condescendence, No. 15, and in the answers to these articles, and that with his earliest convenience."

Mr Grainger reported affirmatively on the first query. In regard to the second, he stated that the feuars had got the precise length in front, but that there was a considerable deficiency in the back ground, which he specified; that the feus, if built on as shown on the plan, would trench several feet on the adjoining feuars, at the sides; and that if the back ground of the feus in dispute was made to the depth shown on the plan, the difference would be eighty-two yards on the three feus. In answer to the third query, the reporter stated, that the pursuers could still give an equal quantity of ground as the stipulated area and back ground, but this could only be done by encroaching upon Mr Drysdale's feu on the east, Mr Ness's feu on the west, and the ground appropriated on the feuing plan for the stables on the south, by altering the position of the lane, which was to be carried along the back of the feus on the south side of Great Stuart Street, and part of the west side of Randolph Crescent.

Thereafter a great variety of procedure took place, and both parties adduced a proof of their averments bearing on the understanding of parties, their acquiescence, the staking off of the ground, &c. &c., and other questions which are not at present in question.

The Sheriff pronounced the following interlocutor:

"*Edinburgh, 25th November 1840.*—The Sheriff having resumed consideration of the cause, with Mr Smith's report, objections thereto, and whole process, Sustains the defences, as solizies the defenders from the conclusions of the action, reserving to the pursuer his right to insist in a competent action against the defenders, in respect of their alleged acquiescence in the deviations from the original feuing plan, or their obligation to accept the ground offered in lieu of other portions of the areas in question, and to them their defences as accords: Finds the pursuers liable in expenses, allows an account to be given in, and when lodged, remits the same to the auditors for taxation, and decerns accordingly." (Signed) "GRAHAM SPEIRS."

"*Note.*—This action is raised for implement of a penal obligation in the contract of sale between the parties.

"The pursuers, by missives of sale, sold to the defenders two building stances or areas in Great Stuart Street, delineated on a feuing plan of these grounds, and the defenders became bound to implement certain obligations referred to in the missives and relative articles of roup, one of which is to build houses on these areas. It is to enforce this obligation that the action is brought. The defence is, that the pursuers are unable to implement their part of the contract by giving the defenders possession of the two areas purchased by them. It is proved by Mr Grainger's report that there is a very material difference both in the boundaries and in the extent of the areas, Nos. 88 and 90, as delineated on the plan referred to in the missives of sale, and the actual

boundaries and contents of these areas respectively. But, as the action is laid upon the *missives of sale*, it is thought that the pursuers are not entitled to enforce a penal obligation arising under the contract, unless they implement the obligation incumbent upon them. It is not denied that the pursuers cannot now put the defenders in possession of the precise areas purchased by them. But they have proposed, in the course of the action, to give ground equal in extent to that taken away, and which, in the opinion of Mr Smith, the reporter, would answer the defenders equally well. The Sheriff does not think that this proposal to alter the boundaries of the feu, and to substitute one piece of ground for another, can competently be entertained under the conclusions of this summons. Neither does he think it necessary to express any opinion in reference to the defenders' alleged acquiescence in the altered boundaries of the feu, in consequence of the line of Great Stuart Street being staked off before the date of the sale. This may be the subject of another action at the pursuers' instance; but in so far as respects the present proceedings, he is inclined to regard that fact as adverse to the pursuers. For if the position and extent of the areas were actually altered before these were sold to the defenders, these alterations ought to have been stated in the *missive of sale*, and described in the feuing plan. But, on the contrary, the *missives* refer to the original plan, and the summons is laid on these *missives*, without reference either to these alterations or to the defenders' alleged acquiescence in them.

"*Besides*, the Sheriff thinks it is a very doubtful matter whether he has *any jurisdiction* to determine that the defenders are bound to hold, as included in, or comprehended by, the *missives* of the sale, the ground now offered to them."

The pursuers then advocated, *pleading*—That, under the whole circumstances of the case, the defenders, as feuars, were bound to implement the articles and conditions of roup, and relative *missives*, so far as applicable to the areas, Nos. 88 and 90 (89 being vested in Mr Playfair), and consequently they were bound to erect the dwelling-house and buildings on the said area, and to complete the same in terms of the conclusions of the summons. The summons was in itself regular and formal, and applicable to the actual circumstances of the case, and the advocates were entitled to obtain decree under it without the necessity of bringing any new action, either in the Sheriff Court or in the Court of Session. The alleged deviations from the feuing plan, founded on by the defenders, were altogether trifling and insignificant; and, even if they had been stated by them immediately after their bargain was concluded, would have afforded no ground for their resiling from it. Much less could the alleged deviations afford any good defence against the present action, which was not brought until the defenders had held the areas in question for many years, without taking any steps whatever for reducing their contract, or making any complaint or remonstrance respecting it. Even supposing that the alleged deviations were of any importance, the defenders were barred from founding upon them by the facts established by the proof, upon which the Sheriff-substitute's interlocutors of 25th October 1837, and 17th January 1838, were mainly founded. The advocates would have been entitled to decree in terms of their libel, even independently of the offer (to give a substitute) on pages 5, 13 and 14, of the revised answers: But that offer, and the power and willingness of the pursuers to fulfil it in its fullest extent, as established under the investigations which took place subsequent to the interlocutor of 28th March 1838, were of importance, as proving that the defenders had no real grievance of which to complain, and that they were actuated only

by an unwarrantable desire to get rid of the contract deliberately entered into.

The respondents *pleaded*—That the case and pleas attempted to be raised by the pursuer in this process, could not be competently raised or maintained under the libel. The main plea or demand, under which he insisted that the defenders were bound to accept of the ground professed to be offered to them as a surrogate or substitute for the ground referred to in the original *missives*, could not be competently raised or maintained before the Sheriff Court, but only in a process of declarator before the Supreme Court, to which the other feuars, as being interested in the question, behoved to be made parties. The offer was not such as the defenders could, in any circumstances, be bound to accede to, and this in respect of the nature and effects of that offer, as found and reported upon by Mr Grainger, whose report was now binding and conclusive against the pursuer. Nothing was proved, or even averred by the pursuer, in the course of the proceedings, sufficient either to bar the defenders of any of their defences, or to prove that they were bound to take the ground offered, either in respect of implied agreement, acquiescence, or otherwise.

The Lord Ordinary pronounced the following interlocutor:

"15th December 1841.—The Lord Ordinary having heard counsel in this advocacy, and thereafter considered the record and proceedings in the Inferior Court, approves of the interlocutors of the Sheriff complained of, and therefore repels the reasons of advocacy, and remits the case to the Sheriff *simpliciter*, and decerns: Finds the respondents entitled to expenses, as the same may be taxed by the auditor, and decerns.

"*Note*.—Upon the best consideration which the Lord Ordinary has been able to give this and the relative case of Mr Playfair, he is of opinion that the objections to the action sustained by the Sheriff are insuperable.

"The object of this action, which was brought before the Sheriff of Edinburgh, was to enforce the stipulations in certain *missives* of feu entered into by the defenders, Messrs Forayth, in 1824, relative to the specific stances, Nos. 88 and 90 of the feuing plan of Lord Moray's grounds in Great Stuart Street, and No. 94, in Ainslie Place, and the action concludes that the defenders shall forthwith be ordained 'to proceed with and complete the dwelling-houses on said stances, &c. &c.,' agreeable to the foresaid articles of roup, and *relative missives* of feu.' A separate action with the same conclusions was also brought before the Sheriff against Mr W. H. Playfair, architect, who acquired a right from Messrs Forayth to the lot No. 89, as delineated on the said plan. Both these actions have been in dependence before the Sheriff since 1833.

"The defenders pleaded, that some time after the date of these *missives*, they discovered that Great Stuart Street, as now open to, and used by the public, had not been laid off in the precise direction laid down in the original feuing plan of the Drumsheugh grounds, referred to in the *missives* and articles of roup; that, on the contrary, the street, as now formed, is considerably more to the south than it should have been according to the *feuing plan*; and they maintained, that as they have hitherto got no possession, and paid no *feu-duty*, there is no completed contract between them, and that they are not bound to take areas in any different position from those laid down in the feuing plan.

"The noble pursuer rejoined, that the deviation was trifling, and that he was willing, and had it in his power to give the defenders possession of an area of *equal dimensions* behind the south line of the street, as now lined off, and a consent to that effect from some of the neighbouring feuars was produced, at a certain stage of the proceedings in the Inferior Court. This accordingly has led to a wide inquiry before the Sheriff. In the first instance, Mr Grainger reported that the street, as

formed, is eight feet farther south than the line of the street laid down in the *feuing plan*; and Mr Smith, architect, reported that the superior can still give as much ground to the south of the present line of the street as the original plan exhibits, and that, in his opinion, the areas with the *new* boundaries will be as valuable in all points to the feuars, as the areas delineated on the original plan. This appeared to the former learned Sheriff (Mr Duff), and to his intelligent substitute (Mr Matheson), to be sufficient to entitle the noble pursuer to decree in terms of his libel. But the present Sheriff-depute was of opinion that the ascertained state of the facts, as to the partial change in the situation of the areas since the feuing plan was made out, render it quite impossible to give decree in terms of the present libel as framed; while he entertained doubt as to the jurisdiction of the Sheriff to try the question in any shape, which the state of the facts, as disclosed by the investigations in this cause, may require. The Sheriff, therefore, by his interlocutor of 25th November 1840, assoilzied the defenders, to which he added a note explanatory of his views. The Lord Ordinary feels himself bound, on every rule of law and form applicable to the case, to affirm the judgment under review, on the following grounds:—

"I. In the *first* place, it is conceived that, from the course which the discussion and inquiries in this cause took, the case resolved into a question totally *incompetent* in the Sheriff Court. There can be no doubt that the Court of the Judge Ordinary is competent to entertain all cases of *personal obligation*, though constituted by contracts or agreements respecting *heritable estates*, on which ground actions are daily brought before the Sheriff for payment of feu-duties and annualrents, and fulfilment of other obligations constituted by contracts peculiar to heritage. But even in cases of that description, the Sheriff could not proceed to try or to enforce a personal obligation, if any fair doubt were raised as to the completion, and validity, and subsistence of the contract itself, of which the personal obligation was only an *accessory*. The validity of all contracts respecting heritage, when challenged, can be tried in the Supreme Court alone; and the Judge Ordinary cannot *declare*, and, still less, he cannot *adjust* a disputed contract relative to a real estate, *incidentally*, to enable him to give effect to the subordinate and personal obligations in the contract. Cases may indeed be figured, in which parties, for the purposes of delay, may pretend to deny a contract concluded in the most formal manner, and long ago followed with possession; but the present case manifestly does not fall within that class.

"Here the defenders pleaded that they had not got possession; that they had paid no feu-duty; and that they held the missives of feu abandoned, or incapable of fulfilment;—and the superior admitted so far that the contract was not yet completed, and offered to give the defenders an *equivalent of other ground* in lieu of a part of the original subject delineated on the feuing plan; and these specialties, it is manifest, unavoidably raised an important question of *heritable right and title* to be constituted in the competent court, which precluded the superior from suing before the Judge Ordinary for implement of the personal obligations of a contract, as yet incomplete and *unadjusted*.

"It was strenuously contended that the defenders, by *building the cellars* in front of their lots, had taken possession of the feus as at present lined off, and that this was an *homologation* of the alleged deviation, which bound the defenders to accept of the lots as now altered. But that very question is as clearly within the class of those exclusively appropriated to the Supreme Court as any which can arise. If the missives *per se* were insufficient to constitute a final contract binding the feuars to take the areas as now laid off, it is for the Supreme Court alone to find and declare, in a proper declarator, whether the feuars, in respect of their *possession*, had acceded to a different arrangement, and are bound to take a charter to areas containing boundaries in some respects different from those specified in their missives. Indeed, if such pleas as were entertained for a time in the Sheriff Court, in the present case, can be competently tried before the Judge Ordinary, every possible dispute that can occur between the sellers and purchasers of landed estates respecting the import and extent of the contract, may be equally brought in every Sheriff Court in Scotland. Such a

doctrine, it is apprehended, would be contrary to the principles and practice of the law, hitherto acted on, in all analogous cases.

"II. In the *next* place, even if the Sheriff had possessed jurisdiction to try the question, to which all the later inquiries and reports in his Court were directed, it is supposed that a decree '*in terms of the libel*' as framed, would be quite inept and useless to the noble pursuer. The conclusion of the libel is, that the defenders shall be decerned and ordained 'immediately to commence to erect dwelling-houses and buildings on the foresaid areas or stances, Nos. 88, 89 and 90, in Great Stuart Street,' &c. &c., '*in terms of, and agreeable to, the foresaid articles of roup and missive of feu.*' The libel is thus founded on the articles of roup, and these again bear reference solely to the original *feuing plan*; but a decree in these terms would not avail the superior, and is not, it is presumed, the decree which he latterly required, as the whole investigations before the Sheriff related to the practicability of the superiors giving, and of the feuars taking, lots which (at least as to a part of their area and boundaries) will be *different* from the feuing plan. No doubt, the learned and worthy Sheriff who preceded the present Judge Ordinary, pointed at a decree against the feuars to erect buildings within the areas, as now altered and proposed to be laid off, and not according to the correct boundaries of the feuing plan; but upon the principles laid down by the House of Lords in the late case of Stuart and Glog (1 Robinson's Reports, 721), it is apprehended that decree could not have been granted by any court in *these terms*, under the conclusions of the summons in the present action.

"On these grounds, the Lord Ordinary has come to the same conclusion as the Sheriff in his last judgment on the merits. The learned Judge, no doubt, states that he considered the present as an action for the enforcement of *penal obligations* in a contract of feu: but the Lord Ordinary cannot take that view of the case. He holds that the obligations sought to be enforced were ordinary and reasonable covenants, similar to those which in general occur in mutual contracts of this description near large towns. Still, whatever may be the nature of the stipulations, implement of them must be sought in an action properly libelled to meet the specialties of the case, and pursued before the Court, which has an exclusive jurisdiction in the constitution of heritable rights.

"The Lord Ordinary has *superseded* the advocacy against Mr Playfair at present, as his pleas are necessarily the same with those of his authors, Messrs Forsyth, and one discussion on review may suffice for both parties."

The advocates reclaimed; but the Court, considering that the action was incompetent in the Sheriff Court, *adhered* to the Lord Ordinary's interlocutor.

Lord Ordinary, Cuninghame.—*For Forsyths*, G. G. Bell, Maitland; Gibson-Craigs, Dalziel and Brodie, W.S., *Agents*.—*For Playfair*, Rutherford; , *Agent*.—*Alt.* Dean of Faculty (Wood), Walker; Walker and Melville, W.S., *Agents*.—F. Clerk.—[G.D.F.]

10th June 1842.

SECOND DIVISION.—(G. D. F.)

No. 212.—THE RIGHT HONOURABLE THOMAS ALEXANDER LORD LOVAT, *Pursuer*, v. ARCHIBALD T. F. FRASER, *Defender*.

Resting-Owing—Meliorations—Entail.

The pursuer brought this action against the defender, concluding for payment of £1066, alleged to have been found due to him by the defender for certain claims, according to an award pronounced in a reference. The action was defended on the ground that whatever sum, if any, should be found due on the award, should depend on certain other accounts between the parties being investigated and settled. But as these were still *sub judice*, the pursuer was not entitled, in the meantime, to insist.

There was also a plea by the defender of compensation arising out of claims, which however were still in Court, which he had against the pursuer, as succeeding heir in the entailed estates, for three-fourths of the expenditure under the Montgomery Act. The Lord Ordinary found, in reference to one of the claims in the action (one of no general importance), that it was comprehended in, and settled by the award, and was not contingent on the investigation or adjustment of other accounts; and in reference to the other claim, his Lordship remitted it to an accountant to report.

Though the point between the parties in regard to the meliorations was not decided by the Court, the interlocutor and note of the Lord Ordinary is herein given, as raising questions of general importance.

"3d February 1842.—The Lord Ordinary having heard counsel in this cause, and thereafter considered the revised minutes of debate, writs produced, and whole process, finds that certain accounts between the noble pursuer, as heir of entail of the deceased Honourable Archibald Fraser of Lovat, and the defender Mr Fraser of Abertarff, as executor of the said Archibald Fraser, were latterly referred to Alexander Shepherd, solicitor in Inverness, now deceased, who, in 1834, made up a report on the state of accounts, as far as seemed to him then practicable, and thereafter, on 10th November 1834, pronounced an award agreeable thereto, declaring the balance then due by Abertarff to the pursuer to be £1066. 5. 7., including interest till that date, and carrying legal interest thereafter till paid: Finds that both parties homologated and confirmed that balance by subscribing a doquet annexed to the report and award, and acknowledging the correctness of the balance: But supersedes issuing decree for the above balance, *in hoc statu*, to afford time to the parties to discuss certain counter claims urged for Abertarff in the present, and other processes now depending in Court: Farther, with reference to the two counter claims which are discussed in the revised minutes now under consideration, finds, 1. That the first counter claim urged for the defender is founded on an averment that Abertarff had been erroneously charged with the rent of Wellhouse, which was paid to the deceased Lovat on 1st December 1815, and that it is not well founded,—in respect, *first*, that this claim was not truly a point reserved by Mr Shepherd in his final award, though his report contained a note directing the attention of parties to the article which, by their subsequent doquet, they declined objecting to; and, *secondly*, in respect the Lord Ordinary is satisfied, from the explanation of the pursuer in his revised minute, that the executor was justly charged, in the accounts both of 1829 and 1834 (as well as in prior states), with the said term's rent, for which his executor was accountable to the succeeding heir: Therefore repels that counter claim, and decrees: 2. With regard to the defender's second counter claim, founded on the heritable bond granted by the late Lovat, binding himself and the other heirs of entail, in terms of the Statute, for the computed half of the expense of erecting the bridge of Beaully, Finds that Abertarff's claim on that matter is not foreclosed, but was specially reserved by Mr Shepherd, the referee, as he found 'it impossible to adjust this account while the principle of accounting between the county and the contractor to the bridge remains unsettled': Finds it admitted that the deceased Archibald Fraser of Lovat made large payments in money and in counter claims to the Commissioners for Highland Roads and Bridges, to account of the said heritable bond in October 1815, recently before his death; but that he executed no discharge or renunciation of the said heritable security in respect of such payments: Finds that the defender, as the successor or disponent of the late Lovat, claims an interest to the amount of the said payments, or to such extent as the Statutes permitted and declared such bonds to affect the heirs of entail in the estates over which they extended: But in respect the parties differ widely as to the state of accounts, and other facts which ought to be more clearly elucidated by a man of skill before a final decision on the merits of this claim, before further answer, remits this branch of the case to Mr Donald Lindsay, accountant, to examine the whole accounts and vouchers relative to, or con-

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nected with, the said bond, and to report, (1.) How far the payments made, and balance credited, by the late Lovat to the Commissioners of Highland Roads and Bridges, to account of the said bond, in October 1815, were composed, in whole or in part, of assessments or charges which the proprietor was entitled to charge as a burden against the said entailed estate; or whether the late Lovat was, at that date, owing any further or prior arrear of assessments, or other charges, in respect of roads and bridges, which he did not account for to those entitled to levy the same. (2.) Whether the late Lovat had any security over the entailed estates, authorised by Statute, for his assessments paid to account of the said bond, other than that document itself, and infestment thereon: *Lastly*, to prepare a state, showing to what amount the said payments by Lovat, in October 1815, formed charges against the entailed estate at his death in December 1815, and the amount of the sums chargeable by the noble pursuer, as heir of entail, at Whitsunday next 1842, if the said bond shall be held as a subsisting and available security to the successor and disponent of Lovat, to the extent of his advances on account thereof in 1815, taking into consideration the obligations incumbent on the said Archibald Fraser himself by the Statutes, to keep down the interest and pay 3 per cent. per annum during his own possession of the entailed estate, in extinction of road and bridge debts; with power, generally, to the accountant to report on any other points of fact or accounting which either party may suggest as material to the pleas to be afterwards maintained by them; the said report to be lodged *quam primum*; and in the mean time, reserves all claims of the parties, *hinc inde*, to expenses of process, till an ulterior stage of the cause.

"*Note.*—The earlier findings of the preceding interlocutor have hardly been disputed since the parties joined issue in the cause. It was agreed on both sides, that Mr Shepherd's award, in so far as he finally adjusted the accounts, cannot now be opened up by any party. But the defender contended that decree should not be allowed to go out for the balance ascertained by Mr Shepherd, till his counter claims, urged in this and in another well-known process in Court, for constituting the amount of the improvements on the entailed estate of Lovat claimable by Abertarff, as executor of the Honourable Archibald Fraser, the last heir of entail, were ascertained. It is understood that the noble pursuer did not latterly object to that proposition, which will now be found more necessary than was at first apprehended, from the importance and extent of the counter claims.

"In the present process, the discussion has been confined to two counter claims of the defender, which are stated with great clearness and ability in the *revised minutes* that have been lately lodged for the parties. The Lord Ordinary has expressed his views on each of the points, so far as the facts yet ascertained enable him to do so, in the specific findings of the prefixed interlocutor. But a short additional explanation may be necessary, especially on the second and more important question which is here raised between the parties.

"1. The *first* counter claim rests on the allegation that the defender was improperly debited, both in Mr Shepherd's report and in prior states, with £140 as a term's rent of a farm called Wellhouse, which was paid to the late Lovat by the tenant a few days before his death (on 8th December 1815), and was held as a sum which the defender, as Lovat's executor, was bound to repeat to the heir, on the ground that it consisted of *forehand* rent conventionally exigible at Martinmas 1815, but not legally due till Martinmas 1816, and so legally claimable by the heir; to which the defender objects, that the said payment was not *forehand*, or made to account of the term's rent due at Martinmas 1815, but of a prior arrear due at Whitsunday 1815, which, of course, fell to be retained by the late Lovat and his executor, without any accounting to the heir. Now, on considering the statements of both parties on this point, the Lord Ordinary is clearly of opinion that this is not a claim which was latterly reserved by Mr Shepherd at all; on the contrary, it appears that any objection to it was latterly given up, or abandoned by, the defender himself, when he *doqueted* the report subsequent to Shepherd's award. But even if the question were open, the Lord Ordinary is of opinion that the plea is utterly erroneous and groundless in point of fact. Looking to the mass of states, reports, and relative documents produced with regard to this

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claim, he thought at one time of remitting them to an accountant to report on their import; but when he recollected that these documents have all been sifted and examined carefully by the men of business acting for both parties, who made up states for the parties in 1829, and afterwards by Mr Shepherd in 1834, it was conceived to be quite out of the question to require any new report from another accountant on such a matter. The facts on which this claim depends, cannot be more clearly and ably, or more briefly stated in any report, or by any man of business, than they are by both the learned counsel, under branch I. of these revised minutes; and it humbly appears to the Lord Ordinary, that the statement and argument of the noble pursuer, in answer to the claim in his minute, p. 22 to p. 40, is one of the most satisfactory and conclusive demonstrations which he has ever read in a disputed matter of accounting. The Court, if called on to review this judgment, really require no other aid than the minutes.

"II. The *second* counter claim, however, of the defender, is of a different description. The question here raised also is now very perspicuously and candidly stated in the revised minutes for both parties; and when these are contrasted with the vague and erroneous statements on the point at issue, to be found in previous statements, both judicial and extrajudicial, it is impossible not to feel that the proper merits of this branch of the case have never before been properly set forth and understood. Now that the real merits of the claim are brought by both parties to a precise and definite point, the Lord Ordinary must own that he has a strong impression that the claim of Abertarff on this head is, to a certain extent, insuperable; but as the parties are not entirely agreed on either the state of accounts, or on the facts generally on which the claim may depend, and as a great mass of states and accounts have been recovered and put into process, which apparently very little affect the real question at issue, but must, nevertheless, for the satisfaction of the Court, be examined by a person skilled in figures, to ascertain their bearing on the case, it has been thought indispensable to send this branch to an accountant of experience, to give information on the matters of fact and accounting specified in the interlocutor, as well as to exhibit a state of the true amount of the claim, in case it be ultimately sustained.

"At the same time, it is perhaps due to the parties and to the accountant, and may possibly save some unnecessary detail in the accounting, for the Lord Ordinary to state briefly the view which he is at present disposed to take of this claim on the part of the defender.

"Keeping in view the provisions of the Statutes passed in 1803 and 1804, relative to the construction of highland roads and bridges, it will be observed that the late Lovat, in the year 1814, availed himself of a provision in these Acts to grant an heritable bond over the entailed estates for £5237, as the half of the computed expense of erecting the new Bridge of Lovat across the Beauly. That sum was afterwards restricted to £4734, being one-half of the actual expense of execution.

"In July 1815, Mr James Hope, W.S., acting for the Commissioners on Highland Roads and Bridges, called upon Lovat to pay up this bond,—or at least to make a payment equivalent to the assessments on his own estates, which Lovat had retained for a series of years, apparently to meet the bond; accordingly, it is proved beyond dispute, that the late Lovat, in October 1815, paid the Commissioners upwards of £3000 to account of the said heritable bond. It will be the business of the accountant to report in what manner, and on what sort of voucher that payment was made. It is admitted that no discharge of the heritable bond and infestment, in so far as they affected the entailed estate, was ever granted; and it also appears that no assignation was executed. The fact is undoubted, that the late Lovat died a few weeks after this payment; so that the rights of parties must now be regulated by the rules and principles of *common law* applicable to the case of payments made to account of analogous securities, and in similar circumstances.

"Before entering on these, however, the noble pursuer states one general plea, which, if well founded, would supersede further argument. He pleads that the counter claim now under consideration was referred to Mr James Keay, advocate, by Messrs Kinloch and Shepherd when the accounts were left to their adjustment in 1829, and that Mr Keay gave an opinion in

1831 adverse to the claim. But the facts of the case are quite insufficient to support that plea. There was indeed a case laid before Mr Keay in 1829, and certain statements made and questions put respecting assessments, quite different from those which the state of the question as to Abertarff's claim, under the bond for Lovat Bridge, required. This is manifest on a perusal of the memorial and opinion of Mr Keay, to which it is sufficient to refer. Accordingly, so completely was Mr Shepherd sensible that Mr Keay's opinion did not rule the question, that he states in the outset of the report and award, now labelled on, 'that the adjustment of the account of the Lovat Bridge comes *within the present reference*.' In no view, therefore, is it foreclosed by Mr Keay's opinion.

"The chief plea, however, of the noble pursuer against the counter claim in question, seems to rest on the assumption that the late Lovat, by the mere act of advancing or settling a balance with the Commissioners in 1815, *discharged the bond* as against the entailed estate, to the extent of the sums so paid, and of course that Abertarff, as his general representative and disponent, can maintain no claim afterwards, under this bond, against the heirs of entail; but the defender, as the general disponent and successor of Lovat, replies, that a discharge of an heritable security, subsisting and created over an entailed estate, cannot be raised up by *implication*, unless the party making the payment had shown an intention of extinguishing the security, and that there are no *termini habiles* for any such inference in the present case.

"On the assumption that there are no material specialties to affect the case, it is apprehended that the plea of the noble pursuer, on the preceding state of the argument, could not be sustained without a departure from all the principles by which the rights of parties making advances to account of securities over entailed estates in Scotland have long been regulated. When a debt constituted against, and due by heirs of entail, is paid by an heir in possession, the latter unquestionably has a right to demand an assignation to keep up the debt against the heirs of entail; and so strong is the presumption of law that the heir means to exercise that right, that even when he takes a conveyance and discharge from the creditor, it is nevertheless held, 'that the discharge hath not the effect of extinguishing it *confusione*,'—*Ersk. B. III. tit. 4, § 27*,—a section which contains a very clear view of the law and authorities on the subject.

"No doubt, it is alleged that there was no conveyance here, by the creditors of the bond and infestment, to the late Lovat and his heirs generally; but, if so, it is equally certain that there was no discharge of the bond. The adjustment of the voucher or security to be given to Lovat, in respect of his payments in 1815, seems to have been delayed, and ultimately superseded, by his death. But, in the ordinary case, if a party making a payment on account of an entailed security, dies before it is discharged or assigned, it is supposed that the right to demand an assignation passes to the general heir and disponent of the party who has advanced the money. There is every legal and equitable presumption to support such a demand.

"The plea of Abertarff, however, is still more clear in reference to the debt now claimed. As the Statute expressly declared that heirs in possession were to have recourse against the subsequent heirs of entail for their advances, to be repaid at the rate of three per cent. per annum, it is supposed that a formal assignation was necessary in this case to secure the relief of Lovat, and his successor and disponent, against the heirs of entail. The Statute itself ascertained and constituted the obligation of these heirs for their proportion of any bond advanced by a proprietor in possession.

"It is objected, however, that the late Lovat did not take any means of charging the entailed estates with the assessments which he advanced, and, therefore, that Abertarff cannot maintain any claim against the heirs of entail for these sums. But it is obvious to answer, that when Lovat executed an heritable bond, charging the heirs of entail and their estates with the whole expense of the bridge, for which he had become bound, and when the assessments were applied, as far as they would go, in payment of that bond, Lovat had the most complete security that could be devised for reimbursement of these assessments from the heirs of entail, in terms of the Statute. He was not entitled both to keep up the bond over the entailed estates, and

to charge the assessments by a *separate security*, as another burden thereon. The assessments came to be covered by the bond; so that there is double authority under the Statute now to charge them against the heir of entail.

"As the Lord Ordinary understands the case, the bond and infestment over the entailed estates for one-half of the expense of the bridge, is at this moment *undischarged*. Now, who is entitled to take up and found on this document? The noble pursuer states candidly, that, on his succession, he, or his curators, paid up the balance due upon the bond (said to amount to about £1500), and that they took an *assignment* to keep up the bond as a security for that balance against the entailed estate. See minute, No. 109, p. 49. But, with deference, was not the late Lovat, or his general disponee and executor, legally entitled to act in the same manner with respect to the prior portion of the bond paid by Lovat in 1815? At present, the Lord Ordinary is unable to understand on what ground this can be resisted.

"Nevertheless, the aid of an accountant is indispensable in the case. By the Statutes, the heir in possession is bound to keep down the *interest* of every constituted debt against the entailed estate during his possession, and also to pay three per cent. towards the extinction of the principal. Now, while the date of the heritable bond is ascertained, and while the payment in 1815 is equally vouched, it remains to be seen, by an accurate account made up in terms of the Statute, what parts of the debt fell to be extinguished by the late Lovat himself prior to his death.

"Besides, various other points requiring explanation may occur in the accounting. Thus, there is one charge deducted by Mr James Hope from the claim of the Commissioners against Lovat in 1815, which is also stated as deduction from Lovat's claim against the heirs of entail, although the ground of the latter deduction is not at once apparent. It would appear that the late Lovat had executed a certain road near Fort-Augustus, for which the Commissioners allowed him £799. 6s., and Mr Hope seems to have sustained that as a payment to account of the bond. But the accountant will consider if this ought to be deducted in a question between the late Lovat and the heirs of entail, in an accounting as to the statutory security of the former. At present, it has the aspect of a claim arising upon a separate account between Lovat and the Commissioners, for money which Lovat had advanced, or work that he had performed for them unconnected with the bridge, for which the Commissioners were his creditors. If so, it is difficult to perceive how the payment of that debt by the Commissioners to Lovat should form a deduction from the claim of the latter against the *entailed estate* on a totally different concern. But this probably admits of a satisfactory explanation, which, of course, will be given to the accountant.

"It is only necessary to add, that although the process is loaded with many superfluous documents, there are some of importance, which the Lord Ordinary has not been able to find. Thus the bond (the foundation of the whole counter claim) binding the heirs of entail for the expense of the bridge, does not appear to be produced, nor the infestment, if any was taken thereon; neither can the Lord Ordinary find any vouchers from Mr Hope as to the payments in October 1815. It is probable the accountant will call for these, and the Lord Ordinary, if asked, will grant a diligence for their recovery."

On a reclaiming note, the Court

"Recal the interlocutor of the Lord Ordinary reclaimed against, in so far as it relates to the two counter claims urged by the defender, and to that extent only; and in regard to the first counter claim urged by the defender in his minute of debate, Find that the same is excluded, and the defender barred from bringing forward the same by the docket subscribed by the defender, and appended to the award of Mr Shepherd, acknowledging the correctness of the balance now sued for, after such award had been examined and considered by him with a view to state to the referee any objections, if he any had, to the same, and by the correspondence in December 1834 and January 1835, in which, in consequence of, and in reliance upon such acknowledgment of a specified balance being due, Lord Lovat, on the other hand, agreed to allow payment of that balance to remain

over until certain other matters were adjusted between the parties: And in regard to the second counter claim, find that the same is not stated or embraced in the record, and cannot be competently proponed in this action: Find the pursuer entitled to the expenses incurred by him from the date of the interlocutor of 19th November 1841; allow an account thereof to be lodged, and remit to the auditor to tax the same and to report; and *quoad ultra*, remit to the Lord Ordinary to proceed with the cause."

Lord Ordinary, Cuninghame.—Act. A. Anderson; Gibson-Craigs, Dalziel and Brodie, W.S., Agents.—Alt. Rutherford, Moncreiff; Aeneas Macbean, W.S., Agent.—F. Clerk.—[G.D.F.]

11th June 1842.

FIRST DIVISION.—(H. B.)

No. 213.—DAVID ROUGHEAD, Complainer, v. JOSEPH STEPHENSON AND OTHERS, Respondents.

Process.—Wakening and Transference.—Diligence.—Arrestment.—Statute 1 and 2 Vict. c. 114.—It is incompetent, under Statute 1 and 2 Vict. c. 114, to insert a warrant of arrestment in a summons of wakening and transference.

Thomas and William Stephenson, sons of the deceased Joseph Stephenson, brought an action of count and reckoning against James Roughead and others, their father's trustees. The original parties having died, and the action having fallen asleep, Joseph Stephenson and others, as representing the pursuers, raised an action of wakening and transference against the representatives of the defenders, among others, against Archibald Dunlop and others (James Roughead's trustees), who stated as a preliminary defence, that they had denuded themselves of the trust-estate in favour of David Roughead, the truster's son. To meet this allegation, the pursuers raised a supplementary action of transference and wakening against David Roughead, inserting in the will of the summons a warrant of arrestment in the form authorised by 1 and 2 Vict. c. 114. Roughead objected to this as incompetent, on the ground that the only summonses on which such arrestments could be used were those "concluding for payment of money;" whereas the conclusions of the summons in question simply were, that the pursuers should have the said process of count and reckoning "wakened and transferred at their instance, for their respective interests as aforesaid, against the said David Roughead, son of the deceased James Roughead, to the effect the pursuers may have such action and execution against him as they would have had against the deceased James Roughead his father, in his lifetime," &c. He accordingly applied for letters of general loosing, when the Lord Ordinary pronounced the following interlocutor:

"30th May 1842.—The Lord Ordinary having resumed consideration of this cause, passes the bill, and grants warrant for letters of general loosing as craved.

"Note.—It is not necessary, in this case, to decide whether the statutory enactment, 1 and 2 Vict. c. 114, § 16, which makes it 'lawful to insert in summonses concluding for payment of money, a warrant (or will) to arrest,' does or does not extend in sound construction to a summons of transference; though, if it were, the Lord Ordinary, as at present advised, would be disposed to hold, that where the summons in the primary action concludes for payment, these conclusions are to be considered as substantially imported into, and repeated in the transference, so as truly to make them also conclusions of this latter process. He thinks there could be no doubt of the competency of embodying and setting them forth *in extenso* in the



summons of transference as conclusions immediately directed against the defender, against whom transference is sought. And if this would be competent, he sees little difference in substance, or in the sound sense and principle of the thing, where the same result is effected by *reference*, instead of by *actual repetition*.

"But what the Lord Ordinary rests upon as the ground of the above judgment is, that there was here, not the mere transference of a process that was *awake*, but a combined wakening and transference of a process which was *asleep*. Now it is clear, upon the authorities, that, down to the date of the Statute, there could in no form be any legal arrestment, or any legal warrant for arrestment, obtained upon a *sleeping process*. To make arrestment competent, or to render it competent to apply for warrant to arrest, it was indispensable that the process which was thus *asleep* should *first be wakened*. And as the Statute was directed merely to the giving of a *short-hand remedy* in cases where the older and more round-about forms would previously have been available, and not to render arrestment competent where it would not previously have been so, nor yet to entitle parties to apply for warrant to arrest, at a time, and under circumstances, with reference to which it would previously have been incompetent for them so to apply, it humbly appears to the Lord Ordinary that the Statute really makes no difference in this question, and that it is just as incompetent under the statutory form to arrest, or to issue a warrant for arresting upon the dependence of a process which is *asleep*, as it was in all time preceding when a different form of procedure had to be resorted to.

"The Lord Ordinary therefore entertains no doubt, that had the secondary process here been a *simple process of wakening*, and not combined, as it is, with a relative process of *transference*, there could not, either under the Statute or otherwise, have been any valid arrestment, or any valid or legal warrant to arrest, so long as the primary process was in a state of *sleep*.

"Nor does the combination of a transference with the wakening, as it seems to him, mend the matter. For the transference itself would have been incompetent, as a secondary process, where the primary process was *asleep*. And, therefore, the wakening truly lies at the root of the whole matter. Indeed, if the Lord Ordinary be right in holding that the conclusions of the transference can have *active* the effect of conclusion for *payment* only by reference to the conclusions in the primary action, they could, in no view, of themselves afford ground for the warrant to arrest, when the primary action was itself *asleep*, and its conclusions thereby in abeyance.

"A distinction was attempted to be drawn between the arrestments which were used *before*, and those which were not used till *after* the execution of the summons of wakening and transference. But the distinction is one which cannot practically avail. For although no doubt, according to certain authorities, it is not absolutely necessary to have an interlocutor of wakening, and so it may plausibly be maintained, that the mere execution of the wakening is sufficient, *per se*, to waken the principal cause, the Lord Ordinary is not aware of any instance in which the effect of wakening has been held complete until the summons of wakening was not only executed, but the executed summons actually *produced in causa*. But be this as it may, the fatal circumstance here is, that till the principal cause was wakened, it was not competent, either under the old or new form, to *issue the warrant to arrest*. At the date of the summons of wakening and transference, therefore, it was just as much a nullity, under the Statutes, for the writer to the Signet to insert 'a warrant (or will) to arrest,' the primary action being *asleep*, as, prior to the Statute, it would have been, in the like circumstances, to issue separate letters of arrestment. Of course, if the warrant to arrest was a nullity at the time of its being inserted, it could not be rendered otherwise by any *after* execution of the summons which contained it. And hence the arrestments *posterior to the execution* of the summons, equally with those *prior to its execution*, are all tainted with the nullity of the warrant on which they proceed.

"The only question, therefore, that remains is, *was the primary action asleep?* And upon this, as the Lord Ordinary understood the statements of the parties, there can be no room for doubt. In the *first place*, it is not easy to see how the re-

spondents are to get over the statement in their own summons of wakening and transference. For the process is there treated throughout as a sleeping process, so far as regards the present complaint. And as the warrant to arrest must, therefore, have gone out upon that footing, it is difficult to deal with the actual diligence itself upon a different footing; or, in other words, to support it by *extraneous evidence* against the positive allegation of the writ on which it bears to proceed. But, in the *next place*, and more especially, there seems to be no question that the process, as regards the present complainer, was truly *asleep*. It has been wakened, no doubt, as against the general trustees of James Routhead. But the express purpose of the ulterior and supplementary proceeding, which lies at the bottom of the present question with the complainer, David Routhead, was to meet the possible contingency of its being decided that the trustees of James Routhead were not the defenders whom it was proper to have convened. The summons is brought against the present complainer 'without prejudice to the pursuer's right of action against the trustees,' on the distinct footing that it 'is proper and necessary, on account of the allegation that the said trustees have *denuded of the trust-estate*, to have the process wakened and transferred against the said David Routhead, son of the deceased.' In other words, the respondents, lest they may have called the wrong party, are now proceeding against the present complainer, as they would have been entitled to do had they begun with him as *their party* from the first. But is it not clear, in such circumstances, that the respondents cannot avail themselves, *against the complainer*, of the fact that the process has been wakened *against another party, as his father's trustees*. They are, in truth, pursuing two separate and independent sets of defenders; and they must deal with each severally in the question of wakening, as if the other had not been in the field. If they had *never* proceeded against the trustees, they concede that the process would have been *asleep* as against the complainer. But if their proceeding against the trustees be *inept*, as it must be, if the trustees were *not their proper party*, the result is still the same; and in no view can their wakening the process, as against the trustees, have any effect as a wakening against the complainer."

The pursuers reclaimed. At advising,

Lord President.—Here we are only interpreting a Statute, and must be guided entirely by its enacting words. These are, that after a certain date it shall be "lawful to insert in summonses concluding for payment of money a warrant (or will) to arrest." Now, the present summons simply concludes, that a certain action, for certain reasons of alleged liability, shall be wakened and transferred against the defender. It neither directly, nor by necessary inference, contains a conclusion against him for payment. Till he is actually made a party, we are not to scan and scrutinize the summons, in order to ascertain how it may ultimately apply against him. I have, therefore, the greatest difficulty in holding that the Statute authorises a warrant of arrestment to be inserted in any summons not containing a money conclusion. Whatever may have been the intention of the parties who brought the measure into Parliament, our only guide is the enacting clause, in which I see nothing to sanction such an arrestment as that now in question. This is my difficulty; and I feel it to be the more important, that the Lord Ordinary adopts rather a different view. As presently advised, my impression is, that before this Act was passed, it was not the practice to arrest on the dependence of actions of transference. It is admitted that no case can be produced in favour of the practice, though there must have been five hundred if it had really existed. The presumption is, that the Legislature, in introducing an extraordinary remedy, did not mean to alter former practice, unless in so far as it does so expressly. The Lord Ordinary holds that warrant of arrestment might have been inserted if the action had been one merely of transference. I cannot adopt this view. Here, however, the action is one of wakening and transference,—not transference and wakening. It must first be raised from its grave, and have life put into it. Till this is done, it cannot be transferred. Though differing from the Lord Ordinary as to the sufficiency of an action of transference to warrant arrestment, I perfectly agree with him as to the other point, and am therefore for refusing the note.

Lord Gillies.—I concur with your Lordship, particularly as to the Statute, and will not weaken the observations by attempting to repeat them. While the process is asleep, it is a legal nonentity. The citation of the defender calls upon him "to hear and see the aforesaid process awakened, transferred and insisted in," &c.; but if it is not previously awakened, none of the other proceedings can take place; and hence, all subsequent conclusions imply that the first step has been successful. Here, however, before the wakening necessary to give validity to the process has taken place, arrestment is used upon it as a depending process. This is clearly incompetent.

Lord Mackenzie.—The question is, whether an action of wakening and transference contains a proper conclusion for payment of money in the sense of the Statute? I am clear that it does not. If I could infer with the Lord Ordinary, that an action of transference transfers the full conclusions of the summons, I would say the same of an action of wakening; but I cannot venture so far. The conclusion of an action of wakening and transference, is simply that the action be awakened and transferred; and there is an end of the matter. There is no style, or established practice, in favour of such arrestments; and I see no warrant for them in the Statute. I cannot hold that an action of transference, either by itself, or conjoined with a wakening, will authorise an arrestment on the dependence.

The Court refused the note.

Lord Ordinary, Ivory.—For Complainer, Solicitor-General (M'Neill), Monro; Graham and Anderson, W.S., Agents.—For Respondents, Rutherford, Horn; Peter Bairnsfather, W.S., Agent.—N. Clerk.—[H.B.]

11th June 1842.

FIRST DIVISION.—(H. B.)

NO. 214.—ALEXANDER PEARSON and OTHERS (*Boyd Alexander's Trustees*), Pursuers, v. WILLIAM MAXWELL ALEXANDER, and BOYD ALEXANDER and his CHILDREN, Defenders.

Succession—Testament—Trust—Burden—Personal and Real.—A testator directed his trustees to convey certain lands to A, whom failing to B, but declared, that in the event of A or his issue succeeding to a certain other estate, he or they should be bound to denude of the estate now conveyed in favour of B or his issue,—it being the testator's meaning and intention that the two estates should never be united during the lifetime of B, or any of his issue.—Held that the trustees would discharge their duty under the settlement, by inserting the testator's declaration in terminis in the conveyance to A; that the declaration amounted only to a personal obligation on A, and could not be made to affect the lands as a real burden or species of entail.

The late Boyd Alexander of Southbar, by trust-disposition and settlement, of date 19th April 1808, conveyed his whole property to trustees, for the purpose, *inter alia*, of conveying his whole heritable property, and particularly his estate of Southbar and Boghall, under certain specified burdens, to his nephew, William Maxwell Alexander, his heirs and assignees whomsoever. By a codicil to the deed the truster declared it to be his desire and intention, that, in the event of William Maxwell Alexander predeceasing him without issue, or with issue also predeceasing, every thing meant to be conveyed to William Maxwell Alexander should go to his brother, Boyd Alexander.

In February 1816, the truster executed a supplementary trust-deed, in which, considering that he had made several purchases of land since the date of the original deed, and that, in terms of that deed, these lands would descend to William Maxwell Alexander, he altered this destination, and desired his trustees to sell the newly purchased lands, together with any fu-

ture purchase, and regard the prices as forming part of his personal funds; declaring it to be his intention that it was only the estate of Southbar and Boghall which "was to descend and belong" to William Maxwell Alexander, and failing him, as described in the original deed, to Boyd Alexander. Of date March 1819, a codicil was appended to this supplementary deed, making various alterations both on it and the original deed. The *fourth* alteration is as follows:

"As I have by my codicil, already referred to, provided that in the event of the death of the said William Maxwell Alexander without lawful issue before me, or of the death of such lawful issue likewise before me, that the said Boyd Alexander, also my nephew, shall succeed to the real property specially conveyed in my said first trust-disposition and settlement (and which comprehend the estates of Southbar and Boghall), and to the personal property likewise thereby provided to the said William Maxwell Alexander, it is now my further meaning and intention, and I hereby declare such to be the case, that if it shall happen at any time hereafter that the said William Maxwell Alexander, or any of his lawful issue, shall succeed to the estate of Ballamyle, in the county of Ayr, belonging to his brother, Claud Alexander, Esquire, then and immediately on that event taking place, and whether the said William Maxwell Alexander shall have lawful issue or not, the said William Maxwell Alexander, or any of his lawful issue, as the case may be, so succeeding to the said estate of Ballamyle, shall be bound and obliged immediately to denude themselves of, and to convey the said estates of Southbar and Boghall to and in favour of the said Boyd Alexander, my nephew, and his heirs and assignees whomsoever,—it being my meaning and intention that the said estates of Southbar and Boghall shall never be united with the estate of Ballamyle in the person of the said William Maxwell Alexander, or of his issue, while my nephew, the said Boyd Alexander, or any issue of his body, shall be in life; it being always expressly understood, that in the event of the said Boyd Alexander, my nephew, or any of his issue succeeding to the said estates of Southbar and Boghall, he and they shall be burdened in the same manner as the said William Maxwell Alexander, and his heirs and successors, are by my said settlements."

In executing the part of the trust-deed in favour of William Maxwell Alexander, the trustees proposed to dispose to him the estates of Southbar and Boghall,—inserting in the disposition a declaration in terms of the above *fourth* alteration. The sufficiency of such a declaration to meet the intentions of the truster having been questioned, the trustees raised a summons of declarator and exoneration, in which, stating that they had made up a feudal title in their persons to the lands of Southbar and Boghall, and were prepared to convey them in terms of the settlement, but that doubts had been expressed by the parties concerned, whether the terms of the destination and obligation proposed to be imposed on William Maxwell Alexander and his issue were sufficient, they concluded to have it found and declared that, under the terms of the settlement,

"the pursuers are bound to convey, make over, and dispose the lands and others mentioned therein, and hereinbefore described, to the said William Maxwell Alexander, and his heirs and assignees whomsoever; and that under the terms of the said settlements, the said Boyd Alexander and his heirs and assignees have merely a conditional interest in the said lands and others, in the event of the said William Maxwell Alexander, or any of his issue, succeeding to the said estate of Ballochmyle, and ought not, in the conveyance to be executed by the pursuers, to be substituted in the dispositive clause thereof after the heirs and assignees whomsoever of the said William Maxwell Alexander: As also, that the said Boyd Alexander and his forefathers are not entitled to have their said conditional interest provided for in the said conveyance, by means of a clause of devolution, or otherwise than by means of a personal obligation upon the said

William Maxwell Alexander, or any of his lawful issue, who shall succeed to the said estate of Ballochmyle: As also, that the pursuers will have fulfilled the duty imposed upon them, and implemented the directions of the said truster, in so far as regards the rights and interests in the lands and others before described, given to the said William Maxwell Alexander, and to the said Boyd Alexander, and their respective heirs and assignees whomsoever, by the said settlements, by executing a conveyance to the several effects set forth in this conclusion, and under the burdens before mentioned or referred to, in the terms expressed and contained in the draft of the deed proposed to be executed by the pursuers, to be produced in process, and herein in part before recited: Or otherwise, it ought and should be found and declared, by decree foresaid, that the said Boyd Alexander and his foresaids ought to be substituted in the dispositive clause of the said deed to the said William Maxwell Alexander and his foresaids, or to him and his lawful issue, and that they are entitled to have a clause of devolution inserted of the said lands and others in their favour, in the event of the said William Maxwell Alexander, or any of his issue succeeding to the said estate of Ballochmyle; or at least, what other right and interest they have in the said lands and estate, and what clauses and provisions they are entitled to have inserted in the deed of conveyance to be executed by the pursuers, for enforcing and securing the same, other than, and different from, those contained in the draft to be produced by the pursuers."

William Maxwell Alexander *pleaded*—1. Mr Boyd Alexander and his children have only a conditional interest in the lands of Southbar and Boghall, arising under the codicil of 1819. 2. The proper mode of providing for such interest is by a personal obligation of the defender to denude in terms of the provision contained in said codicil. 3. The defender, on granting such obligation, is entitled to conveyance of the lands, in terms of the trust-deed of 1808.

Boyd Alexander, for himself and children, *pleaded*, That according to the true intent and meaning of the truster, the trustees, in conveying the estates of Southbar and Boghall to William Maxwell Alexander, are bound to make the conveyance one in favour of William Maxwell Alexander and his heirs, whom failing, to the defender, and not merely to introduce the condition as to William's denuding in the defender's favour, but to secure the due implement of that provision by declaring the obligation to that effect to be a real burden on the lands conveyed.

The Lord Ordinary pronounced the following interlocutor:

"4th March 1842.—The Lord Ordinary having heard parties, and considered the process, finds that the defenders, Boyd Alexander, Esquire, and his children, are not bound to be satisfied with the clause in the deed prepared by the pursuers, referable to the contingency of the other defender, William Maxwell Alexander, or his issue, succeeding to the estate of Ballochmyle, but are entitled to have the provision that, in this event, the said William Maxwell Alexander, or his lawful issue so succeeding, shall be obliged to denude of the estates of Southbar and Boghall in favour of the said Boyd Alexander, and his heirs and assignees, made a real burden in the title to be granted to the said William Maxwell Alexander; and before farther answer, appoints the cause to be enrolled, in order that it may be settled, whether the parties can adjust the appropriate clause or clauses themselves, or wish a remit to a neutral person, or how they propose to proceed: Reserving all questions of expenses.

"*Note*.—The law, as expounded in several decisions, is, that trustees, in the situation of the pursuers, are bound to carry what shall appear to have been their constituent's intentions, as deducible from his trust-deed, into effect; and the present truster, not content with leaving this to the law, expressly declares that the pursuers should 'regulate themselves according to my meaning and intentions, as pointed out by my previous settlements, and by this codicil.'

"Now, it is clear that he meant that Southbar and Boghall should never be united in the person of the same heir with Ballochmyle. He says so in express terms—and the question is, whether his trustees can be allowed to give William Maxwell Alexander such a title as may confessedly enable him to defeat this intention? The Lord Ordinary thinks that they cannot, but that Boyd Alexander is entitled to insist that they shall not merely insert into his title a general and very easily defeasible declaration, but that they shall do what the defender now desires, to secure his interest.

"There are several courses that might have been followed. But it is needless to examine these, because Mr Boyd Alexander restricts his claim to the one that is the mildest for the other party, viz., that the obligation to denude shall be made a *real burden*, and shall enter Mr Maxwell Alexander's sasine and the future investitures. To this extent, *at least*, the Lord Ordinary has no doubt that the claim of Boyd is well founded.

"There is nothing to be learned from decisions on this subject, except the general rule, that the will of the granter cannot be allowed to be evaded or defeated. Where the mere insertion of his words into the title to be framed will suffice, this (as in Anderson, 11th February 1835) exhausts their duty. Where more is required, the Court (as in Stirling, 30th November 1838), will order this addition, whatever it may be, to be made. Here the granter has given no form of deed, but has merely explained an object which he wishes his trustees to attain: and the question is, whether they attain it by mere insertion into the title of his expression of his wish, which may be disregarded, and his intention defeated the very next day?"

William Maxwell Alexander reclaimed. At advising,

Lord Gillies.—On the first blush of this case I had great doubts of the soundness of the interlocutor; and these doubts have been confirmed. It was clearly the intention of the truster that the estates of Southbar and Ballochmyle should not be united; and he has so expressed it. Intentions, when a similar object is contemplated, are common, but none are more frequently frustrated. The question here is, has the truster used the proper terms to give effect to his intention, or to bind us to give effect to it now? I don't think he has. The case of Duthie (25th February 1841) is conclusive on the point. Indeed, the present case is *a fortiori*. All that the truster has done is not to give an instruction to his trustees, but to append a codicil to his settlements containing an obligation on his heir. To give effect to his intentions in the manner contended for by Boyd Alexander, would just be to rear up a new form of entail. The truster was a man of business who knew, and might easily have known, that if these were his intentions, he could only give effect to them by executing a regular entail. He has not done so. But he has said that the estates are not to be united; and is it therefore to be maintained, that as the union cannot otherwise be prevented, we must order a strict entail? Suppose an individual wishes to bind his heir not to spend beyond a certain sum. The obvious way of giving effect to his wish, is to execute an entail which will prevent people from trusting him; but if he does not choose to do so, it is impossible to have it done for him. I am clear that, in the present instance, the trustees will fully implement their trust by disposing in terms of the proposed draft.

Lord Mackenzie.—I am of the same opinion. There is here no direction whatever to entail. There is not even a clause to prevent alienation, but merely a clause which binds the disponent in a certain event "to denude." This is merely a personal obligation, and cannot affect the lands. And I would infer, that it was not the truster's intention to affect them. He says, they are not to be united "in the person of the said William Alexander," &c. Now, what is here asked? A new kind of real right, which is to be substituted for the obligation which was originally personal, but is to be personal no longer. In this way effect is not to be given to the meaning, as expressed by the truster, but a new meaning altogether. The personal obligation appears to me to give full effect to the intention. If at the time when the estate of Southbar stands in the person of William Maxwell Alexander, the estate of Ballochmyle opens to him, he is under a personal obligation to denude himself of the former. From the very nature of the obligation, it appears im-

possible to carry it beyond the person. Indeed, I doubt if the thing proposed by the other defenders could be accomplished by the law of Scotland at all. Certainly, it could not be accomplished without an entail. At first, I thought that an entail had been ordered; but when I saw that there was to be no entail, I was satisfied that the thing was utterly impossible. The real right proposed would be of a very extraordinary description,—the effect being, that whenever the party holding the one estate happened, in whatever way, to come into possession of the other, one of them should jump away to a different party altogether. It would be a perfect anomaly.

Lord Fullerton.—I am of the same opinion. There can be no objection to allow the truster's declaration to go into the disposition, but the attempt to convert the personal obligation contained in it into a real right, would be utterly impracticable. As observed, there is here no instruction to the trustees to do any thing, and therefore there is no analogy between this case and those in which the trustees have been ordered to do certain things, *e. g.*, to execute a strict entail according to the law of Scotland. In such cases, it has been found that the thing ordered to be done, must be done in such a way as not to leave the entail imperfect. Here the direction to the trustees is to convey in fee-simple; and were it to be held, that under such a direction, they are entitled, with the view of carrying out what is said to have been the truster's intention, to execute an entail, it is clear that, in the same way, every condition in a settlement might be construed into a direction to make an entail. Were a truster to say, my intention is that my heir shall not sell the lands disposed to him, or contract debt, the trustees might perhaps be entitled to insert this, *in terminis*, in the conveyance, but surely not to insert all the fetters of an entail. So here. As to the proposal to convert the declaration into a real burden, it is altogether out of the question.

Lord President.—I see no reason to doubt the soundness of the opinions now delivered. We are always, as far as possible, to give effect to the will of the testator. This principle we applied lately in the case of *Ramsay v. the University of St Andrews*. What was the intention of the truster here? If he intended, that, on a certain event, he wished the estates to be entailed, why did he not say so? Mr Alexander was a regular man of business, and knew how to give effect to his intentions. He does so by framing a codicil, which clearly enough indicates his wish, that the estates should not be united, but also indicates that he left it to his two nephews to give effect to it—just as if he had said, I have explained my wish, and have full confidence that you will not neglect it. As to an entail, there is no indication of it. This distinguishes the present case from those alluded to by Lord Fullerton, in which there was an express direction to entail. Then the proposed conveyance fulfils the direction given to the trustees, who are not entitled either to make an entail, or constitute a real burden.

The Court pronounced the following interlocutor:

“Recal the interlocutor of the Lord Ordinary reclaimed against, and find and declare in terms of the first conclusion of the libel; and farther, find that, upon executing a deed of conveyance in terms of the draft, No. 10 of process, the pursuers are entitled to be exonerated and discharged in terms of the conclusions of the libel to that effect, and exoner and discharge the said persons accordingly, and decern; appoint the expenses of both parties, defenders, to be paid out of the trust-funds.”

Lord Ordinary, Cockburn.—*For William Maxwell Alexander, Solicitor-General (M'Neill), Moir; Hunter, Campbell and Company, W.S., Agents.*—*For Boyd Alexander, Anderson, Cowan, J. H. Maxwell; A. J. Russell, W.S., Agent.*—*B. Clerk.*—[H.B.]

11th June 1842.

SECOND DIVISION.—(G. D. F.)

No. 215.—*Poor JOHN MAIKLEM, Pursuer, v. JOHN MACGRUTHAR, Defender.*

Jury Case—New Trial—Husband and Wife—Expenses—Circumstances in which a new trial granted on the motion of the defender, generally, on the ground that the verdict was not sufficiently warranted by the evidence, but on condition of the defender paying the pursuer the expenses he had incurred in the first trial.

The pursuer—alleging that a bond had been granted by Thomas Henderson, and Jean Henderson and spouse, on 27th June 1839, by which these parties obliged themselves to pay to the pursuer and his wife ten per cent. on every £100 recovered by them out of a certain succession to which they claimed right—brought this action against the defender, who, it was alleged, prepared the deed for its delivery to them. The defender admitted having prepared the deed, but alleged, that some time after its execution, and before delivery, it had been returned to the granters at their desire; and, accordingly, that he was not answerable for delivery, and was unable to comply with the demand. A draft of the bond, and certain documents bearing on the circumstance, were recovered; and thereafter the following issue was sent to a jury:

“It being admitted, that on or about the 19th day of July 1839, a bond was executed in favour of the pursuer by Thomas Henderson, Edward Buchan, and Jean Henderson or Buchan:

“Whether the said bond was delivered to the defender, as agent for the pursuer, or for his behoof?—and Whether the defender wrongfully retains and refuses to deliver the same to the pursuer, to the loss, injury, and damage of the pursuer?

“Damages laid at £1500.”

The jury found,

“that in respect of the matters proven before them, they find that the bond was delivered to the defender, as agent for the pursuer and his wife, and for their behoof, and that the defender having wrongfully retained, and refused to deliver the same to the pursuer, find him liable in damages to them, and assess the same at 10 per cent. on the sums received, or to be received, conform to state signed by the counsel for the parties.”

The defender now moved for a new trial, on the ground, (1.) that the verdict did not answer the issue; and (2.) as being against evidence. As to the first ground, it was explained that the issue was taken, whether the bond was executed in favour of the pursuer, but that the jury had found that it had been delivered to the defender, as agent for the pursuer and his wife, while his wife was no party to the action. It appeared that the finding for the wife had been introduced by the jury, in consequence of an intimation from the presiding Judge, that as it appeared that the wife was interested in the bond, that that interest should be protected by the jury.

The Court granted a new trial, principally on the ground that the evidence, which chiefly depended on the instrumentary witnesses, was contradictory or unsatisfactory. But in regard to the other objection, the Court held that the defender was now precluded from urging it as an objection, especially as he made up a record in which the wife's interest appeared, and had taken the issue as it stood, and gone to trial thereon without stating any objection. In these circumstances, the Court held that he had waived any objection to want of title; and, besides, their Lordships were of

opinion that they were bound to protect the interest of the wife. The new trial was granted on condition of the defender paying the expense of the former. On a subsequent day, a motion was made to the Court for leave to sist the wife as a party; but this the Court refused,—the Lord Justice-Clerk observing, that the Judge at the trial would protect the interest of the wife; and if he presided, he would suggest to the jury to endorse on their verdict that the wife had an interest in the result.

Presiding Judge at trial, Lord Justice-Clerk.—Act. A. Anderson, C. Robertson; T. M'Indoe, S.S.C., Agent.—Alt. Solicitor-General (M'Neill), Inglis; J. and J. Wright, W.S., Agents.—[G.D.F.]

14th June 1842.

SECOND DIVISION.—(G.D.F.)

No. 216.—ROBERT KERR, *Pursuer*, v. ARCHIBALD SCOTT, *Defender*.

Public Informer.—Statute 50 Geo. III. c. 48.—Process.—A party who had been appointed by the Sheriff of Edinburgh as an officer of Court, was employed in that capacity under the Middle District Road Acts, to supply information to the Procurator-fiscal of the county, to enable him to prosecute for offences committed under the Road Acts. On the occasion of these prosecutions, the officer acted as principal witness, and was paid weekly wages for his duties and trouble, and, libelling on the 50th Geo. III., he brought an action against the Procurator-fiscal, in which he insisted he was entitled to a half of the fines recovered from offenders, on the ground of being informer—plea in defence sustained, that the Procurator-fiscal, who pursued for the penalties, was, in the sense of the Act, the informer; and action accordingly dismissed.

The pursuer set forth in the summons in this case, (which was raised in 1840,) that he had been admitted in 1825 by the Sheriff of Edinburgh as an officer of Court, and

“at the time of his said appointment and admission, it was stated to him by Archibald Scott, Solicitor-at-law in Edinburgh, and Procurator-fiscal of Court, that he wished the pursuer to give his attention particularly to the detection of offences committed by carters against the Road Acts, and that the pursuer would be remunerated for his trouble from the fines to be levied and recovered upon his information: That the pursuer attended to these duties, but he farther had occasion to observe various offences committed by proprietors and drivers of stage-coaches and other carriages, and the pursuer proceeded to give such information to the said Archibald Scott, as public prosecutor, as enabled him, with the aid of the evidence supplied by the pursuer, to obtain convictions against a considerable number of offenders of that class: That, from the 6th day of August 1825, to the 11th day of August 1830, the pursuer continued, from time to time, to lodge informations with the said Archibald Scott, which led to convictions against that class of offenders, upon whom fines or penalties were imposed, amounting generally to £5, but which, in some instances, were modified to a moiety of that sum, in terms of the Act of Parliament: That an account of the fines imposed and levied upon coach proprietors, coachmen, and others, in consequence of information given by the pursuer, during the time and in the manner foresaid, and amounting in all to the sum of £237 Sterling, is herewith produced and referred to, and held as repeated *brevitatis causa*.”

He then concluded, under the 50th Geo. III. c. 48, § 17, that the

“defender ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to hold just count and reckoning with the pursuer for the half of the whole fines and penalties levied and recovered by him from coach proprietors and coachmen, in consequence of information supplied to him by the said pursuer, for offences against the Road Acts,

from the 6th day of August 1825, to the 11th day of August 1830, with periodical interest thereon from the date of recovering the same till payment: And to make payment to the pursuer of the sum of £130 Sterling, or such other sum, more or less, as shall appear to be the amount, with interest, resting—owing to the pursuer at the said 11th day of August 1830.”

In defence it was stated, that from 1825 to 1828 the pursuer was employed as a road officer for the county of Edinburgh, but that from 1828 to 1838, when he was discharged, his duties were confined to the limits within which the Middle District Road Acts extended, and that, for the first part of his employment, he was reimbursed for his trouble out of the fines and penalties levied on offenders, but thereafter he was paid weekly wages for the duties he performed, as a public officer under the trustees of the Middle District, during which time he received no part of the fines.

It was admitted that the pursuer supplied information to the defender, which, together with evidence drawn from other sources, enabled the defender to prosecute as pursuer himself; but it was explained, that the present pursuer acted as principal witness for these prosecutions for penalties.

The defender *pleaded*—1. That the pursuer having received such wages or remuneration for his services as were agreed upon, or, at any rate, such as he was satisfied with at the time, and having made no claim from the time of his appointment till after he ceased to act as an officer, he was not now entitled to insist against the defender for the sum claimed in the summons; and, 2. That he had no right in law to make the present demand, since, in the cases of prosecution and conviction referred to, he was not the informer to whom a moiety of the fines and penalties was appointed to be paid. But the defender, as the prosecutor who sued for and recovered the penalties, was the informer in the sense of the Statute.

The Lord Ordinary pronounced the following interlocutor:

“4th February 1842.—Having heard parties, and considered the process, sustains the defences; assoiliizes the defender, and decerns: Finds the defender entitled to expenses; appoints an account thereof to be given in; and when lodged, remits to the auditor to tax the same, and to report.

“*Note*.—The pursuer, though he may have given what is popularly called information, was not the informer in the statutory sense. This character belonged to the defender, who gave the Court to be informed of each delict. The pursuer's position was quite different. He was a Sheriff's officer, to whom the detection of these offences was assigned, as it was to other officers; and although his outlay was repaid, and his wages were made to bear a certain proportion to the fines, still it was by wages, and as an officer, that he was paid. Accordingly, he generally appeared as the witness in these prosecutions,—a character inconsistent with his being entitled, as a matter of right, to part of the penalties. The long delay before bringing the action can only be accounted for on the idea that he understood he had got all he was entitled to.”

The pursuer reclaimed, but the Court *adhered*.

Lord Ordinary, Cockburn.—Act. Rutherford, Donaldson; James Malcolm, Agent.—Alt. G. Grant; Peter Crooks, W.S., Agent.—F. Clerk.—[G.D.F.]

8th June 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 217.—THOMAS SCOTT, *Appellant*, v. MESSRS CURLE and ERSKINE, *Respondents*.

Reparation—Damages—Wrongous Imprisonment—Process—Caption—Advocation—Amendment of Libel—Expenses—
In an action of damages for wrongous imprisonment, on the ground that the pursuer had been apprehended under a process-caption issued by the Sheriff of Roxburghshire for recovering a process which had been advocated to the Court of Session, and was therefore under the control and jurisdiction of that Court,—the circumstances being, that a bill of advocacy had been passed, but the letters had not been expedite within the ten days allowed by the Act of Sederunt, so that the bill fell, and a certificate to that effect was given out to the defenders,—and the Sheriff-Court process stood borrowed on a receipt by the pursuer, as a procurator there, in common form, to return it when called upon,—he not having complied with the regulation of the Act of Sederunt in case of an advocacy, viz., to return the process to the Sheriff-clerk, that it might be transmitted to the Court of Session, on an obligation by the complainer's agent for its redelivery when the advocacy should be finally disposed of; and the pursuer having unwarrantably expedite his letters of advocacy after the certificate that the bill had fallen had been issued—Held (affirming the judgment of the Court of Session), 1. That there was no relevancy to sustain a claim of damages; and, 2. That the pursuer was not entitled to state, after the record was made up, but not closed, a new objection which went to the nullity of the caption altogether, otherwise than by an amendment of the libel on payment of the whole previous expenses.

This was an action concluding for £2000 of damages on account of imprisonment under a process-caption alleged to have been irregularly issued. The circumstances were these:—

The pursuer, who was a procurator in the Sheriff Court of Roxburghshire, presented, in April 1836, a petition to the Sheriff of Roxburghshire against Mrs Barbara Erskine or Pott, widow of the deceased Charles Erskine, writer in Melrose, and against the defenders, James Curle and James Erskine, praying the Sheriff to ordain these parties to deliver up to the petitioner certain title-deeds over which the defenders had then a right of retention or hypothec. The petition was found to be improperly directed against Mrs Erskine; while the Sheriff (after a good deal of procedure), on 18th June 1836, sustained the defenders' plea of retention, and dismissed the pursuer's petition, with expenses. The pursuer then presented a bill of advocacy to this Court, which was of course passed *ex parte*.

It was provided by Act of Sederunt, 14th June 1799, that,

"5thly, When a bill of suspension or advocacy is passed by the Lord Ordinary on the bills, the complainer shall expedite the letters at the Signet within ten days thereafter, otherwise the same shall fall to the ground, and the respondent shall be at liberty, upon a certificate from the Signet-office, obtained at any time after the said period is elapsed, bearing that the letters are not expedite, to go on with his diligence or other proceedings, as if the bill had been refused."

This regulation had been preserved and renewed by Act of Sederunt, 11th July 1828, § 17 and 18.

The pursuer did not expedite his letters within the ten days, and the defenders took out from the Signet-office the requisite certificate on 3d September 1836, three weeks after the passing of the bill.

The Sheriff-Court process had been borrowed by the pursuer, as procurator, from the Sheriff-clerk, in the

common form, and stood on a receipt against him. He averred that it was lodged in the Bill-Chamber prior to the passing of the bill of advocacy.

The Sheriff-Court Act of Sederunt provides, cap. 19, § 1:

"Any party who has given notice of his intention to advocate, and has lodged his bond of caution, in terms of cap. 19, sec. 2, may be allowed to see the process from the time of giving such notice, until it is competent to extract the decree."

And cap. 19, § 4, provides:

"When a bill of advocacy is presented to the Court of Session, the process shall be produced by the procurator, whose receipt stands for it, in order that it may be transmitted by the clerk, agreeably to Act of Sederunt, 17th January 1797, and minuted as having been sent; or failing his producing the process, the Sheriff may grant caption for recovering it, and enforce such fine for non-compliance with this regulation as to the Sheriff shall seem reasonable."

The Act of Sederunt, 11th July 1828, provided,

"9. That in all cases in which the Lord Ordinary on the bills shall think it expedient, before passing or refusing a bill to which it is competent to appoint answers to be made, to order production in the Bill-Chamber of the proceedings in the Inferior Court brought under his review, it shall be incumbent on the complainer to lodge the same, with the inventory thereof, in the hands of the clerk to the bills, within such time as the Lord Ordinary may think reasonable, and which may, on cause shown, be prorogated, and failing such production, the bill shall be refused, and expenses found due."—"10. That on production to the clerk of any inferior court of a copy, duly certified by the clerk of the bills, of an interlocutor of the Lord Ordinary on the bills, either passing a bill of suspension or advocacy complaining of a judgment of such court, or ordering the process before such court to be produced in the Bill-Chamber, such clerk shall be bound, upon satisfaction of his legal fees, to deliver the whole steps of process, so far as in his hands, all conform to inventory, to the complainer's agent practising before such court, on his receipt and obligation for redelivery thereof, so soon as the matters at issue shall be finally disposed of in the Court of Session in case of the bill being passed, or in the Bill-Chamber, if the bill shall by a final interlocutor be refused; and the said clerk shall, previously to such delivery, if required, take the usual summary measures for compelling the restoration to his hands of any parts of the process which may have been borrowed, provided that the complainer shall not be entitled to require with the process the writs produced by the respondent, unless by his consent."

The form of proceeding herein pointed out was not followed by the pursuer.

The defenders having extracted their certificate at the Signet-office, wrote to the pursuer on 7th September 1836, requesting him to return the Inferior-Court process to the Sheriff-clerk. This not being done, they, on 15th September, transmitted the Signet-office certificate to the Sheriff-clerk, and marked a caption in the Sheriff-clerk's office-book, in common form. The Sheriff-clerk, according to the practice of the Court, intimated to the pursuer the application for the caption before actually issuing the writ. No objection having been lodged, the Sheriff-clerk gave out the caption to the defenders in the usual form. The defenders wrote to the pursuer on 21st September, intimating that they had

"been obliged to apply for a caption against Mr Scott for it" (the process.) "The caption is in Messrs Curle and Erskine's hands, and they now intimate to Mr Scott, that unless the said process be returned to them, or to the Sheriff-clerk's office in Jedburgh, by Friday next, at twelve o'clock noon, they will be under the necessity of putting the caption into the hands of an officer."

The pursuer returned no answer to this letter.

The pursuer, in the meantime, expedited letters of advocacy upon his bill, and signeted them on 26th September. He then called and enrolled them in absence of the defenders. Having seen the advocacy in the printed rolls, they appeared and stated the objection of incompetency under the Act of Sederunt, which was at once sustained by the Lord Ordinary.

The pursuer having still kept up the Sheriff-Court process, the defenders directed the officer to put the process-caption into execution. The pursuer was in consequence apprehended and incarcerated on 23d December 1836, upwards of three months from the date of the caption. The pursuer then presented a bill of suspension and liberation, accompanied by a certificate from the clerk in whose office the letters of advocacy had been called, dated 24th December 1836, and certifying that the process of advocacy "is at present in dependence in the Court of Session."

On this application Lord Cockburn, Ordinary, granted warrant of liberation in absence of the defenders. The pursuer, in the meanwhile, reclaimed against the interlocutor dismissing the advocacy; and he raised the present action. On the reclaiming note the Court (26th May 1837) adhered, with additional expenses.

The ground of action libelled on by the pursuer was, that his incarceration was illegal and unwarrantable, in respect that at the date of the apprehension, "the said" (Sheriff Court) "process was part of the record of the said process of advocacy, and was subject to the orders, control, and jurisdiction of the Court of Session, and entirely out of the control and jurisdiction of the Sheriff of Roxburghshire."

In defence it was *pleaded*—1. That the expediting and enrolling of the letters of advocacy, founded on by the pursuer, having been illegal and unwarrantable, could not stop the defenders' legal diligence, and hence the using of that diligence was lawful, and was not relevant as a ground for claiming damages; and, 2. The proceedings of the defenders libelled being neither, causeless, malicious, incompetent, illegal, nor oppressive; but being in every respect regular and legal, and having been rendered necessary by the contumacious and illegal conduct of the pursuer himself, this action could not be maintained.

The record having been prepared (but not closed), and the case remitted to the Issue-Chambers, the defenders moved to have it retransmitted, in order that the question of law raised under their defence should be disposed of by the Lord Ordinary before trial.

"20th November 1838.—The Lord Ordinary having heard the counsel for the parties on the points of law or relevancy which the defenders require to be decided before remitting the case to the issue clerks, with a view to a trial by a jury—Before answer, appoints the said parties severally to prepare and give in minutes of debate on the said points of law or relevancy, to be seen and interchanged within fourteen days from this date, and finally revised and lodged with the clerk within ten days thereafter.

"*Notes*.—The Lord Ordinary has not the least doubt of the competency of requiring a decision in this stage of the proceedings on any points of law or relevancy which it may be expedient now to decide, although this is one of the cases appropriated to jury trial by the Statutes, and indeed, since the case of *M'Leod and Buchanan*, 10th June 1837, he cannot think that this is open to question. Even in the earlier case of *Lord Eglinton's trustees*, (10th March 1837,) where the question

turned solely upon the 12th section of 59th Geo. III. c. 35, a large majority of the Judges held that there could be no doubt that that section applied to the enumerated cases, as to the power of giving a preliminary decision on points of law or relevancy, though some of them were of opinion that it did not apply as to the power of finding that the case was not in itself proper for trial by jury, which alone was then in dispute. The whole five Judges who voted in the minority (to whose views Lord Cuninghame also inclined), held that it applied to both these cases; and two out of the six, who made the majority, were clear that it applied to the enumerated cases, in so far as regarded the power to decide law or relevancy before trial, though not as to the power to remit as unfit for jury trial; and a third, Lord Cockburn, was doubtful. But the matter seems to be put out of dispute, as to the point now in question, by the 33d section of the 6th Geo. IV. c. 120, which had no bearing on that former case. The opinion of the Court, accordingly, was unanimous in *M'Leod and Buchanan*. The Lord Ordinary trusts, therefore, that the defenders will refrain from resuming the discussion of this point in their minute; though, as he is anxious to pronounce no judgment *hoc statu*, which might lead to intermediate litigation, he has not thought it advisable to fix the matter by any interlocutor.

"He has a very clear opinion, too, both that the point of relevancy which is here raised is one which it is highly expedient to have settled before the case (if, after such settlement, any case shall be left,) goes to a jury; but that it would be unjust both to the parties and to the Judge or Judges at the trial, to leave it to be argued and decided in the summary way in which it must necessarily be disposed of on such an occasion. The question, as he understands it, is, whether the actual dependence of a process of advocacy, upon expedited letters, of a judgment of the Sheriff of Roxburghshire, had transferred the original record and exclusive cognisance of the cause to this Court, at the time the defenders proceeded to carry into effect a process-caption previously issued by the said Sheriff against the pursuer,—the admitted facts being, that the advocator had omitted to expedite the letters of advocacy for more than ten days after his bill was passed; and a certificate of that fact had been obtained in regular form from the Signet-office, in consequence of which the Lord Ordinary, before whom the case came, had found that the advocacy had finally fallen, and that there was truly no such process in Court, but that his interlocutor had been submitted to review by a reclaiming note, and that this note was still undisposed of when the caption was put to execution; the final result being, that the note was refused, and the Lord Ordinary's judgment confirmed.

"The defenders are not understood to dispute, that if there was a process of advocacy truly depending in this Court, they could not have lawfully executed the caption issued by the Sheriff for restoration of the proceedings to his clerk, and that the subsequent and ultimate dismissal of that depending process, or a remit to the Sheriff *simpliciter*, could never free them from the consequences of having anticipated this result on their own authority, and thus deprived the advocator of the *interim* protection against any execution of the Sheriff's warrants or decrees to which he was entitled, as the pursuer of a process of review in the Supreme Court. But they say that the objection which the Lord Ordinary had sustained, was not to the *merits*, but the *competency* of the advocacy, and accordingly, that the case was not remitted *simpliciter*, but dismissed, as brought irregularly into Court; and they maintain, that it being thus manifest that the record was never legally taken out of the Sheriff Court, it was clearly competent for them to force back the process under his authority, in spite of any null and fictitious proceedings which the pursuer might attempt in this Court, on the ground of letters improperly expedited on the face of them, after the advocacy had irrecoverably fallen and been annulled. If they can make out this proposition, there is no doubt an end of the case of the pursuer, which rests solely on the *illegality* of his apprehension on this caption during the alleged dependence of the advocacy at his instance in this Court. If there was truly no such dependence, and the apprehension was consequently warranted by law, there are not on the record any such allegations of excess or personal violence as to justify any claim for damages; and for this reason the Lord Ordinary thinks it essen-

tial that the legality or illegality of the proceedings should be determined in the first place,—the question as to such legality being sufficiently raised on the documents in process, and the facts admitted on the record. If he had been satisfied, therefore, upon the argument he has already heard, that the execution of the caption was legal, he would at once have dismissed the action, and assuaged the defenders.

“He cannot say, however, that he is as yet so satisfied when he considers the pursuer’s replies. His argument in substance is, that a question of competency is as much a question of law, and may be as difficult a question as one on the merits, and that a defence founded on an alleged irregularity in bringing a process into Court, is no more to be acted upon by a defender at his own hand, and before *final* judgment, than any other defence, and adds, that so long as the validity of such a defence is *sub judice*, there is a depending process which fixes the record, and all legal control over it, exclusively in the Court whose judgment it is awaiting. He asks, how the defenders would have justified their execution of this caption if the Court had altered the judgment of the Lord Ordinary, and remitted to him forthwith to hear parties on the merits of the depending advocacy? Or upon what grounds, other than their own rash confidence in its being adhered to, they can now justify their illegal proceeding in anticipation of such a result? He asks, whether they will now maintain that they might legally have acted as they have done, if the Court had previously been equally divided on the question of competency, and the matter had been standing over for consideration when the caption was put in execution? He then asks, whether the record of the Sheriff Court process, which had been duly transmitted from the Bill-Chamber to the clerk to the advocacy, at the time of its first enrolment in this Court, and was known to be in his hands by the defenders when they stated their objections to the Lord Ordinary, could possibly be at the disposal of the Sheriff till the judgment of the Lord Ordinary was final, and while it was yet doubtful whether he might not be directed to proceed to the discussion of its merits at the next calling? And, finally, he asks, whether, even if he were yet to intimate an appeal to the House of Lords against those last judgments, that record must not be laid on the table of the House, and all execution either of the Sheriff’s orders, or those of this Court, suspended, till a regular warrant was obtained for such execution pending the appeal?

“The Lord Ordinary gives no judgment, and has formed no decided opinion upon these questions, further than that he is not prepared to dispose of them without more consideration, and that he thinks them not only of great importance, but of very considerable difficulty, and wishes, upon this account, to see them argued in writing. If, after considering the minutes, he should still have the same difficulty, he will probably report the question to the Court, and if the parties contemplate going there at any rate, it might be convenient that the minutes should at once be printed. If he decides to report, he will certainly order the minutes to be boxed before the Court rises for the Christmas recess, so that the trial, if it is ultimately to proceed, may be as little delayed as possible.”

On 7th December 1838, the Lord Ordinary allowed the pursuer to give in a minute, stating an addition to the record, that the “caption was not signed by the Sheriff, nor was it an extract of any warrant duly signed by him,”—the caption having been signed by the Sheriff-clerk,—and also an additional plea applicable to that statement. The minutes of debate were given in, when the Lord Ordinary (9th November 1839) made *avizandum* therewith to the Court, adding the following note:

“The Lord Ordinary inclines to think that the new plea of the pursuer, founded on the want of the Sheriff’s signature to the caption, cannot be entertained under this summons, though, upon its merits, it seems to be the best plea he has. There is something, perhaps, in the specialty, that the clerk of a court is the proper custodian of the processes then depending, and entitled, as it were, to effect their restoration *via facti*, and by an

act of *rei vindicatio*, which may sanction his issuing caption of his own authority for this particular purpose, though such an assumption of judicial power would be indefensible in any other circumstances; and if there was any thing like a general usage to this effect, it might be held that he was constituted *virtute officii* a substitute for the Judge, as to this particular function. But it is plain to the Lord Ordinary that the general usage is all the other way; and in a question as to the actual invasion of the personal liberty of the subject, he thinks the supreme tribunal of the country cannot be too jealous of all questionable assumptions. But as the case now stands, he does not think that the question is here.

“Upon the original ground of action, he retains, to a certain extent, the doubts expressed in his former interlocutor, and has therefore reported the case without a judgment. On the merits, however, he is more inclined than he was originally to sustain the defenders’ objections to the relevancy: But he still feels that there are great difficulties in the way of such a decision.

“The distinction taken by the defenders between objections to the competency or formality of an action, and to its merits, is perplexing enough in itself; but the farther distinction between nice and critical objections to the competency, and such as are said to be so obviously well founded as not to admit of a *bona fide* or rational defence, is incomparably more perilous. In all questions of relevancy, the objector must admit or assume the truth of the whole statements on which the other party rests his conclusions. But an essential part of the pursuer’s averments in this case is, 1st, That he was encouraged by his legal advisers to maintain the validity of the proceeding on the expedite letters, and did accordingly maintain them in the most perfect *bona fides*; and, 2d, That the defenders proceeded to execute the caption against him ‘*causelessly and maliciously*.’ Now, so far from admitting or assuming the truth of these averments, the defenders, in their argument on the relevancy, vehemently and entirely deny them. They form part, however (and a very material part), of what the pursuer offers to prove to a jury: and, if the case is sent there, will probably be put *specially* in issue. In these circumstances, there are two questions for the Court, 1st, Whether, assuming the truth of these, along with the pursuer’s other averments, there is or is not a general relevancy in his statement? and, 2d, Whether, if there be such a relevancy on this assumption, it would be fitting (or even competent for us, in an action of damages like the present) to form any judgment as to the truth of these averments, and substantially to hold them as false, on account of their palpable improbability, their inconsistency with admitted facts, or on any other consideration? On the first question the Lord Ordinary should have great doubts, but on the second, he should have a clear opinion against such interference with the proper functions of a jury.”

A majority of the Judges were of opinion, 1. That the new objection to the caption, which was not covered by the summons, could not, at so late a stage, be received under an amended libel, without payment of the whole previous expenses; and, 2. That on the case there was no relevancy to sustain a claim of damages.

They accordingly (18th January 1840) remitted to the Lord Ordinary to close the record, sustain the defences, and dispose of the question of expenses as to his Lordship should seem fit.

Scott then appealed.

Lord Chancellor.—My Lords, this case came before your Lordships by appeal from an interlocutor of the Court of Session. At the time of the hearing I felt no doubt, except on one point—that of the form of the certificate. With respect to the rest of the case which has been brought before your Lordships by the appellant, it did not create one moment’s doubt. The interlocutor of the Court of Session dismissed the suit,—the Court being of opinion that the pursuer was not entitled to the relief he prayed, and accordingly compelled him to pay the costs of the suit; but it, at the same time, gave him the liberty of commencing another suit if he had any cause of complaint.

It really, therefore, is a case that resolves itself into a question of costs, though it does not assume that shape. Your Lordships do not allow an appeal in respect of costs; but where the same question is presented in another shape, your Lordships are under the necessity of hearing a discussion on a question as unimportant between the parties as if it had been presented as a mere question of costs. My Lords, the contests between the parties arose out of a suit in the Sheriff Court, from which the appellant presented to the Court of Session a bill of advocacy. There is no doubt that that bill of advocacy fell to the ground, unless a certain process took place within ten days,—that is to say, at the expiration of ten days. According to the construction which has been put on the Act of Parliament, it was competent for the opposite party to put an end to the proceeding if that process had not taken place. Ten days elapsed—and more than ten days elapsed. The parties then applied for a certificate, which certificate was in these words: “Certificate of the keeper of the Signet. Searched Signet-books from the 22d day of August last to the 3d day of September current, both days inclusive, and found no letters of advocacy there entered as having passed the Signet, during the above period, at the instance of Thomas Scott of Abbottsmeadow against Messrs Curle and Erskine, writers in Melrose, and Mrs Erskine residing there.” There is no doubt that upon the ten days being elapsed, and the proper certificate being obtained, by the Act of Sederunt the cause was actually gone: it no longer existed. The terms of the Act of Sederunt are—“that the party may go on with his diligence or other proceedings as if the bill had been refused.” There is no question made upon that: that is gone. After that, however, the appellant proceeded as if this process had not been taken to put an end to the bill of advocacy. He brought the case first before the Lord Ordinary, and after the Lord Ordinary had decided on this very ground, that the certificate of lapse of time put an end to the suit, he thought proper—not being satisfied with the Lord Ordinary’s decision—to bring the case before the Court of Session; and the Court of Session of course adjudged in the same way the Lord Ordinary had done before. It is said, however, that the appellant having possessed himself of the Sheriff Court process, the suit was still pending, and that the pendency of the suit prevented the party taking any proceeding in the Sheriff Court. My Lords, that would be a very strange view to be taken of the case. The Act of Sederunt put an end to it completely, and enabled the party who had got the certificate to go on with the proceedings in the Sheriff Court. There is no question about the construction of the Act of Sederunt. If, then,—the suit being actually out of Court—there being no further opportunity of preventing the party going on in the Sheriff Court,—a party thinks proper to institute so useless a proceeding as to apply to the Lord Ordinary, in the first instance, and the Court of Session afterwards, that cannot be considered as a pendency of the suit in favour of the party who has gone on prosecuting that writ—assuming the proceedings to be regular after the expiration of the ten days, and after a certificate granted to the opposing party, which, by the terms of the Act of Sederunt, put an end to the cause. It may be assimilated, according to our course of practice, to the case of the Court of Chancery dismissing a bill: the plaintiff is actually out of Court; and if he thinks proper to give notice of a motion in that case—if he comes before the Master of the Rolls, or the Vice-Chancellor, who must necessarily give judgment against him on the motion, on the ground that the suit is no longer in existence,—and if the party, notwithstanding that, brings the matter by appeal before the Lord Chancellor, who must necessarily decide that that suit is ended,—can such person say that the suit was pending? Certainly not: nor can the appellant be heard to contend that this suit was pending, because he has chosen to take these proceedings contrary to the Act of Sederunt. It is impossible to contend that this is a pendency of the suit for the purpose of preventing the party who, by the Act of Sederunt, had a right, on the certificate being granted, to take the course he did. The respondents having armed themselves, as I have stated, with the certificate under the terms of the Act of Sederunt, proceeded in the Sheriff Court, and, having found that the proceedings which ought to have been in the hands of the Sheriff, were somehow

in the possession of the appellant—having been procured by him from the Sheriff Court—applied to have them restored. They were not properly in his possession, and ought not to have remained in his possession; and it is quite clear he had no right to use the possession he so obtained from the Sheriff Court for the purpose of expediting letters of advocacy. The mode of proceeding is very clearly pointed out. He ought to have restored them to the Sheriff Court—having borrowed them for a particular purpose. He did not say that he was to deposit them in the Sheriff Court; but, contrary to the purpose for which the documents had been intrusted to him, and contrary to the Act of Sederunt, he brought these proceedings into the Court of Session—at least, so he states; and that may be assumed for the present purpose to be a correct representation. But there is another fact which he does not dispute; for it appears, upon his own representation, namely, that on the 7th of September, those documents were in the possession of his agent. He is then called upon, by proceeding in the Sheriff Court, to bring in these documents: he does not do so: he states no reason for not doing so; but afterwards he deposits them in the Court of Session. Now, if a party is intrusted with documents in the Sheriff Court, under an obligation to return them into the Sheriff Court when called upon to do so, and he afterwards thinks proper to deposit them in the Court of Session, or elsewhere, he cannot be permitted to plead the possession of the Court of Session as a reason why he should not obey the order of the Court:—that, however, was the course taken. After repeated applications, having deprived himself of the means of obeying the order of the Sheriff Court, by having deposited the documents elsewhere, at least so he alleges, he is arrested under process of the Sheriff Court for not obeying the order of that Court; and then, fortunately, through a not very accurate representation, he gets liberated; and for that arrest he brings his action; and these facts are stated by himself. He also states,—not as the statement of a grievance, but in the course of the narrative—that he was apprehended on the 23d of December 1836, by a process-captain under the hand of the Sheriff-clerk of Roxburghshire;—not, I say, stating that as a grievance, but narrating it as part of the transaction. Now, that process-captain is said not to have been regular: for that it was signed by the clerk, and not by the Sheriff. That the Court of Session, on the case being brought before them, did not determine. They did not think the summons stated that as a ground of action, which it clearly did not, but as a part of the narrative; and they held, that if the party meant to state that as a part of the ground of action for his arrest, he ought to have distinctly stated it as such; and therefore the Court of Session adopted a course which preserved to the party complaining of the arrest, all the benefit he might be entitled to in consequence of any defect in the process-captain, by giving him liberty to bring another action on that ground if he thought proper; but it refused him an opportunity to amend his pleadings, by introducing a new grievance as a ground of action. Now, the action having proceeded on a totally different ground, this error in the process of caption not having been brought forward, and stated as a ground of complaint, but merely incidentally stated as one among other circumstances, it would certainly have been a very inconsiderate exercise of discretion for the Court to have permitted the amendment to have been made. It was for the Court to determine the question of relevancy or competency; and the Court being of opinion, in which it appears to me clearly that they were right, that that was not a complaint stated or relied upon,—the permitting a party to amend the record for the purpose of bringing forward some new case, would have been an act of injustice towards the other party. They felt that they could not permit a record framed for one purpose to be turned to another, and therefore they dismissed the suit, ordering the pursuer to pay the costs; but at the same time that they dismissed the suit, they left him at liberty to bring another if he thought proper. Now, the costs must be paid at all events. If the amendment had been permitted, the costs must have been paid up to that point, when the suit was put on a new ground: so that regarding it simply as a question of costs, the effect of the suit being dismissed with costs, with liberty to bring a new action, would be precisely the same in every respect, except that, in the one case, the party

would have to pay costs up to the period of the amendment; and in the other, to pay the costs of the suit so dismissed. My Lords, the only point on which I yesterday entertained any difficulty, was as to the form of the certificate. I did not receive any explanation why, the bill of advocacy having passed on the 13th of August, the search is stated to have been from the 22d day of August, and find that there was no bill of advocacy at that period.—Why it was that the information was not required for the period previous to the 22d, the date stated in the certificate, I do not understand; but there is in the appellant's case, a passage cited from Mr Beveridge: "It may be noticed, that in practice the ten days have been reckoned heretofore, not from the date of the interlocutor passing the bill, but from the date that the bill so passed is issued, or in a state to be issued by the clerk to the bills." Whether that is the period to which the date refers or not, there has no satisfactory explanation been given; but in the same page of the appellant's case, there is a passage which appears to me to remove the difficulty as to the period to which the certificate refers; for it is there stated, that "if the letters should be expedite before the certificate is issued, although beyond the ten days, the proceeding is quite effectual. In fact, the keeper of the Signet would not issue a certificate, if, before such certificate was applied for, the letters were actually expedite, although after the ten days." The only difficulty that arises upon the terms of the certificate, is the possibility that, in the interval between the 13th of August and the 22d of August, there might have been a signet attached to the letters of advocacy; but that is entirely excluded by the statement the appellant himself makes, that on the application to the officer for the certificate, though more than the ten days had elapsed, he would not have granted the certificate applied for, if, even after the expiration of the ten days, letters of advocacy had been expedite before the certificate was applied for. Now, that appears to remove the possibility of there having been such letters at the time the certificate was granted; and in point of fact, there is no statement that there were such letters expedite at any time between the 13th of August and the 22d. My Lords, this, however, was a question for the parties before the Lord Ordinary in the original suit; because when the case came before the Lord Ordinary,—if this bill of advocacy was gone,—if there had been no letters of advocacy,—of course it was competent to the party contending that the bill of advocacy was gone, to raise that as an objection, and to apply for the dismissal of the suit; and it was also competent for the other party to insist on the irregularity of the certificate if any such objection could be made; and then it would have become the duty of the Lord Ordinary or the Court of Session to decide on the regularity of the proceeding; and if there was no certificate, in consequence of which the suit was necessarily ended, it would be matter of discretion for the Lord Ordinary, or the Court of Session, what course should be pursued; but neither on the one occasion or the other, do we find any proceeding on the ground of a supposed irregularity of the certificate;—it is, therefore, a case in which the whole effect of the certificate remains, and this certificate must be assumed to be a regular certificate, in the absence of any authority to show that it is an irregular certificate: the case having been four times before the Court of Session,—twice before the Lord Ordinary, and twice before the Court of Session; and that objection not having been made, it would be too much for your Lordships to assume, in a question of practice, that there is any thing in substance in that which appears certainly not perfectly explained. My Lords, if then that is a valid certificate, the proceeding in the former action was gone at the time the letters of advocacy issued, and all further proceedings were null and void: and so the Court said, whenever any question came before them on the subject of the proceeding,—whether the respondents were correct in their proceedings in the Sheriff Court, or whether there was any defect in the process of caption, is a question which may be tried if another action is brought. It is quite sufficient that this suit has failed on all the grounds on which it was brought, and therefore the interlocutor of the Court of Session was perfectly correct in dismissing that suit, and directing the pursuer to pay the costs, leaving him at liberty to bring another action if he thought fit. Under these circumstances, my Lords, I submit that the interlocutors appealed from should be affirmed, with costs.

Interlocutors affirmed, with costs.

Second Division.—Lord Jeffrey, *Ordinary*.—J. W. Nicholson, *Appellant's Solicitor*.—Spottiswoode and Robertson, *Respondents' Solicitors*.—[W.H.D.]

8th June 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 218.—CHARLES TODD, *Appellant*, v. *The Magistrates and Town-Council of Glasgow and Others*, (*Parliamentary Trustees of the River Clyde*), *Respondents*.

Accretion—Alluvion—River—Feu-right—Property—By a series of Statutes, the first in 1758 and the last in 1826, a trust was created for improving the navigation of the river Clyde. Powers were conferred on the trustees to undertake all necessary works for that purpose, whether it should be by contracting or enlarging the channel of the river. The trustees proceeded by contracting the channel, for which end they erected embankments in the channel of the stream. At one part of the river a feu-right had been granted in 1792 by the Magistrates and Town-council of Glasgow (who were then also the trustees of the river), of a piece of ground of a specified measurement, and described as bounded on the north by the Clyde. A considerable space having been interjected between the original limits of the feu and the river, in consequence of the embankment made by the trustees, and the filling up of the ground behind, which was done principally by them, so that it became solid ground about 1826—Held, in an action of declarator by the feuor, to have that new ground declared to belong to him in absolute property, as having accreted to his original feu, that he had not acquired such property therein, but that the trustees were entitled to remove their embankment and resume possession of the interjected space, for the improvement of the navigation, without giving any compensation to the feuor as for his own ground.

The present action was raised by the appellant, who set forth in his summons, that in 1792 his predecessors acquired from the Magistrates and Town-council of Glasgow a feu of a piece of ground on the banks of the Clyde, below the Broomielaw: That the feu-contract described the feu as "consisting of one acre, one rood, and thirty-five falls of ground, or thereabout, in which measure both parties acquiesce, be the same more or less;" and as also described by its boundaries, and in particular, as being bounded "on the north by the river Clyde:" That certain reservations and declarations were contained in the feu-right, being in substance, (1.) a reservation of the minerals; (2.) a declaration that it should not be lawful to the feuor to erect any quay, harbour, wharf, &c.; (3.) nor to make or allow any road or passage to any quay, harbour, wharf, &c., for the purpose of loading or unloading any merchandise; (4.) that it should not be lawful to the feuor to interrupt the privilege of footpath subsisting over the lands; (5.) nor to

"erect any building, fence or other obstacle, to interrupt the said foot-path, or to abridge, diminish, or interrupt the right of towing ships, lighters, boats and vessels on the river Clyde, or the navigation of the said river, or the rights or privileges there-to belonging in any manner of way; which foot-path, towing-path, and other rights and privileges, are hereby reserved in full force:"

That since the date of the feu in 1792, the channel of the Clyde had been contracted, and certain ground had been gained from the river in consequence of operations performed by the respondents or their predecessors; and the summons concluded that the appellant

"is entitled to the full and absolute property of the subjects

down to the said river, and of the whole ground extending to the said river, without distinction as to whether the said ground formed part of the subjects at the date of their original acquisition, or has since been gained in consequence of the river having receded, or its channel having been contracted or narrowed, or of any operations employed for the purpose of so contracting or narrowing the said channel, or in connection therewith."

The respondents stated, that it was true that, since the date of the feu-right, the ordinary water channel of the river had been contracted, not by any natural cause, such as the receding of the river, but by artificial restraints connected with the objects of navigation: That at the date of the feu-right, the river was under public regulation and control, for public purposes, and it had continued to be so, with enlarged and altered powers conferred by the Legislature: But that, although in the course of these operations, and in following out the views which, from time to time, had been entertained as to the measures best suited to improve the navigation, it was at one time considered advisable to contract the ordinary water channel, the respondents were now advised to enlarge the present contracted water channel, and for that purpose to slice down and cut off in many places a considerable portion of the embankment which their predecessors had made, encroaching upon the original water course, and restraining the ordinary water channel within narrower bounds than were natural to it.

The following were the legislative enactments with reference to the river Clyde, on which the respondents founded.

The first Statute upon the subject was passed in 1758, viz., 32 Geo. II. c. 62. By the first section of that Statute, authority was given to the Magistrates and Council

"to cleanse, scour, straighten, enlarge and improve the said river Clyde, from Dumbuck ford to the Bridge of Glasgow, aforesaid, and to dig, cut, and deepen the same, or any part thereof, and thereby to make the said river more navigable or passable for boats, barges, lighters or other vessels:" And also to make such "works, as to the said Magistrates and Council, and their successors in office, shall appear necessary or convenient for promoting the said navigation, and, from time to time, to repair, amend, and alter the same:" "And also to do all such other acts, matters and things, as they shall at any time think necessary and convenient for carrying on, supporting, improving and maintaining the said navigation."

The second Statute was passed in 1770, viz., 10 Geo. III. c. 104. By that Statute it was enacted, that the Magistrates and Council

"shall have full power and liberty, from time to time, and at all times hereafter, to make and keep the said river Clyde navigable from the lower end of Dumbuck ford to the Bridge of Glasgow aforesaid, so as there may be at least seven feet water at neap tides in every part of the said river, within the bounds aforesaid, for ships, vessels, barges and lighters to come and go to and from the said city of Glasgow; and for that end to alter, direct and make, or cause to be altered, directed and made, the channel of the said river through any land, soil or ground (part of the present bed of the said river), between the lower end of Dumbuck ford and the Bridge of Glasgow aforesaid, and to make, set up and erect so many jetties, banks, walls, sluices, works and fences, for making, securing, continuing and maintaining the channel of the said river within proper bounds, for the use of the said navigation, as to the said Magistrates and Council, and their successors in office, shall seem proper and convenient."

The third Statute was passed in 1809, viz., 49 Geo.

III. c. 74. By that Act the trustees were authorised not only to continue the works authorised by the former Acts,

"but also to carry on such new and additional works as they shall think proper, till such time as the said river is at least nine feet deep at neap tides, in every part thereof between the Bridge at Glasgow and the Castle of Dumbarton."

By the same Statute there was the following special provision in section 10:

"That in carrying on the said works, the transverse bed or channel of the said river in the highest flood, shall not be lessened or contracted, but the same, in all time coming, shall be kept, at least, of the present extent and dimensions, for the purpose of allowing the water and land floods to pass freely off during heavy rains."

The only other Statute was passed in 1825, viz., 6 Geo. IV. c. 117. By that Statute certain other trustees were added to the Magistrates and Council; and the trustees were authorised not only to continue the works authorised by former Acts, in the manner therein described, but also to carry on and execute such new and additional works as they should think proper, until such time as the river was thirteen feet deep at neap tides; "reserving always to the proprietors of lands adjacent to the river, all rights to soil acquired from the said river, or other rights competent to them at common law."

The statement of the respondents as to the mode in which the new ground claimed by the appellant was formed was, that "with the view of improving the navigable channel, the Clyde trustees erected jetties and embankments, and built retaining walls on each side, by which the transverse section of the river was greatly lessened or contracted; and they afterwards filled up the space between the wall on the north side of the river and the pursuer's ground, so as to form a new bank, to an extent greater than the original feu. The last operation, whereby a large pool opposite the pursuer's property was filled up, took place about the year 1826."

The appellant, again, denied that the contraction of the channel had been wholly by artificial operations, although it was principally by these; and that the filling up was wholly done by the trustees. He stated, that the earth was laid down in part by himself, and partly by the respondents; and that in consequence of this, a very considerable extent of ground had been gained from the river, and added to the property acquired in 1792. According to a plan made up in 1797, the subjects contained 13,092 square yards. According to another plan made up in 1837, and comprehending the ground down to the river, the extent of the same subjects was 16,851 square yards, making an addition or acquisition of not less than 3759 square yards.

The appellant *pleaded*—1. That he had the full and absolute property of all the ground gained from the river on his north boundary, whether by natural or artificial accession, subject only to the servitudes and restrictions contained in his titles, and to such as lay, at common law, on every proprietor on the banks of a navigable stream: *Ersk. II. 1, 15. Campbell v. Brown*, 18th November 1813. *Boucher v. Crawford*, 30th November 1814. *Fisher v. D. of Atholl's Trustees*, 3d June 1836;—and, 2. That the Parliamentary Trustees of the river Clyde were not proprietors of the ground

so gained from the river, and were not entitled to appropriate or use it as such, or to deal with it differently from the other parts of the appellant's property.

The respondents *pleaded*—1. That this action could not be maintained, in so far as it applied to the ground which formed part of the bed of the river at the date of the original feu-right in 1792; (1.) because that ground was excluded from the appellant's property by the terms of the feu-right and the limits there set forth; and, (2.) because it could not be pretended that the appellant had enjoyed possession of that ground during the years of the long prescription: 2. That, further, the appellant and his predecessors had no right to make any erections or encroachments on the alveus or channel of the river, as the same stood at the date of the feu-right in 1792,—all such operations being illegal, and prohibited at common law: 3. That the ground in dispute having been recently taken from the channel of the river by artificial means and operations carried on by the parliamentary trustees, with a view to the improvement of the navigation, the same did not accrete or belong to the appellant: 4. That in virtue of the Statutes under which they acted, the respondents were entitled to restore this ground to the channel of the river, or otherwise to appropriate it exclusively to purposes connected with the navigation of the river, without allowing any sum in name of damages or compensation to the appellant: 5. That even supposing the appellant had an interest in the ground in dispute, such interest would be subject to the right of the respondents, as parliamentary trustees, to use the ground for the purposes of navigation, without his having any claim for reparation against them; and, 6. That as the whole of the appellant's ground formed part of the bank of a public navigable river, it was subject to a servitude or restriction at common law, whereby the appellant was debarred from putting up buildings or other erections upon it, or raising its height, so as to injure the navigation, or prevent the free course of the water over the banks in time of land floods.

Cases were ordered by the Lord Ordinary. The following passages in the respondents' case (pp. 15 and 19) were referred to by the Lord Ordinary in his note:

"To allow a right of property to be acquired by mere accession, whether natural or artificial, can only be supported upon principles of natural equity or expediency. Hence, even supposing this abstract right to exist, it must be received under various important and well-defined limitations. For it is clear that no one can acquire a right of property in land by accession, 1st, where this is contrary to his own title; or, 2dly, where there is a preferable right in favour of another party founded on an express grant or special Statute; or, lastly, where the claim is plainly inconsistent with the rights of the public. Upon all these grounds, the claim advanced by the pursuer in this case must be rejected.

"On the other hand, it is equally indisputable that the trustees had a right to the *solus* of the channel at the place in dispute, before they commenced their operations, and without which these operations never could have been carried on at all. But surely if they had such a right, it could not be lost or extinguished by their placing an embankment or mound of earth upon the *solus*, though the effect of this might be to convert the water into dry land. Suppose that the parliamentary trustees had made a large embankment or *opus manufactum* in the centre of the river below the bridge of Glasgow, and erected warehouses or other buildings thereon, completely surrounded with water, could the conterminous heritors have claimed the

ground thus acquired from the river? Clearly not. Again, put the case, that in place of filling up the channel with earth opposite the pursuer's property, the trustees had erected a wharf or quay, projecting for some distance into the fairway of the river, could the pursuer have claimed the *solus* upon which it was built, because the erection happened to lie adjacent to his northern boundary? It is thought no such claim could be advanced. But, if not, where is the difference between these cases and the present? Here the right of the defenders to the ground is infinitely stronger than in the cases which have just been put, because they have no intention to take the ground for erecting wharfs or placing any buildings thereon, but solely for the purpose of appropriating it to the objects of navigation, by restoring the channel to its original breadth."

"11th July 1839.—The Lord Ordinary having considered the revised cases for the parties, with the productions and whole process,—makes a vizandum therewith to the Lords of the Second Division; and appoints copies of the said cases (which are already printed) to be boxed to the said Lords *quam primum*, in order to be reported; and grants warrant to the keeper of the Inner-House rolls to enrol the cause therein, as soon as either of the said cases is boxed under this appointment.

"Note.—This case, like all others which turn upon principles and interests so large, and (if the epithet may be allowed) expansible, is not unattended with difficulty. But the Lord Ordinary is of opinion, that the weight both of principle and of authority is with the trustees for the navigation.

"It is a long, and by no means an easy step, from the case of gradual and imperceptible accession, by the action of natural causes, to great and sudden acquisitions of additional land by artificial operations of the acquirer himself. But it is a still greater and far more difficult step from this last, to the allowance of such acquisitions to an inactive proprietor, when these have been obtained by the artificial operations of a third party; and most of all by the operations of a public statutory board, performing them (tentatively or permanently) for the improvement of a local navigation, and met, when afterwards proceeding to remove them, in the discharge of the same duty, by a claim on the part of the alleged (gratuitous) acquirer.

"Whatever other difficulties may be in the case, the Lord Ordinary has no idea that the pursuer can ever make good against such defenders, the broad and sweeping right he asserts "to follow the river" to whatever distance it may be carried, because his property is described in his titles (though they limit him to a precise measurement by rods and yards) as bounded by that river. To show the fallacy of this proposition, it is only necessary to consider to what consequences it would lead. By the Statutes, the trustees have power not only to deepen, widen, or contract the channel of the river, but also to 'straighten, direct, or alter its course.' But, suppose that in the exercise of this power (and to avoid a long bend like those on the Forth), they had thought fit to carry the channel of the river quite away from its former bed opposite to the pursuer's ground, and to lead it through a new cut three or four hundred yards farther off, thus interposing between him and the actual stream a large tract of land (twenty or thirty acres it might be in extent,) would the pursuer be entitled to take to himself the whole of this interjected territory, in virtue of his alleged right to have the river at all events for his boundary, and consequently to follow it wherever it went? The notion is evidently extravagant. But the pretension might lead to still greater absurdity. His titles, he says, gave him an *inalienable* right to have the river for his boundary 'on the north.' But suppose the trustees had found it necessary to divert its course in an *opposite direction*, and to carry its channel some three or four hundred yards to the south of the pursuer's acre and half of ground, what would become of his north river boundary then? Or how would he proceed with his claim to all the land between him and the river on the south?

"The propositions in law at the bottom of page 15 of the defenders' case, and the illustrations beginning at the middle of page 19, seem to the Lord Ordinary to admit of no answer. Some others, however, to the same effect, have occurred to him. Suppose, that, instead of closing in their retaining wall up to the land at each end, the trustees had left it open, and for the

sake of quickening the action of the water, had constructed it in the form of a *breakwater* running along the shore, at a distance of but a few yards, but completely insulated, and leaving a narrow run of water between it and the old original bank, could it be doubted that, in such a case, the pursuer, though losing all the benefit of his open frontage to the river, and cut off from any useful access to its navigable channel, must yet have been contented with his original boundary, and could have had no pretensions to the *property* of the unsightly bulwark by which he was excluded? But suppose, again, that this insulated breakwater had been faced up as a quay on the side next to the channel, and levelled on the top accordingly, and that, in order to make it accessible for the purposes of trade and navigation, the trustees had connected it with the shore by two or three bridges across the interposed narrow water-run, would the property of it have been in this way transferred, by what he calls 'legal accession,' to the pursuer? But if open-arched bridges would not have this effect, would the substitution of a *solid mound* or two, as the means of communication, if placed *towards its centre*, have any other? It would be strange if they could; and yet if two such mounds were placed, one at each of the two *extremities* of such a breakwater, they would bring it *precisely* into the condition of the original front wall or quay of the trustees, which the pursuer confidently maintains did convert all the space behind it into his private property. It is inconceivable, however, that such a trifling change in the plan of the connecting passages should have so extraordinary an effect; and, if the trustees could certainly have removed their breakwater, if, after a certain trial, it was found not to be serviceable, without raising any right in the pursuer to compensation in any of the former cases, the Lord Ordinary cannot understand how he should have such a right in the last, which, however, is substantially identical with that which has occurred. It appears to him, in short, that the trustees must always have a right to remove any embankment they may have erected in the river, when they find it does not answer their purpose, and that this right cannot be affected by the mere form or plan of such embankment, but must be the same, whether it is constructed as a detached breakwater or an advanced dike, touching the shore only at its upper, or at both its extremities, or an open wooden quay resting on a low embankment overflowed at every flood-tide.

"The pursuer dwells much on the long *possession* he has been allowed to hold of the added ground, and of the plain finality (as he contends) of the operations by which it was added. But upon both points there is great and palpable exaggeration. The Lord Ordinary doubts whether the trustees could, consistently with their duty, have announced any of their operations as final while their engineers told them there was room for improvement; and certainly there never has been any such announcement. The whole of their operations in fact have been *tentative*; and their general character has varied, and even been in some degree reversed, after years of experience had pointed out the errors of the first conception. The two first acts, for example, contemplate improvements, chiefly by the construction of artificial channels, with locks, dams, and sluices; and all the latter ones, by scouring and cleaning the natural bed of the stream; and while the Act of 1809 points mostly to gaining additional depth by *narrowing* the water-way, that of 1825 provides most anxiously for bringing up a *larger* mass of tide-water and securing *sufficient width* for the purposes of navigation. It is not disputed, accordingly, that from the very first, the plan and principles of the operation have undergone material changes; and that, though the work has been going on ever since 1758, it was not till 1826 that the experiment of an advanced or contracting bulwark in front of the pursuer's ground was completed.

"Since that time, there cannot well be any thing like a settled state of possession; and, considering the nature of the subject, that possession could scarcely be attended with many indications of ownership. The pursuer accordingly has admitted that the added ground has been chiefly used for the purposes of navigation as a towing-path or landing-place, &c.; and that, except in carrying his drains through it, and occupying a small part as a tank or basin, he has had no beneficial use of it. But, in truth, he admits enough to show that the occupancy (or right to occupy) as proprietor has been mostly with the trustees,

or those for whose benefit they were acting. He admits that they were fully entitled to use it for all purposes connected with the navigation and trade of the river; and consequently, not only to have a towing-path and landing stairs there, but to have occupied it with cranes and windlasses for unloading vessels, and posts or pauls, and ground-rings for mooring or making them fast, and all the other apparatus of a landing-place within the city's grant of free harbour; in short, that they were entitled to take the same use of it as they might have taken of any other quay or wharf which they had erected on ground belonging to themselves, or had constructed as a detached bulwark in the bed of the river, connected with the shore only by mounds or bridges. The first question to be asked, therefore, is, whether if, instead of building this quay in the bed of the river, beyond the pursuer's original property, they had cut off an equal breadth—say 25 or 30 yards—from what was included in his measurement, and then in his occupancy, and built up a pier or quay for such purposes on the space so laid open, the pursuer would not have been entitled to have been paid for it as ground actually taken from him by the trustees for the use of the navigation? But if his admitted property would have been justly considered as taken from him, by being appropriated to such uses, it would certainly be rather extraordinary if a quay built on what never was his property, should yet become so by being so appropriated. The present claim of the pursuer goes down, it will be observed, to the very water edge, and includes the whole space occupied by the advanced dike or quay of the trustees,—not, however, to the effect of excluding them from the actual use of it, which he admits to be *preferable* to his own, but to the far more extraordinary effect of *preventing them from taking it away* when they find that it does not promote, but obstruct the uses for which it was erected.

"He does not (or at least he cannot well) deny, that if, within a year or two of its erection, they had found it necessary to remove this their dike from the bed of the river, they might have done so without making him any compensation. But he seems to think, that because it was allowed to stand for twelve or fourteen years, they can now deal with it only as his property. The Lord Ordinary does not understand this. On the contrary, he is very much inclined to go along with what is said by the trustees, as to the insufficiency even of a prescriptive possession to sanction *obstructions* in navigable waters. He is indeed pretty clearly of opinion, that if the operations had been wholly performed by the pursuer himself, and for the sole purpose of gaining ground from the river, it would have been competent for the trustees to have removed them, even after forty years' possession, if it had then been clearly made out that they operated as such obstructions. That the fact is so, he thinks is sufficiently proved by the reports of their engineers, upon the faith of which they are now about to remove them, and farther to enlarge the channel at a very great expense; and he does not see that it should make any difference, *in the pursuer's favour* at least, that they were originally made, not at his expense but theirs; and not with the most remote view to his benefit, but under an erroneous expectation of improving the navigation.

"The Lord Ordinary will not go into the authorities referred to on either side, no one of which, he thinks, bears materially on the hinge points of the present case, which are in the peculiar powers and privileges of the defenders, as parliamentary trustees. But even upon the more general questions involved in former cases, it appears to him that the pursuer has little to found on beyond certain *obiter dicta* reported (more or less correctly) as having fallen from Judges, no doubt of great authority, when deciding cases which did not call for the announcement of any such large principles; and he must add, that the account given (at p. 28 of the defenders' case) of the proceedings in the House of Lords, as to the most recent of these cases, goes very far to shake the authority, not only of its decision in this Court, but of the previous decision in that of Campbell and Brown. But the true ground of the Lord Ordinary's opinion here was not, as he conceives, involved in any of those cases.

"Before concluding, however, he thinks it right to say, that the only thing that has occasioned any hesitation in his mind, is that express provision in the Act of 1825, by which, while giving ample powers to *widen* the channel if necessary, there is

'reserved to the proprietors of adjacent lands all rights to soil acquired from the said river, or other rights competent to them at common law.' There is something perplexing, no doubt, in this distinct reservation; and it is not easy to adopt the trustees' explanation, that it was a mere redundancy, and gave no benefit or security that would not have been enjoyed without it. The Lord Ordinary holds, that it gave something more than this, but thinks that what it gave was *security* rather than any new right; and while he cannot construe it, therefore, as excluding any right which would otherwise have been clearly in the trustees, he conceives that its insertion will be sufficiently explained, and its object satisfied, by holding that it was meant only to secure to the adjacent proprietors such acquisitions of soil as might have come to them by *natural imperceptible accession*, and to exclude what might have been a plausible claim on the part of the trustees to interfere, without payment, with such acquisitions.

"He has reported the case to save a little time and expense to the parties, and not, as will be seen, on account of any difficulty he should have felt in deciding it."

At advising on 23d January 1840, the Court sustained the defences, and absolved the trustees, but found no expenses due.

Todd appealed; but after hearing the appellant's counsel, the judgment of the Court of Session was affirmed, with costs.

Second Division.—Lord Jeffrey, Ordinary.—Archibald Grahame, Appellant's Solicitor.—Richardson and Connell, Respondents' Solicitors.—[W.H.D.]

15th June 1842.

SECOND DIVISION.—(G.D.F.)

No. 219.—JOHN HENDRIE, *Advocator*, v. ROBERT STEWART, *Respondent*.

Sale—Warranty—Proof—Circumstances in which the buyer of a horse was held entitled to rescind the bargain on the ground of unsoundness, after the horse had been in his possession for five days.

Stewart purchased a horse at Rutherglen market, on 8th May 1840, from Hendrie, for a sum of £43. 10s. The animal was warranted as perfectly sound. Immediately after the sale, he submitted him for inspection to a veterinary surgeon, who pronounced no decided opinion at once; but on the fifth day after the sale, he gave a certificate that the horse was unsound. In consequence of this the buyer then requested the seller to take the animal back; but having refused to do this, the buyer then presented an application to the Sheriff of Lanark, setting forth the above circumstances, and that it was part of the bargain at the time that he was to have a fair trial,—in evidence of which he stated, that only £30 were paid on the market-day, and the balance was allowed to remain in his hands till such time as he should be satisfied in regard to the animal. He therefore craved the Sheriff to order the horse to be sold, and to pay over to the petitioner such price, deducting charges, as should be obtained, in relief of the £30 left in Hendrie's hands on the market-day.

Hendrie admitted that the horse was sold under the warranty of being sound; but he averred that he was so when sold; and, further, that the sole condition of sale was, that the buyer was only to have the market-day to satisfy himself in regard to the animal, and not longer; and he accordingly argued, that as Stewart had taken him away, and kept him for a length of

time, he could no longer throw up the bargain, which must now be held to have been finally concluded: The Sheriff meantime granted warrant for selling the horse (the price obtained, after deducting charges, left a balance of £22. 4s.), and thereafter allowed a proof, *hinc inde*, as to the state of the animal when sold, and the conditions and understanding of parties at the sale.

The import of the proof is set forth in the following interlocutor of the Sheriff:

"Glasgow, 24th December 1840.—Having considered the interlocutor appealed from, and reviewed the whole process; finds it proved by the receipt, No. 6, that the horse here was sold for the price of £43. 10s., 'warranted sound and steady in harness': Finds that, independently of the said written warranty, and which is also proved by parole evidence, that the agreed on price of £43. 10s. for a carriage-horse was a sound price, and warranted soundness in the animal: Finds it proved by the parole evidence, that in addition to this express and implied warrant, it was a condition of the bargain that the animal was to be reported on favourably by Mr Stewart, veterinary surgeon: Finds that, in implement of the bargain concluded under these conditions, the pursuer delivered to the defender a draft for £30, with an obligation for the price, dated 8th May 1840, in these terms:—'Although I have got the receipt for £43. 10s., I have only to-day given the draft for £30 on the Western Bank, and the balance will be remitted by me to Mr John Hendrie. By (Signed) ROBT. STEWART.' Finds that, upon the animal being submitted to Mr Stewart's inspection in terms of the bargain, he reported that he could not say that it was sound, nor yet decidedly that it was unsound, but recommended that it should be sent out to the pursuer's residence at Carfin, put to moderate exercise, and taken good care of, and that he would give a decided opinion in a few days: Finds it proved that the animal was taken to Mr Stewart's accordingly, taken good care of, and put to moderate exercise, and that as it appeared he was not sound, he was again submitted to Mr Stewart for inspection, who made a report and granted the following certificate of the unsoundness of the animal: 'And I hereby certify that I find the horse unsound, having the tendons of both fore-legs enlarged.' Finds that, in consequence of this certificate by the agreed on referee, the pursuer offered back the horse to the defender, which he declined to accept, and in consequence the present action was brought for warrant to sell the horse, which had been lodged in the Black-Bull stables by the pursuer, and for a warrant to apply the proceeds of the sale, after deducting expenses, in payment *pro tanto* to the pursuer of the £30 paid to account of the price: Finds that, in the circumstances which have now been detailed, the bargain was a conditional one, subject to the inspection and approval of the animal by Mr Stewart, and that as no period was fixed within which Mr Stewart's final opinion was to be given, it was competent for him to adjourn the giving of said opinion, and that if the same was given within a reasonable time, it was binding upon the parties: Finds that Mr Stewart's final certificate having been given on the 13th of May, five days after the bargain, and forthwith intimated to the defender, was given within reasonable time: Finds that the horse having been sold by warrant of this Court, in the course of the present process, brought the price of £30 Sterling on the 24th of June last, whereof £20. 10. 10. has been consigned in the hands of the clerk of Court, the remainder having been absorbed in the expenses of sale and keep of the animal: Finds that, under the special terms of the warranty which was granted here, and of the obligation of reference as to the soundness of the horse, come under by the defender to Mr Stewart as referee, the defender, in the whole circumstances of the case, was bound to have taken back the horse: Finds, *separatim*, that although there is great discrepancy in the evidence, the preponderance, upon the whole, is in favour of the opinion, independent of Mr Stewart's certificate, that the horse was not sound, and therefore that, under the bargain, the defender was bound to take it back: Therefore, alters the interlocutor complained of, decerns and declares in terms of the prayer of the original peti-

tion to this effect, that the pursuer is found entitled to uplift the consigned money, and that action is reserved to him against the defender for the balance of the £30 paid on account of the horse, after deducting said consigned money: Finds the defender liable in expenses of process; appoints an account thereof to be given in and taxed by the auditor, and decerns."

(Signed) "A. ALISON."

In an advocacy, the Lord Ordinary pronounced the following interlocutor:

"18th December 1841.—The Lord Ordinary having heard parties, and considered the process, finds that the proof establishes, 1st, That the sale of the horse in question was conditional, on its being approved of as sound by Mr Stewart, veterinary surgeon in Glasgow, and that this person gave it timeously as his opinion that the horse was not sound; 2d, That at the date of the sale the horse was unsound: Therefore, on these two grounds of fact, or on either of them, repels the reasons of advocacy, and remits to the Sheriff *simpliciter*, and decerns: Finds the advocator liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and to report.

"*Note*.—The case is not free of all doubt; but it appears to the Lord Ordinary, first, That the favourable opinion of Mr Stewart was an understood condition of the bargain. The answer of the advocator to this is, that Stewart did not reject the horse—that delivery was taken, and part of the price paid. But though at once he did not absolutely reject, he suspected and stated at the moment to the respondent (or, what is the same thing, to his servant acting in this transaction for him), that he would require some time to observe the animal; and in five days he declared him unsound. The horse had no doubt been taken away by the purchaser for these five days, and a partial payment of the price took place; but this was all on a reliance that the warranty was to turn out effectual.

"2d, That the evidence of the unsoundness preponderates. The strong circumstance in favour of the advocator is the testimony of Mr Poett; and if this intelligent and disinterested witness had seen the horse at, or even near the period of the sale, the Lord Ordinary would have held his evidence conclusive. But his opinion, if not altogether destroyed, is reduced to nearly nothing by the fact that he did not see the horse till about three months after the sale, during all which time it had been under the advocator's charge.

"The Lord Ordinary proceeds more upon the first of these grounds than upon the second."

The Court on a reclaiming note,

"Recal the interlocutor reclaimed against: Find it unnecessary to pronounce any opinion on the first finding in the said interlocutor; and find that the proof establishes, that at the date of the sale the horse in question was unsound, and decern and declare in terms of the prayer of the original petition; and remit to the Sheriff, with instructions that the pursuer shall have right forthwith to uplift the consigned money, in part payment of the balance of £30, reserving his action for the remainder: Find the pursuer entitled to expenses incurred both in this Court and the Inferior Court; appoint an account," &c.

Lord Ordinary, Cockburn.—Act. Dean of Faculty (Wood), Russell; S. Campbell, S.S.C., Agent.—Alt. P. Robertson, A. Anderson; T. Sprot, W.S., Agent.—F. Clerk.—[G.D.F.]

16th June 1842.

FIRST DIVISION.—(H. B.)

No. 220.—ANTOINE VIGNES, Pursuer, v. EDINBURGH and LEITH BANK, Defenders.

Deposit—Restitution—Bill of Exchange.—A bill deposited in a bank having been inadvertently delivered to a third party who had a partial interest in it—Held that the bank were bound to restore the bill to the depositor, or pay the full amount of the proceeds, without deducting the partial interest of the third party.

A bill for £60 at four months, drawn and accepted by certain parties at Tain, was indorsed by the ac-

ceptor to Donald Robertson, and by him to Antoine Vignes, hotel keeper in Edinburgh, who having put his own name on the back of it, carried it to the Edinburgh and Leith Bank for negotiation or discount. On the following day, Donald Robertson called at the bank, and being supposed to be the person who had left the bill, obtained delivery of it. Shortly after, in the course of the same day, Vignes called for the bill, and being asked what right he had to it? answered, that it belonged to him, and that the bank had no right to give it up to Robertson. Thereafter, a correspondence took place between Vignes and the bank,—the former threatening legal measures if the bill or its proceeds were not forthwith delivered to him, and the latter promising every effort to recover the bill, but denying liability for it under the circumstances. Robertson had sent off the bill to Tain for discount, and not being able to redeliver it, was incarcerated by the bank for non-delivery, under a decree to that effect which they had obtained against him. The bank then addressed a letter to Vignes, stating that Robertson had offered to pay the bill, under deduction of £18 of the proceeds, said to belong to him, and asking Vignes to say whether he consented to this arrangement. Vignes answered, that he had given instructions to his agent to raise the necessary action against the bank; "but as you now make the proposition of paying me the amount of the bill, with the exception of the £18, which you state Robertson claims, I have given directions to stay farther proceedings until I again hear from you, whether you will guarantee me against all farther claim on said bill, provided I agree to accept of the terms proposed by you; as, without your doing this, or delivering up the bill to me as I gave it to you, I have no security that the bill may not come against me again; and I must of course protect myself." The accountant of the bank replied,—“You must either consent to Robertson's proposal, or, on delivery of the bill, pay down the £18 you got; for I can give no guarantee whatever. By agreeing to the proposal now made by him, you are just in the same position as you would have been had the bill been discounted.” Vignes offered, on getting up the bill in the same state as when he left it at the bank, to pay the £18 to Robertson, or to deposit it in the hands of a third party till the bill became due; but he, at the sametime, intimated his determination to execute his summons against the bank if the bill were not delivered on the following day,—adding, “the expenses incurred by me in the matter will of course fall to be paid either by you or Robertson.” The bank having declined to admit their liability for the expenses, but offered to do what they could “to recover the amount from him (Robertson) before liberating him,” Vignes, thirteen days before the bill arrived at maturity, executed his summons, concluding against the bank for delivery of the bill as deposited, or its proceeds, with interest from the date of its becoming due, and also for “all expenses, loss and damage, which the pursuer has incurred, or may sustain” in consequence of the unwarrantable delivery of the bill to Robertson, together with the expenses of process.

The bill having arrived at maturity, and been duly retired by the acceptor, the bank pleaded—1. That as they had always been willing to pay the full amount of the pursuer's interest in the bill, the action was unnecessary

and groundless: 2. That the conclusions of the action were irrelevant and untenable, (1.) as to the delivery of the bill, which the acceptor, who had paid it, was entitled to retain; (2.) as to payment of the full amount, in respect that to the interest of £18 of the proceeds the pursuer had no right whatever; (3.) as to damages, in respect that none had been sustained, or were relevantly averred; (4.) as to expenses, which ought, on the contrary, to be awarded to the defenders, "in respect that it is attributable to the duplicity, and otherwise blameable conduct, of the pursuer himself that any expenses have been incurred."

The Lord Ordinary pronounced the following interlocutor:

"19th March 1842.—The Lord Ordinary having heard counsel for the parties, and thereafter made *avizandum* with the whole process, and having considered the same, in respect of the admission of the defenders in the defences, Finds them liable in payment to the pursuer of his full share and interest in the bill libelled on, with interest, and appoints a statement of the amount thereof to be given in: *Quoad ultra*, sustains the defences, and decerns: Finds the defenders entitled to expenses, subject to modification: Appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same, and to report.

"*Note*.—The circumstances of this case are very peculiar. The pursuer, in the month of April 1840, left a bill in the Edinburgh and Leith Bank in St Andrew's Square, Edinburgh, drawn and accepted by persons at Tain, who indorsed it to Donald Robertson, who also indorsed it to the pursuer. It is said in the submissions, that the pursuer's object was, that it should be retained in the bank in the ordinary way of business. It is admitted that Robertson had an interest in the bill to the extent of £18. It is stated by the bank, who are defenders, that the manager refused to discount it, and ordered it to be returned, and that, while it was in the hands of a clerk, a person, who appears to have been Robertson, the previous indorser, called for the proceeds of the bill in question, which he stated he left the day before; and, when it was found that there was such a bill, but that the manager had refused to discount it, it was given to Robertson, not doubting that he was the person who had left it the day before. It is stated by the bank, that, within half an hour afterwards, the pursuer called at the bank, and demanded the bill. A long investigation and correspondence took place afterwards, and, although the circumstances of the case are very extraordinary, the Lord Ordinary is not satisfied that there was any collusion betwixt the pursuer and Robertson; but it appears to him that the bank, in the correspondence which took place in the months of June and July, offered all that the pursuer was entitled to demand, viz., that the bill would be paid in the same manner as it would have been if the bank had discounted it.—(Process, 23, 24, 25, and 27.) The pursuer was not satisfied with this, but brought the present action, in which the defenders, after stating that the bill has been retired by the acceptor (defence, p. 4), tender the pursuer the full amount of his share of the bill, with interest, which they say they had repeatedly done before the action was raised, and in which they are confirmed by the correspondence. In these circumstances, it appears to the Lord Ordinary that the defenders are entitled to some portion of the expenses incurred in defending this action."

The pursuer reclaimed. At advising,

Lord Gillies.—The Lord Ordinary has very properly found the defenders liable in the full amount of the pursuer's interest in the bill, but he has at the same time found that they are not liable in the expenses of process. I have very great doubt of the soundness of this finding. Bankers must have not only honour and integrity, but also perfect accuracy, no less for their own sake than for the sake of their employers. Now, what happened here? The pursuer had a bill which was to arrive at maturity in about three months. He carried it to the bank, and they took the custody of it. There was

thus an implied contract that he, and he alone, was to call for it and obtain delivery. The bank, therefore, are bound to restore it. If they could show that there was any gross fraud on the part of the pursuer, and that he was in league with Robertson, it would be a different matter; but this, though at one time insinuated, is not now alleged or suspected. In these circumstances, the bank were bound either to restore the document or its proceeds. The pursuer had nothing to do with the *spuilzie* by Robertson; and the bank were not entitled to make any stipulation with regard to it. They were custodiers, and all they had to do was simply to restore. Suppose a party, on leaving town, were to deposit £500 worth of plate with his banker, would it do for the banker, when he demanded it, to say, another person called and got it, and I protest against being held liable? I am clear that the pursuer is entitled to his expenses.

Lord Mackenzie.—I am of the same opinion. The bank were bound to restore the document, or pay the whole amount of it; but they offer only a part, and refuse to guarantee the pursuer against being ultimately made liable for more than he had received. He was entitled to this guarantee or delivery of the document; and I therefore think he was entitled to prevail in the action, and ought to receive his expenses.

The Lord President and Lord Fullerton concurred.

The Court pronounced the following interlocutor:

"Alter the interlocutor of the Lord Ordinary: Find the pursuer entitled to expenses; but in respect that the matter relative to the restitution of the bill is at an end, find it unnecessary to dispose of the other conclusions of the libel."

Lord Ordinary, Murray.—*Act*. Inglis; William Wishart, S.S.C. *Agent*.—*Alt*. Macfarlane; Lockhart, Hunter and Whitehead, W.S., *Agents*.—*Adv*. Clerk.—[H.B.]

16th June 1842.

SECOND DIVISION.—(G. D. F.)

No. 221.—ANTHONY MACTIER and OTHERS, Pursuers, v. SIR JAMES CARNEGIE, Bart., Defender,—*Et c. contra*.

Property—Common—Declarator.

Special case. These actions were brought for the purpose of ascertaining the mutual boundaries of the estates of the parties, situated within the parishes of Banchory-Ternan, Durris and Strachan, and Mactier's right, as alleged, to possess a portion of land in common with the defender, which the latter alleged belonged exclusively to him. Sir James Carnegie moved the Lord Ordinary to find that Mactier

"is excluded, by his own titles, from having acquired by prescription, or from now claiming any common property or servitude along with the pursuer, in any part of the baronies of Strachan and Culpershaugh, situated not within the parishes of Banchory-Ternan and Durris, but within the parish of Strachan."

His Lordship refused the motion *hoc statu*, appending the following note to his interlocutor in the case, which sufficiently explains the circumstances of the case and the pleas of the parties:

"The Lord Ordinary was formerly of opinion, and decided that the defender is excluded, by *his own titles*, from claiming any common property in the lands conveyed to the pursuer in his (the pursuer's) titles. But the pursuer now wishes to advance a step farther, and to apply this principle by a finding that the whole baronies of Strachan and Culpershaugh are disposed to him, in so far as these baronies are in the parish of Strachan, and consequently, that the defender is excluded from claiming any common property or servitude over these.

"But these baronies are not disposed to the pursuer. His titles give him a right only to *parts and portions* of them, and the exception in the title of the defender is only of the '*parts and portions*' formerly sold to the pursuer's author. It does not

follow, therefore, that wherever there is a part of either of these baronies in the parish of Strachan, that part necessarily belongs to the pursuer."

On a reclaiming note the Court *adhered*.

Lord Ordinary, Cockburn.—*Act.* Rutherford, Currie; Graham and Anderson, W.S., *Agents.*—*Alt.* P. Robertson, H. J. Robertson; T. Mackenzie, W.S., *Agent.*—*T. Clerk.*—[G.D.F.]

17th June 1842.

FIRST DIVISION.—(H. B.)

No. 222.—*AGNES BOYD, Pursuer and Advocate, v. GEORGE KERR, Defender and Respondent.*

Parent and Child—Filiation—Proof—*Semiplena*—*Circumstances which were held insufficient to establish a case of semiplena probatio.*

Agnes Boyd brought an action against George Kerr, concluding that, as the father of a natural child which she had borne to him, he should be decerned to make payment of aliment and inlying expenses. The defender's judicial declaration having been taken, the Sheriff-substitute found the admissions contained in it sufficient to establish a case of *semiplena probatio*; but this interlocutor having been appealed to the Sheriff, was recalled, and a proof ordered. It appeared that on two occasions, when the parties met in the house of a Mrs Jardine, who keeps a small shop in the village of Cleuchbrae, they had been for about a quarter of an hour together in a box-bed in a corner of the shop, in presence of Mrs Jardine, her daughter, and a neighbour. The defender denied that on these occasions, or any other, he had had criminal intercourse with the pursuer, and maintained that he had acted only in frolic; while the pursuer, without averring that the intercourse had then taken place, condescended on other instances in which she averred it had.

The Sheriff having found that the proof had failed to establish a case of *semiplena*, the pursuer advocated.

The Lord Ordinary pronounced the following interlocutor:

"11th March 1842.—The Lord Ordinary having heard parties, and considered the process,—repels the reasons of advocacy, and remits to the Sheriff *simpliciter*: Finds the advocate liable in expenses; appoints an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and to report.

"*Note.*—The case depends entirely on the construction which is put upon the parties being in the bed; for there is no other fact. If it be supposed that they were there for the purpose, or to the effect insinuated, rather than averred, by the advocate, the sufficiency of the *semiplena probatio* is unquestionable. If it be supposed that that was a mere frolic, and that it took place in circumstances which excluded the idea of any thing else, the insufficiency of the proof is equally clear. The last view is the one which the Lord Ordinary thinks is the most reconcileable to the truth."

The pursuer reclaimed, but the Court *adhered*.

Lord Ordinary, Cockburn.—*Act.* Sandford, Brown; Charles G. Reid, W.S., *Agent.*—*Alt.* Mure; Joseph Mitchell, W.S., *Agent.*—*N. Clerk.*—[H.B.]

18th June 1842.

FIRST DIVISION.—(H. B.)

No. 223.—*POOR ANNA MARIA BROWNE, Pursuer, v. ROBERT BURNS, Defender.*

Husband and Wife—Proof—Statute 6 and 7 Will. IV.—*In Consistorial causes, the proof must be led before a Commissary-Sheriff.*

In a declarator of marriage (the parties being resident in Dumfries) the Lord Ordinary, "in respect the pursuer is suing *in forma pauperis*," granted commission to the Sheriff-depute of Dumfriesshire, whom failing, to his substitute, to take the proof; but on a reclaiming note, the Court *altered*, and found that, in terms of the Statute, the proof could only proceed before the Commissary-Sheriff, or one or other of them.

22d June 1842.

SECOND DIVISION.—(G.D.F.)

No. 224.—*WILLIAM and DAVID STEWART, Suspenders, v. DAVID FERGUSON, Charger.*

Reference to Oath—Suspension and Interdict—Process—*Circumstances in which a note of suspension and interdict against a poinding for feu-duties having been presented without caution or consignation, in which the suspender referred the question in dispute, which was in regard to whether or not a piece of ground was conveyed by a certain feu-right, to the oath of the charger, it was passed on juratory caution; and thereafter, without going into the reference, the suspenders having raised a declarator in regard to the matter in question, the Court sisted the process of suspension, on condition of the suspenders paying over to the charger the rents of the subjects feued out by the charger to the suspenders, leviable during the period embraced in the charge and subsequently, as due.*

See *ante*, Vol. XIII. p. 292. The suspenders feued from the charger certain subjects belonging to him at the Seagate of Dundee, but it came to be a question, whether the agreement comprehended a stripe of ground which was at times wholly or partially covered by the sea on the south boundary. The suspenders averred that it had been claimed by other parties; and, on the ground that it was about to be evicted, they refused to pay the feu-duty which they had stipulated for the whole subjects, and accordingly presented a note of suspension against the superior's charge, but it was refused, in respect of want of sufficient caution. A second note of suspension was refused for the same reason. A poinding having been executed by the charger against one of the suspenders, a third note of suspension was presented, praying for interdict. Neither caution nor consignation was offered, but the suspender tendered a reference to the oath of the charger of the point in dispute. The charger, however, without declining the reference, pleaded that this course was incompetent, in terms of the Act of Sederunt, 24th December 1838, and that the terms of the written contract of feu could not be controlled by a reference to oath. Thereafter, the Lord Ordinary allowed the suspenders to amend their note, "to the effect of inserting an offer of juratory caution; farther, allows them at the same time to state in a minute the precise terms and extent of the reference which they propose to make to the charger's oath." The suspenders amended their note as suggested by the Lord Ordinary, who then made avizandum to the Court, when their Lordships passed the note (see *ante*, Vol. XIII. p. 292.) on

juratory caution, and repelled the plea of the charger. The parties disagreed as to the grounds which the Court had taken in passing the note; but the import, as it appeared to the Lord Ordinary, is stated in the note to the interlocutor of his Lordship in this branch of the case.

Thereafter, the suspenders brought an action of declarator for the purpose of determining whether the stripe of ground in question had been feued out to them, and to reduce and set aside the same on the ground of fraud and misrepresentation, in case it should be held that it was not so conveyed; and they *pleaded*—1. That payment of the ground-annuals charged for cannot be exacted from the complainers, except on the footing that they have received from the charger a clear and unquestionable right and title to the whole subjects in dispute, including as well the houses and yard in the Seagate of Dundee, as the space or stripe of ground extending south thereof. 2. The complainers' right and title to the space or stripe of ground extending to the south of the Seagate, having not only been called in question by third parties, but being also denied and disputed by the charger himself, the ground-annuals referred to cannot be exacted till at least the complainers' right and title have been fully acknowledged and established; and there being now in dependence an action of declarator and reduction at the complainers' instance against the charger, in which the whole questions in dispute have been competently raised, and may be competently tried and determined, this process of suspension and interdict ought either to be conjoined with that action, or sisted till the issue of it. 3. The complainers are not bound by the reference to oath which was offered by them in the Bill-Chamber, and the charger is not entitled now to insist on the reference being gone into: (1.) The reference was offered merely to induce the charger not to oppose the note of suspension and interdict, and with the view of bringing the point in dispute at once to issue, without any protracted or expensive litigation: (2.) But the charger made the most strenuous opposition to the note of suspension and interdict: (3.) He not only did not accede to, or accept of, the proposed reference to oath, but on the contrary, he rejected it, and denied and disputed its competency: And, (4.) the reference to oath was not sustained, but the note of suspension and interdict was passed, and has come into Court independently altogether of the reference.

The charger, who stated that he had never declined the reference, *pleaded*—1. That the suspenders having concluded in their note of suspension solely for a reference to oath of the disputed questions between them and the charger, and offered, in *gremio* of their statement of facts, to refer these disputed matters to oath, and having thereafter, and after the charger had lodged answers, and had intimated his determination to oppose in every way the passing of the note of suspension, lodged a minute of reference to the charger's oath, which, along with the note, was reported to the Court; and the note having been passed by the Court, containing the prayer above mentioned, the suspenders cannot now retract the reference to oath, or alter the conclusions of the note of suspension; and, 2. The reference to oath prayed for in the note of suspension is exclusive of every other mode of proof.

The Lord Ordinary pronounced the following interlocutor:

" 20th May 1842.—The Lord Ordinary having heard parties' procurators, as well in this process of suspension and interdict as in the separate process of declarator and reduction presently depending between the parties, and having made *avizandum*;—In the special circumstances of the case, and more particularly in respect—(1.) That the reference to the charger's oath, as originally proposed in the note of suspension, has never been either sustained by the Court, or its terms adjusted and settled between the parties, the charger, on the contrary, opposing the reference as wholly incompetent: (2.) That, more especially, at passing the note of suspension, there was no condition attached to their Lordships' deliverance which could render it incumbent upon the suspenders absolutely to abide by the said proposal: (3.) That, moreover, the said proposal having at first been made merely with a view to obviate objections which might otherwise (as was supposed) have lain to the competency of the suspension, and to enable the suspenders to 'have the note passed and interdict granted *without caution or consignation*,'—whereas the competency of the suspension was eventually sustained (so far as appears from the terms of the judgment) irrespective of the reference, and on the distinct and separate ground 'of this being a bill of suspension and interdict,'—and the note itself was passed, not without caution or consignation, as, according to its original prayer and the usual practice, it would have been had the reference been sustained, but only upon *juratory caution*,—there was no longer the same practical necessity for a reference; but, on the contrary, there were sufficient grounds, independently thereof, to warrant the passing of the note to the effect of trying the important question that had arisen between the parties: (4.) That at all events, when, with the original grounds of suspension, there came to be combined the circumstance of a depending process of declarator and reduction, and all the additional grounds set forth in this latter process, and substantially imported into and adopted in the record of the suspension, there could no longer, in any view, be a question as to the sufficiency of the suspenders' right to get into a discussion of the matters in dispute, independently of any reference: And finally, (5.) That until the issue of the declarator and reduction, it cannot be positively assumed how far there is any, or what available contract between the parties; and so it might be premature, *in hoc statu*, to enforce execution of that contract in the sense contended for by the charger, but disputed and repudiated by the suspenders: Finds that the suspenders are not bound to abide by, or repeat their proposal to refer their case to the oath of the charger: Finds, on the other hand, that they are entitled to have the said process conjoined with the other process of declarator and reduction, to the effect of their maintaining and making good in both their case, as set forth in the two several records, and that *omni habili modo quo de jure*: Conjoins the processes accordingly. *Quoad ultra*, appoints the processes (as now conjoined) to be enrolled, in order to the pronouncing of such other deliverance therein as may be necessary for advancing the same: And in the meanwhile reserves, *hinc inde*, all questions of expenses.

" *Nota*.—Had this case been now for the first time submitted in the shape of a note of suspension and interdict in the Bill-Chamber, with the relative process of declarator and reduction in dependence; and had such a note been presented upon an offer of *juratory caution*, and entirely free from any question of competency connected with the refusal of the previous note, there could not, it is thought, have been a moment's hesitation in passing the note, although not accompanied with any reference to the oath of the charger.

" But now that the objection originally taken to the competency of the suspension has been repelled, and that juratory caution has been found, this does seem, as to all practical considerations affecting the suspender's right to withdraw the offer to refer, to be still substantially the true position of the case.

" If, indeed, the charger could make out that the suspenders stood in any way barred from withdrawing the reference, there might be more to be said on his part. But the case is quite otherwise: For (1.) there never was here any completed reference at all: And (2.) if there had, the suspenders would

still (under such circumstances as here occur) have been entitled, according to all the authorities, to have resiled; the only question connected with their so doing being one as to expenses; and this the interlocutor reserves. (*See Chalmers*, 18th February 1813; *Bennie*, 28th January 1832.)

"As to the charger's argument, that the suspenders—having originally presented their note upon the footing of a reference—are not now entitled to take different ground, it is thought that the rule of practice given effect to in *Binny*, 26th January 1836, affords a sufficient answer. And see also *Nicholson*, 23d November 1810.

"There only remains the plea that the Court must be held to have passed the note of suspension upon condition that the suspenders should abide by the reference. But the judgment is silent as to any such condition; and indeed, it could not have been otherwise. For when that judgment was pronounced, the charger was still resisting the reference as utterly incompetent, and the note, as passed, left it of course open to try this point as well as the rest. It never could have been intended to tie up the suspenders' hands and leave the charger free.

"It may just be noticed, that in addition to the juratory caution on which the note was passed, the charger is at this moment in the possession and enjoyment of the entire present rental of the property in dispute. The suspenders, on the contrary, are drawing nothing, while, according to their averments on record, they have laid out very considerable expenditure in buildings and other meliorations. The charger, therefore, has nothing to complain of if the question is to be tried at all. On the other hand, it would be a very grievous hardship to the suspenders, if they really have a case capable of being made out in evidence, that they should be compelled to stake all upon their adversary's oath, and this merely because the embarrassments arising out of this very transaction had led them at first into a position of technical difficulty from their inability to find the caution offered in support of the earlier Bill-Chamber proceedings."

On a reclaiming note for the charger, the Court

"Recal the interlocutor complained of, and remit to the Lord Ordinary to sist the process of suspension, on condition that the rents actually drawn by the suspenders since Whitsunday 1839 inclusive, and also the amount of the rental to be fixed as aftermentioned, of such houses and property as may be beneficially occupied by the suspenders, be paid over to the charger, under deduction of any sums that may have been paid to account by the suspenders applicable to the period in question,—the money consigned in bank (if any) being upliftable, and paid as part thereof: And farther, to appoint the sums drawn as rents to be paid within three weeks, under certification that if not paid within that period, the letters will be found orderly proceeded: And farther, to authorise and remit to Mr Christopher Kerr, one of the town-clerks of Dundee, to fix a fair rental for such houses or other property as may be beneficially occupied by the suspenders; and to ordain the amount of the same also to be paid within three weeks after such rental shall be fixed by Mr Kerr; and also on the condition that all future rents drawn from the property, and the amount of the rental so fixed by Mr Kerr for future years, shall also be paid over to the charger periodically as due: Reserving all questions of expenses."

Lord Ordinary, Ivory.—For Suspenders, Macfarlane; Greig and Morton. *W.S., Agents.*—For Charger, Moir; John Murdoch, *S.S.C., Agent.*—*T. Clerk.*—[G. D. F.]

22d June 1842.

SECOND DIVISION.—(G.D.F.)

No. 225.—ALEXANDER MORRISON and NEIL M'CALLUM, Advocators, v. ALEXANDER CAMPBELL, Respondent.

Landlord and Tenant—Lease—Proof—Condition—Circumstances in which held, on a proof, that a landlord had intimated to a tenant possessing a croft on a verbal lease, the particular terms on which he was willing the tenant should remain, and that these terms had not been rejected by the tenant within the period allowed for that purpose by the landlord, and therefore

found by the Court, that the tenant must, by continuing in the farm for another year, be held to have remained on the terms stipulated by the landlord.

Special case of proof. The advocators, and four other persons, had been for many years crofters, possessing separate crofts on the respondent's property without written leases,—the crofts being possessed separately, and the cattle belonging to three of the crofters having right to pasture in common in one of two parks, and the cattle belonging to the remaining three of the crofters in another park. Each of the six crofters had pastured two cows and a horse; but this having been considered by the landlord an overstock for the parks, he sent for the crofters before the middle of March 1839, and stated to them separately, that the terms on which he would allow them to remain for the year from the ensuing Whitsunday, were, that each crofter was to part with his horse at the then ensuing term of Whitsunday, and was to have no right to a waygoing crop at Whitsunday 1840, in consideration of which a proportionate deduction of rent was to be allowed; and in stating these conditions to the crofters, the respondent gave them eight days to consider, and directed them to return within that time if they had any objections, and said he would not allow them to remain on any other terms. The advocators, however, did not intimate within eight days that they would not agree to these terms.

The respondent presented an application to the Sheriff of Argyleshire, praying his Lordship

"to interdict, prohibit, and discharge them from keeping any horses, along with their cows, on the common pasture in the said possession of Kilduskland, in violation of the foresaid agreement, and failing of their instantly removing them, to grant warrant to the petitioners, or any person to be employed by them, for doing so; and upon again advising this petition, with or without answers, to declare the said interdict perpetual; and also find the said Alexander Morrison and Neil M'Callum liable to the petitioners in the sum of £10 Sterling each, less or more, in name of damages, or reserve action for the same."

After a conjunct probation, the Sheriff granted the prayer of this application; but on an advocacy, the Lord Ordinary pronounced the following interlocutor:

"19th January 1842.—The Lord Ordinary having heard parties' procurators, and thereafter made avizandum with the whole process, finds, in matter of fact, *primo*, That the two advocators and four other persons had been for many years crofters, possessing separate crofts on the respondent's property without written leases,—the crofts being possessed separately, and the cattle belonging to three of the crofters having right to pasture in common in one of two parks, and the cattle belonging to the remaining three of the crofters in another park: *Secundo*, That each of the six crofters pastured two cows and a horse each: *Tertio*, That this was considered by the landlord an overstock for the parks, and that he, before the middle of March 1839, sent for the crofters, and stated to them separately that the terms on which he would allow them to remain for the year from the ensuing Whitsunday were, that each crofter was to part with his horse at the then ensuing term of Whitsunday, and was to have no right to a waygoing crop at Whitsunday 1840, in consideration of which a proportionate deduction of rent was to be allowed: *Quarto*, That the pursuer, in stating these conditions separately to the crofters, gave them eight days to consider them, and directed them to return within that time, if they had any objections to state against them, and said he would not allow them to remain on any other terms: *Quinto*, That there is no proof that at this time the pursuer said any thing about removing the crofters: *Sexto*, That there is no evidence that any precise sum was stated as the deduction to

be made from the rent, or that the advocates at any time expressed, verbally or otherwise, their agreement to the landlord's proposal, though it is proved that certain of the crofters, at least Robert Peffers, the second witness, went back and expressly agreed to the landlord's terms: *Septimo*, That, according to the recollection of the witnesses, the eight days elapsed before the period of warning had expired: *Octavo*, That the pursuer's gardener called on the advocates at their houses, and asked them to sign what he calls 'the agreement,' which they refused doing. 'That this might have taken place in the month of April, and after the period for warning had expired:' Finds, in matter of law, *primo*, That where tenants possess lands under a verbal agreement, any new lease, differing as to possession, way-going crop, or amount of rent from the former verbal tack, must be expressly agreed to, verbally or otherwise, or the former agreement will be held to subsist: *Secundo*, Finds that in this case there is no evidence that the advocates ever expressed their assent to the new terms of lease proposed by the pursuer: Therefore advocates the cause; alters the interlocutors complained of; recalls the interdicts which have been granted; dismisses the application to the Sheriff, and decerns: Finds expenses due, and appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same, and to report.

"*Note*.—It is with great reluctance that in this small matter the Lord Ordinary has come to an opinion different from that of the Sheriff and Sheriff-substitute, for whose judgments he has the greatest respect; but he feels himself obliged to decide the case regarding a trifling possession upon the same principles of law as he would do if the rent was considerable, and the crop and grazings large.

"It has been held that the landlord having announced the terms on which he would allow the possession to be held, which were acquiesced in by others, and no special dissent being proved by the advocates, though they were allowed a reasonable time to do so, they must be held to have agreed by their failure to object, and that there was therefore a concluded agreement by this failure to announce dissent. The Lord Ordinary apprehends that no agreement with regard to land can be concluded without an express assent of some sort or other. There is no proof of any assent whatever here on the part of the advocates, and as the statement was made by the landlord to the tenants separately, what others did, did not affect the advocates. The landlord's witness, his gardener, says, that when he brought what he calls 'the agreement' to sign, the advocates refused to do so. The Lord Ordinary has given the landlord the benefit of what is rather matter of inference than of positive proof, according to the evidence even of this single witness, upon that point, that it was then too late to bring an action of removing. But 'the agreement' might have been equally brought at the end of the week on the advocates not giving their consent then, as it appears the witness Peffers did. The landlord has alleged in the proceedings in the Inferior Court, that he had told the advocates that if they did not state objections he would hold them to agree; but he has not proved that by any of his witnesses, even by his gardener Niven. He, when interrogated under a leading question, whether he 'understood from what passed on the said occasion that the pursuer, Mr Campbell, had generally told all these crofters that they would get a week to consider of his terms, and if they objected to them, to come and intimate so to him within that period? Depones that the deponent decidedly understood so.' But the question is not put to him whether the landlord told them that he would hold them to agree if they stated no objections. It may, however, be maintained, that when the landlord said, as he did to Peffers, that he would agree to no other terms, and gave them a week to state their objections, it was to be inferred that if they did not state objections they would be held to agree. That is only proved by Peffers in his own case; and he went back to give his assent.

"As the law has hitherto been understood between landlord and tenant, even if the landlord had proved his averment, that he told the advocates that if they did not object in a week, he would consider them to have agreed—That would not convert a failure to come back into an agreement. The agreement must be direct, and concluded on the one side as well as on the other. Neither landlord nor tenant can singly lay down a new law on

the matter, and say, if you do not DISAGREE, I will hold you as AGREEING. The case might be different if there were any proof that the advocates had agreed to this, and said that if they did not come back to object, then the landlord might consider them as agreeing. They might then be said to have agreed that their *not objecting* should be held, after the lapse of eight days, a consent. But there is no evidence of any assent of any sort on the part of the advocates, or that they did any thing but hear what the landlord said, and leave the room, and went away. It is not proved that they gave any token of assent at any time. The pursuer's witness, Niven, who, after having had a 'considerable conversation' as to the new arrangements with the advocates, after they had seen the landlord, depones, 'that neither of the respondents stated to the deponent that they had agreed to the terms proposed by Mr Campbell, the pursuer.'

"It has been argued, that the advocates were not in *bona fide* to allow the time for bringing a process of removing to expire without declaring to the landlord that they did not agree to the terms which he proposed. If such a plea of *mala fides* were sustained, the Court would never have pronounced the judgment they did in the case of Gordon v. Bryden (13th January 1803), and in many other cases. In that case, the tenant appears to have acted in a manner totally inconsistent with good faith. Having received an intimation by letter of the new lease, to which he sent no answer, he showed the farm to the future tenant, sold a part of his stock, and dismissed his servants; which were all positive acts on the part of Bryden, tending to mislead the landlord and the person to whom the farm had been let. But the Lord Ordinary has not been able to discover any evidence in this case which proves that the advocates were in *mala fide*, or did any act tending to mislead the landlord. In order to make out that view of this case, Niven, the gardener, was examined, to state what passed privately between him and the landlord, from which he inferred that the landlord would have brought a removing, if he had believed that the advocates objected to his terms. But what passed between him (the landlord) and his servant cannot be evidence against the advocates, unless it was communicated to them; and the mere failure to come back at the given time to state objections, though it might be disobedient, perhaps, and disrespectful, cannot, without some previous agreement on their part, be considered as either an act of agreement or of *mala fides*."

The respondent reclaimed, when the Court, holding that the circumstances above set forth were amply instructed by the proof,

"Find, in point of law, *primo*, That it was incumbent on the advocates, possessing from year to year on a verbal lease, if they did not agree to the terms stated to them as aforesaid, to make intimation of such resolution to the landlord within the eight days allowed to them for consideration as above: *Secundo*, That as no such intimation was made by the advocates within the eight days so allowed to them for consideration, they must be taken and held to have agreed to, and acquiesced in, the terms and conditions stated to them as aforesaid, by the pursuer, as the only terms on which they could be allowed to remain for another year in possession of their crofts: Therefore, repel the reasons of advocacy; adhere to the interlocutors of the Sheriff, so far as they continued the interdict granted against the defenders on the 3d of June 1839, and 19th of March 1840; and remit to the Sheriff *simpliciter*: Find the defenders liable in expenses in this Court, as well as in the Inferior Court, as the latter are already taxed and modified; appoint an account," &c.

Lord Ordinary, Murray.—Act. Rutherford, W. E. Ayton; John Blair, W.S., Agent.—Alt. C. Robertson; T. S. Paton, S.S.C., Agent.—F. Clerk.—[G. D. F.]

22d June 1842.

SECOND DIVISION.—(G. D. F.)

No. 226.—ANDREW LOUSON (*Craik Senior's Trustee*),
Advocator, v. JAMES CRAIK, Junior, Respondent.

Sale—Stoppage in transitu—Cautionary Obligation—Bankrupt
—A senior requested A junior to order from a mercantile company a quantity of goods to be sent by them to his (A senior's) premises. This was agreed to, on A junior accepting a bill along with A senior for the price, and the goods were sent by the common carrier, who, owing to an error of the clerk in addressing them, left them in possession of A junior. On the bankruptcy of A senior, his trustee claimed them from A junior, as part of the bankrupt estate, but A junior refused to deliver, on the ground that, as guarantee, he was entitled to retain possession till freed of his cautionary obligation. The Sheriff, in an application for delivery, held that A junior had not acquired the goods by any valid title, and therefore, that he could not retain them in relief of his guarantee, and accordingly decreed against him in the application for delivery; and the Court, in an advocacy, affirmed the Sheriff's judgment.

James Craik, senior, residing in Forfar, requested his son, the respondent, who also resided there, to purchase on his (the father's) account, from Messrs Aberdeen, Gordon and Company, of Montrose, a quantity of yarn of a particular description, to be delivered by them at his, Craik senior's, premises in Forfar. The respondent, who admitted the terms of this request, accordingly performed the commission, and Messrs Aberdeen, Gordon and Company, agreed to the same, on condition of the son becoming security for the value. The respondent interposed his credit to the sellers by accepting a bill along with his father, at four months, for the price. The sellers despatched the goods by the common carrier, with the intention, it was said, of being delivered, according to orders, to James Craik, senior, but, owing to some mistake of the clerk, the goods were addressed to Craik, junior, instead of Craik, senior, in consequence of which the carrier left them in the custody of the son, who took possession, though, as admitted by him on the record, he had not ordered them from Messrs Aberdeen, Gordon and Company, on his own account.

A few days after the purchase of the yarns, Craik, senior, was sequestrated, when Louison, his trustee, demanded the goods from Craik, junior, on the ground that they were his father's, and were vested in him, the trustee, as part of the bankrupt stock. On refusal to deliver, the trustee presented an application to the Sheriff of Forfar to enforce the demand; but the respondent, who admitted the preceding statement, contended that, as guarantee, he had a right to retain the goods, and to stop them *in transitu*, by the same title that the sellers themselves could have done; and further, that he was entitled to keep possession till relieved of his guarantee.

The Sheriff-substitute found that the respondent had no legal title to the goods, and had no right to apply them in relief of his cautionary obligation, and therefore ordained him to make delivery to the trustee.

The following note was added by the Sheriff-substitute:

"The bankrupt, Craik senior, asked the defender, his son, to purchase some yarns for him. Neither of them seems to have had any intention that the defender, in making the purchase, should incur any responsibility for the price, or derive any emolument from the transaction.

"The defender accordingly bought the yarns in question for

the bankrupt, and by the bargain, these were to be delivered to him by the sellers; the yarns were not to pass through the defender's hands, and he was not, in the character of agent for his father, to have any concern in the matter after concluding the bargain. From that time the defender's character of agent in this transaction ceased to exist.

"The price was payable four months after the delivery of the yarns to the bankrupt, and it so happened that the sellers demanded security for payment of the price. The defender of his own accord became that security. The stipulation for security shows, that both the sellers and the defender held that the defender was under no responsibility for the price in his character of agent for his father, and that his responsibility for the price rested solely on his express obligation as cautioner therefor.

"After the bargain was completed, the only character therefore which the defender held in the matter was that of cautioner for the price. The sellers immediately forwarded the yarn to the bankrupt, and while these were in *transitu* to him, the defender, without any authority from the bankrupt or sellers, took possession of the yarns 'as guarantee for his father,' and still retains them.

"The ruling question in the case therefore is,—Had the defender, as cautioner for payment of the price, right so to take possession of the yarns in relief of his cautionary obligation? It appears to the Sheriff-substitute, that in judging of that question, the defender falls to be held as standing in the same position as any other person who had become security for the price of the yarns, and he thinks that the defender had no right to lay hold of the yarns, and has no right to keep them in relief of his cautionary obligation.

"If the Sheriff-substitute be right in this, then the yarns fall to be held as still *in transitu* to the bankrupt as at the period the defender took possession of them, and must now be delivered to the petitioner as trustee for the bankrupt's creditors,—the sellers having interposed no objection to their being so."

The judgment of the Sheriff-substitute was reversed, on a reclaiming petition, by the Sheriff, who stated his views in the following note:

"The parties are here placed in very opposite situations. The pursuer's plea is directed *ad lucrum captandum* at the expense of the defender, while the plea of the latter is directed *de damno evitando*. The pursuer proposes to take possession of the yarns in question, and to pay some small fractional part of the sum at which they were purchased, and to apply the surplus as a gain to Craik's creditors, leaving the defender the joint debtor for the price, who gets no share of the goods, to make up the difference to the vendors. Such a plea would require to be well founded in strict law; for it is clearly at variance with equity and natural justice.

"There seems to be no room to doubt as to the precise matter of fact which gives rise to the question.

"The goods were purchased by the defender from Aberdeen, Gordon and Company, for the use of his father, the bankrupt, and to whom they were to be delivered. But as a condition of the bargain, the defender was required to grant bill along with his father for the price, and thereby became a joint debtor with his father.

"The goods were sent off by the vendors from Montrose, by the carrier to Forfar, along with a note or invoice of the goods, but which, by mistake, was addressed to James Craik, junior, the defender. The goods were accordingly brought to his warehouse, instead of being carried to the warehouse of the bankrupt; and he took delivery of them.

"The bargain is said by the pursuer to have been made 'on or about 5th August,' and it is further said, that immediately after the purchase (which affords no precise date), the goods were sent from Montrose to Forfar, but the precise day of their arrival there is not given; and finally, it is stated by the pursuer in his petition, that on the 21st August the estates of James Craik, senior, were sequestrated by the Court of Session. The pursuer, as the trustee, now claims the goods from the joint debtor (who holds them in relief and security of his obligation to Aberdeen, Gordon and Company), leaving the defender liable to pay the price to the vendors, with the power of

ranking on the bankrupt estate for his relief, by which he must be a considerable loser.

"The equity of the case is very clearly with the defender, but it remains to be inquired whether he has also law on his side.

"The defender being in the possession of the goods, must have a title to retain possession for indemnification of the obligation which he came under to the vendors, unless the pursuer can show that he has a better title to insist for delivery than the defender has to retain possession. The main question, therefore, turns on the title of the pursuer to deprive the defender of the possession of the goods which he has acquired, and which he retains for his indemnification of the obligation he undertook for the bankrupt.

"In considering that question, it is important to recollect, that the bargain between the vendors and the bankrupt never was completed by delivery to him, or to any one acting for him, of the goods sold (for the pursuer has in his pleadings utterly disclaimed the notion that the son, in taking possession of the goods, was acting as the mandatory of his father), and consequently the bankrupt at no period had a right of property in the goods (*jus in re*), but a mere personal claim on the vendors for delivery. In the meantime, two very important circumstances take place: *Firstly*, by a pure accident the goods are allowed to go into the defender's warehouse; and *secondly*, at that very moment the affairs of Craik, senior, must have been in the very worst state, as in a few days thereafter preparations were made to sequestrate his estates, and which took place on 21st August.

"How soon the defender came to be alarmed regarding the solvency of his father it does not appear, but it is only reasonable to hold, that nothing short of a perfect belief that his father was insolvent and unable to pay the price, can account for his availing himself of the accidental possession of the goods, and retaining them instead of forwarding them to his father.

"If the vendors had entertained the same suspicions, they would have had it in their power to have stopped the goods *in transitu*, and the subsequent bankruptcy would have justified them in doing so. For though the defender remained solvent, yet their bargain being with the defender and his father jointly, the insolvency of either of them would have authorised such a measure, and one of the points maintained by the defender is, that being bound to the vendors for the price, and as he had a right, on paying the price, to demand an assignation to all their rights, he might lawfully stop delivery *in transitu*, in order to prevent loss, which would have been consequent to him on Craik's bankruptcy, if the goods had gone into his possession. The defender, in support of that view, and for showing that, to a certain extent, he had a power over the goods on the supposition of the father being insolvent, has maintained that he might have prevented (had he been in due time apprised of the true state of his father's affairs) the vendors from sending off the goods from Montrose, or he might himself have taken possession of the goods at Montrose and brought them with him to Forfar, and kept them there till he was satisfied that his father was able to pay the price and relieve him of his cautionary obligation; and it appears to the Sheriff that there is much in the plea, that under the circumstances that occurred, the defender might have stopped delivery in the hands of the carrier. Nor was it requisite, as the pursuer so strongly contends for, that the defender should put on the record an averment that his father was actually insolvent, or *vergens ad inopiam*, at the moment he stopped the delivery; as it could not be necessary to state as an averment that which never could be made the subject of proof, viz., the precise opinion which he formed of the state of his father's affairs at the moment of the arrival of the goods in Forfar, in respect of which he did not forward them to his father. It was enough that he thought he had grounds for doing so, which he could afterwards justify; and the fact of the father's bankruptcy within a few days thereafter, would have been a full justification, if he had taken such a step, by stopping the goods in the hands of the carrier. But the defender has, as a separate plea, maintained that the goods having come into his possession, though by an accident or blunder on the part of the vendors, he must have a right to retain them till he obtained himself indemnified or secured against the obligation he came under for his father; and the Sheriff is of opinion that that plea is well founded.

"The title to seek delivery of goods to which the bankrupt never had more than a personal claim, cannot be better than the title of the defender to retain possession in security of his claim of relief against the bankrupt. Both claims may be equitable in the abstract; but the pursuer, who seeks equity, must give equity, and the possession is with the defender.

"The pursuer has argued that it was not 'a lawful possession,' as it was part of the contract with the vendors that the goods should be sent to the bankrupt. But the defender did not acquire possession of them by any scheme of fraud, but by one of those accidents which sometimes occur in business. It could not, therefore, be called an 'unlawful' possession, though it is very true that it inferred an obligation on the defender to forward the goods to his father, provided he had had no claim of relief against his father in regard to the price, for which the defender had bound himself as a joint debtor along with his father. But having, without fraud, come into the possession of the goods, and with which he was materially connected, as a joint debtor for the price, he was entitled, if he believed, and could afterwards show that his father was insolvent, to avail himself of the accident that had occurred; because, in retaining the yarns till his father either satisfied him he was in good circumstances, or, on the supposition, gave him security that he would be relieved of his obligation to the vendors, he was taking no undue advantage of his father; and if his father could not have forced the goods out of his possession, without giving the defender satisfaction in one or other of these two ways, it seems difficult to see how the trustee should now be in a better situation than the bankrupt before his estates were sequestrated. Nor is it unimportant to observe that it is not averred by the pursuer that any demand for delivery of the yarns was ever made by James Craik, senior, from the period of their arrival in Forfar. On the contrary, he appears to have acquiesced in the right of his son to retain them for his own indemnification. The first claim made for delivery came from the trustee."

The trustee presented a note of advocacy against this latter judgment on various grounds, but principally founded on the following pleas:—The respondent having admittedly obtained possession of the yarns, by directing the carrier (who ought, in conformity with an agreement to which the respondent was himself a party, to have delivered them to his father, and who by mere accident stopped at the respondent's warehouse,) to unload and give delivery to him, without any authority whatever, must be held to have taken possession of the goods improperly, and was bound to have immediately delivered them to his father, or the parties in his right. The assumption of the Sheriff, that the respondent obtained possession by a mere accident, and without any active interference on his part, is erroneous. A mere cautioner for the price of goods has no right to stop these goods *in transitu*: Bell, I. 225. Besides, it was essential to the validity of any claim of retention that the goods sought to be retained should have come into possession of the party pleading retention by a just title. As the apprehension of the goods on the part of the respondent on their way to his father's warehouse, was unwarrantable, no right founded on possession of these goods so acquired could be set up against the demand for delivery to the parties in right of the goods. The view of the Sheriff, that the respondent's case was supported by equity, was also erroneous; because the respondent was attempting, by reason of his own improper and unauthorised apprehension of the goods, to establish a preference in his own favour over the general creditors of the bankrupt.

Answered—1. The yarns in dispute not having been delivered to James Craik, senior, they never formed part of his estate. Neither he nor his trustee ever ac-

quired the property or *jus in re* of these articles. 2. There being no proof that the carrier was instructed to deliver the goods to the bankrupt, but, on the contrary, it being averred by the advocator that the note accompanying the goods was addressed to the respondent, it was perfectly lawful for him, who had made the bargain and had joined in the bill for the price, to take delivery and possession of the goods. 3. It was in the circumstances perfectly lawful and competent for Aberdeen, Gordon and Company, to send the goods to the respondent, and thus to make him (who had made the bargain, and was answerable for the price,) the medium of delivery to his father the purchaser. 4. By the possession of the goods so obtained, the respondent was enabled and entitled to avail himself of the privilege of retaining them in security of the price for which he was liable. 5. No proof having been adduced, and no allegation having been made, that the respondent's father, between the time when the yarns were received by the respondent and the date of his own sequestration, applied to the respondent for delivery of the goods, it is to be presumed that he was at this period conscious of insolvency, and would not have received, or been justified in receiving the goods in question into his stock, had they been offered to him. 6. A cautioner, by the law of Scotland, is entitled to have communicated or assigned to him the rights of the creditor as against the principal debtor; and upon the principle of the vendor's right to stop *in transitu*, the cautioner for the price, as an equitable vendor, is entitled to stop the goods *in transitu*, or to retain them, if, in passing from the seller, they come into his hands before final delivery to the purchaser. 7. The advocator's demand in this case is eminently opposed to equity, according to the rule *nemo debet locupletari damno alterius*, in respect he is seeking to enrich the creditors for whom he acts, by inflicting a corresponding loss upon the respondent, by requiring from him delivery of goods, the price of which the advocator is not to pay, but which must be paid for by the respondent.

The Lord Ordinary pronounced the following interlocutor:

"12th January 1842.—The Lord Ordinary having heard parties' procurators, and made avizandum—Sustains the reasons of advocacy, and remits the cause to the Sheriff, with instructions to recal his interlocutor of 21st January 1841, dismiss the appeal against his substitute's judgments of 10th December 1840, and 7th January 1841, and decern of new in terms of said judgment, and *decerns*: Finds the respondent liable in the expenses incurred in this Court; appoints an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report, and *decerns*.

"*Note*.—The Sheriff-substitute seems to have taken the sound view of this case. And so far as the respondent defends himself, 1. Upon his right to stop *in transitu*, which implies that the yarns in dispute had never become the property of the bankrupt; and 2. Upon his right to retain in security and relief of his liability as cautioner, which, on the other hand, implies that the yarns are the bankrupt's property (for otherwise they could not be subject to retention for his debts), the argument is contradictory and incompatible.

"If the yarns are to be dealt with as still *in transitu*, the case against the respondent is very clear. For as a mere surety for the price of the goods, he had not in his own right any privilege of stoppage (1 *Bell's Com.*, 225, and 6 *East*, 371, *ibi cit.*), and as in right of the sellers, while there is no sufficient averment on the record to establish that even these parties themselves would

at the time, and under the circumstances in which delivery was made, have been entitled to stop *in transitu*, there is still less any thing to show that the respondent was substituted in their place.

"The case is not less clear as regards the plea of retention; for in this view, 1. It must be held, either that the *transitus* was at an end, or that the power to stop *in transitu* did not exist, so as to make way for the yarns coming into the respondent's hands as the bankrupt's property; and, 2. The question would then come to be, whether the respondent legally obtained possession of them, as being the bankrupt's property; for if he had no good original title of possession, he could have no proper right to retain. Now, in reference to this aspect of the case, it is admitted, 1. That while the yarns were purchased by the respondent as his father's agent, they were not to pass through his hands in the delivery; but, on the contrary, it was agreed or understood that the said yarns should be delivered by the seller to the said James Craik, senior (the respondent's father), at his warehouse or place of business in Forfar (answer to cond. art. 2); and 2. That the yarns having been despatched by a common carrier for the purpose of such delivery, and the carrier having stopped at the warehouse of the respondent, the respondent 'on discovering that the yarns were those the price of which he had guaranteed, ordered the carrier to disload, and took delivery of them on his own account as guarantee for his father, AND WITHOUT ANY AUTHORITY FROM HIM, ASKED OR GIVEN, and still retains possession.' But the respondent had plainly no right thus to intercept the goods at his own hand. In his character of agent he had none, for the original contract stipulated delivery to his father, and it is confessed that subsequent consent to the contrary was neither asked nor given. It is accordingly in the character of guarantee, and not in that of agent, that he says he interposed. But here, again, there being a total absence of authority from the principal debtor, he had no right to usurp possession at his own hand. It is conceded, indeed, that he could not have done so in respect of any claim against his father, whether as cautioner or otherwise, unconnected with the transaction as to these yarns. But, in point of principle, there was nothing in the terms of that transaction to entitle him to take possession of the yarns to which it related, more than to take possession of any other piece of property belonging to his father.

"The only shadow of pretext that the respondent has for his proceeding is to be found in a statement of the advocators, (cond. art. 5), that the note which accompanied the yarns had been by 'one of the clerks of Aberdeen, Gordon and Company (the sellers), by mistake addressed to James Craik, junior, manufacturer, Forfar (the respondent), in place of James Craik, senior, manufacturer, Forfar, the bankrupt.' But if so addressed, the respondent evidently was aware of, and was not misled by the mistake. Accordingly, he defends his usurpation upon entirely different grounds, stating (answer to article 5), that he 'does not now recollect whether it was addressed to him or his father,' and (answer to article 6,) that it was not therefore by force of any supposed warrant or authority from the form of address, but entirely on his own right 'as guarantee,' and 'on discovering that the yarns were those the price of which he had guaranteed,' that he 'ordered the carrier to disload.'

"Indeed, the Lord Ordinary has great doubts whether the most express warrant from the sellers would have entitled the respondent to withhold or retain the yarns delivered as his father's property, and by the very contract of sale, bargained to be directly delivered to his father. But the respondent does not upon the record aver that he either had, or understood himself to have any such warrant from the sellers. On the contrary, as the record stands made up, he must be held as substantially admitting, that so far as there was any semblance of such warrant, it existed through the mere clerical blunder fallen into by a clerk, who had himself no authority to that effect.

"Some argument was raised upon the ground that the respondent's father might not himself have been in a situation, from his state of bankruptcy, to take delivery of the yarns, supposing them to have been duly forwarded. But here, once more, the record is not sufficiently precise, either as to the date of delivery of the yarns, or as to the date of the bankruptcy, to let in a question of this kind. At all events, there seems reason to doubt the validity of the plea in the respondent's mouth, seeing

that he can only defend his own possession through the medium of some basis of right in the bankrupt, and must therefore inevitably assume that the property had *lawfully passed* to the latter."

The respondent reclaimed, but the Court *adhered*.

Authorities for Advocate.—Smith's Compend. of Mercantile Law, p. 451. Brodie's Stair, p. 879. Bell's Dic. v. Retention. More's Stair, Notes, p. 133. Ersk. III. 4, 20. Brodie, 27th June 1837. Haswell v. Hunt, 5 Term. Rep., 231. Scott v. Pettir, 3 Bos. and Pull., 471. Inglis v. Royal Bank, 8th Dec. 1736. Robertson and Aiken v. More, 3d July 1801. Steins, 16th Nov. 1810, F. C. Collins, 23d Nov. 1804, in Note to Bell's Com., I. p. 228.

Authorities for Respondent.—Archbold on Bank. Law, 8th Ed., p. 225. Hawkes v. Dun, 1 Compton and Servis, p. 519. Bell's Com., I. 225.

Lord Ordinary, Ivory.—Act. Anderson, Patton; Graham Binny, W.S., Agent.—Alt. Solicitor-General (M'Neill), H. J. Robertson; James Burness, S.S.C., Agent.—T. Clerk.—[G.D.F.]

22d June 1842.

SECOND DIVISION.—(G. D. F.)

No. 227.—JAMES RITCHIE and JOHN CRAIGH, *Suspenders*, v. JAMES MOIR and ROBERT JAMESON, *Respondents*.

Bill of Exchange.—Suspension.—At a roup of certain tolls of several lines of road, managed under different Acts of Parliament, a party took the lease of one of the bars, and granted his bill for the rent. On the averment that he had been induced to take the lease on the supposition that the tolls on the different lines were managed together, and for joint behoof, and that nothing would be done by the trustees on the one line to affect the traffic on the other, he presented a note of suspension of a charge for payment of the bill; and further, on the averment that their understanding had been broken through by the trustees, by taking compositions and lower tolls on one of the lines, whereby his bar was injured,—he prayed for suspension of the charge, and for interdict against the trustees taking compositions or lower tolls. Note refused, in respect the Road Acts were distinct and separate in their provisions, and that the one set of trustees had no control over the management of the others.

There are three lines of turnpike which run through the county of Clackmannan, generally known as the Clackmannanshire or Coast Road Trust, the Kinross and Alloa Trust, and the Ochil Turnpike Trust, for all of which separate Acts of Parliament had been obtained. The respondent, Jameson, who is Sheriff and Commissary-clerk of the county, was appointed clerk and treasurer for the first-mentioned line of road, by the trustees acting under the particular Road Statute; and he also holds the like, but separate, appointment under the trustees of the Ochil trust. The other respondent, Moir, acts as clerk under the appointment of the trustees of the Kinross and Alloa trust; and the trustees under these Acts are different parties, and entirely separate and independent of one another. It appeared also, that the respondents were in business together.

The different toll-bars on these lines of road were advertised by the respondents to be let for the year to Whitsunday 1841, at the same place, viz., within the Tontine Inn, Alloa, in May 1840,—the table of tolls of all which were advertised to be seen at the Sheriff-clerk's office, Alloa, where the respondents carried on business. On that occasion (May 1840) the suspender offered for the Gateside bar on the Kinross and

Alloa line, and was accepted at the rent of £205, for which he granted his bill along with the other suspender as security, and which was payable in twelve equal instalments. This bar, it appears, is about a mile and a-half from Alloa, and at no great distance from either of the other roads, both of which run in a manner parallel to the Kinross and Alloa turnpike. It was averred by the suspenders that the three branches of road were regulated by the same system, and were managed, as a joint concern, under the authority of the trustees, at the Sheriff-clerk's office, by the respondents, who, on the occasion of the let, held out this to the offerers present, and that relying on this, and that nothing would be done on the one line of road to hurt the other, he had made the offer and granted his bill. He condescended on a variety of particulars in regard to the way in which the respondents acted in the alleged management, and in their business, as giving ground for the inference that the management was for general behoof. He stated, that soon after he became bound for the rent, he discovered that the respondents had entered into certain arrangements with parties resident along the two parallel lines of road opposite his own turnpike, in virtue of which lower rates of toll, and compositions for toll, were taken, which withdrew the traffic from his line, and entirely prejudiced and injured his bar, contrary to the understanding and intention of parties at the letting. In particular, he set forth, that the greater part of the traffic on the road at the Gateside bar (as well as at the Gabberstone bar) arose from the passage of coal to Alloa from the adjacent collieries; and the suspender very soon found that, by an agreement of the kind alluded to, made with Mr Christie, tacksman of the Aberdona colliery, and Mr Maxton, manager of the Woodlands colliery, the source from which the rent of Gateside gate was to be paid by the suspender, was almost wholly taken away. The distance from the Aberdona colliery to Alloa by the Gateside bar, is a mile and three-quarters less than by the Whins bar, and the Whins bar can only be reached by a circuitous and bad road. Nevertheless, Mr Christie, whose carts formerly passed Gateside, began to send his coals round by the Whins, although the additional length of road was such that he was compelled to pay fourpence per ton of additional hire for carriage. Almost immediately after the roup, a printed placard also was issued by Mr Maxton, giving the following intimation:—"To the inhabitants of Alloa. Persons driving coal from this work (Woodlands colliery), by receiving a ticket from the griever, will pass toll free at Whins." A reduced rate or composition was not only to be taken for Mr Maxwell's own carriages, horses, and carts, but he was to receive power to communicate the privilege of passing for a low rate, or nothing at all, to any one who chose to take coals from his work; and persons, accordingly, who produced Mr Maxton's tickets, were allowed by the trustees to pass free at the Whins. The trade at the Gabberstone bar was injured in a similar way, and more particularly by the public who used to frequent the Clackmannan colliery, which is situate between the Gateside bar and Alloa, and who passed the Gabberstone bar, sending their carts to Woodlands and Aberdona collieries.

The suspender complained to the respondents, and

protested against this procedure, and also refused to pay an instalment falling due on 15th July 1840. A charge of payment having been given by Moir, as treasurer of the Kinross and Alloa turnpike trust, of certain instalments which had fallen due, the suspender presented this note, praying for suspension of the charge, and to interdict the respondents and the trustees on the Ochil road, from taking reduced toll at the Whins toll-bar, &c. There were various grounds of suspension, several of which were objections taken on the General Turnpike Road Act; but the leading objection was, that the suspender, as lessee of the Gateside bar, was entitled to be kept and protected in the possession of the toll-duties as let, as the condition on which the rent is exigible. More particularly, the bar, along with the others on the Ochil, Clackmannan, and Kinross roads, was let at the joint roup, under the concurring act and arrangement of the trustees on these roads, adopted, as in previous years, for their common benefit, before the same individuals assembled, and through the representations and information given at the same business-place by the same public officer and his assistants, who were not entitled thereafter (nor any of the trustees represented by their acts and proceedings), in any way to impair and take away the produce of the bar. So far as the rights acquired at this roup were concerned, the Kinross trustees were bound to know what the Ochil trustees intended to do, and the latter to attend to what the former had done; and it was incumbent on all of them to respect the rights so acquired.

In answer, it was explained by Moir, that it was entire misapprehension to suppose that there was any joint management, as the three trusts were entirely separate and distinct; that in regard to the arrangement by which lower tolls were taken on the Ochil branch road, he was no party to it; that it was the other respondent who took compositions for toll on that road; and that he, Moir, had nothing to do with that, as the trusts for which Jameson acted, were in no way connected with the Kinross and Alloa line, for which he acted, and on which the suspender leased a bar; nor was he, as an officer of that trust, in the least degree connected with, or responsible for such acts of management as Mr Jameson considered he was entitled to perform, in the execution of the duties confided to him by the trustees of the other and separate trusts. And he specially denied the statements of joint management, or that such had been held out at the letting to the suspender or the offerers present. And he maintained accordingly, and in opposition to the application for suspension and interdict, that the bill charged on being a valid document, the suspender was bound to pay the instalments charged for; and that when the suspender took the Gateside bar, neither the respondent nor the trustees for whom he acted, came under any obligation with him, express or implied, respecting the Whins toll, or any other bar situated on a different road from that which was under their management; and the respondent, therefore, was not responsible for the proceedings of other trustees managing different trusts under their local Acts. Further, that as neither he nor the trustees of the Kinross and Alloa turnpike-road were parties to, or in any way connected with, the agreements for composition of tolls ex-

gible at the Whins gate, it was impossible for the complainers to found on these agreements as in any way altering or affecting the obligations entered into by them with the respondent and the trustees of the Kinross and Alloa turnpike-road.

Jameson, in reference to the reason for taking the lower tolls at the Whins bar, explained, that that bar had been for several years past kept by the Ochil trustees in their own hands; certain agreements between them and the Devon Company rendering it necessary, or at least convenient, for them to do so. During these years it had never been let, or even advertised to be let, but the toll-dues have been received by a confidential person for behoof of the trustees, and by him they were regularly paid into the Commercial Bank. While this toll had been managed in this manner, the trustees found it expedient to enter into composition-contracts, by which means a considerable part of the revenue of the gate was paid directly to the respondent as their treasurer, and not to the collectors at the Whins. In this manner the composition-contracts complained of were entered into with Mr Maxton and Mr Christie. Both these contracts were in terms of the Statutes, and it was denied that the suspender had either any interest or any title to object to them. Both Mr Maxton and Mr Christie were parties using the road in terms of the Act, and it is in that character that the composition was made with them.

He *pleaded*—That never having entered into any agreement or contract with the complainers, either direct or implied, he consequently was not liable to them for having violated his agreement. The Ochil trustees were a separate and independent body, altogether unconnected with, and independent of, the trustees of the Kinross and Alloa turnpike, and in no degree responsible to them for their management, and still less were they responsible to the complainers, the tackamen of a toll belonging to a trust with which they have no concern, and in which they have no interest: That the Ochil trustees, in the execution of the trust committed to them, had in every respect and particular acted in strict conformity with the provisions of the local Statute and of the general turnpike Act. The conclusions for interdict against the respondent, to prohibit him from entering into compositions for tolls, were unwarrantable and absurd, and directly contrary to the terms of the 53d section of the general turnpike Act.

The Lord Ordinary pronounced the following interlocutor:

"3d March 1842.—The Lord Ordinary having heard parties, and considered the process, repels the reasons of suspension and interdict: Finds the letters orderly proceeded; refuses the interdict and decerns; finds the respondent entitled to expenses; appoints an account thereof to be given in, when lodged, remits to the auditor of Court to tax the same and to report.

"*Note*.—The Lord Ordinary does not think that the suspender has been successful in attempting to detect anything unlawful in any of the proceedings even of the Ochil road trustees. But though it had been otherwise, the Kinross road trustees, from whom Ritchie took his toll, and to whom his bill is due, form a separate and independent trust, and Ritchie cannot withhold payment of the liquid debt due to them on account of any illiquid claim of damages which he may suppose that he has against an adjoining trust.

"The case of Fairley has no application; because, though there was a separation of trust *quoad* management, the warren-

dice given there to the lessee was held to be the general trust of the county. Here there is an entire statutory separation."

The suspenders reclaimed. At advising,

Lord Meadowbank.—The trustees are entirely different parties, and acting under three different Road Acts; and the respondents, who are appointed respectively under different Acts, are not connected with one another in the business of the different roads. They seem to be engaged in other business together, but that is not prohibited by the general Act, or by the Statutes in question. His Lordship did not consider that it would have made any difference, even supposing that one of the respondents had been clerk under the different acts, and had advertised them, as was here done, for the same occasion. The procedure that took place at the letting, must be construed with reference to the separate Statutes, and then there was no difficulty. His Lordship considered that the Lord Ordinary was right, and that it was impossible, in the circumstances, to suspend the diligence on such averments, particularly as it was not set forth by the suspender that the respondents, on the day of letting, told him that the Ochil trustees were not to act as they did.

Lord Medwyn concurred, and said the suspender was bound to have known that the respondents were acting separately under different Statutes. There was nothing in the Act of the Kinross line which gave these trustees a title to control the trustees of the Ochil line in taking compositions. His Lordship did not think that it affected the question that the respondents carried on other business together, and agreed that the interlocutor ought to be adhered to.

Lord Justice-Clerk was not prepared to differ, though he had had some doubts whether it was not a case which ought to go to a jury, if the facts which were stated were sufficient to create the belief that the management and letting was a joint matter. His Lordship, however, concurred.

The Court accordingly *adhered*.

Lord Ordinary, Cockburn.—*Act.* Robertson, Henderson; Graham and Anderson, W.S., *Agents.*—*Alt. Dean of Faculty* (Wood), Solicitor-General (McNeill), H. Bruce; H. G. Dickson, W.S., *Agent.*—*F. Clerk.*—[G.D.F.]

23d June 1842.

FIRST DIVISION.—(H. B.)

NO. 228.—THE EARL OF BUCHAN, *Pursuer, v. HARRY SHIPLEY ERSKINE and OTHERS, Defenders.*

Entail—Fetters.—*An entail prohibited selling, disposing, contracting debt, 'or to do any other fact or deed in prejudice of the said tailzie, or the persons above named,'—resolved the right of any heir who should 'failzie herein, or do any thing contrair to this my destination and appointment,'—and irritated 'all dispositions and other deeds whatsoever, made or done contrair to the said provision and destination'—Held that these fetters were effectual.*

The Strathbrock entail contains the following fettering clauses:

"It shall noways be leissum or lawfull to any of the heirs of tailzie and provision above specified to sell, dispone or wadsett the lands, barrenie and others above written, or any part thereof, or any annualrents or yearly duties to be uplifted of the samen, or to sett tacks thereof for longer space than their own lifetimes, or to contract debt for which the samen may be apprized or adjudged, or to do any other fact or deed in prejudice of the said tailzie, and of the persons above named, and their forsaids;" and if any of the heirs of tailzie "shall, in any time coming, failzie herein, or do any thing contrair to this my destination and appointment, then and in that case the person or persons sva failzieing and doing in the contrair hereof, and the heirs of their bodies, shall amitt and lose their right and haill benefite of this present bond of provision, and infeftments following hereon, and of the haill lands, barrenie and others above written, and the samen shall in all time thereafter pertain, belong and access to the next person for the time, who be vertue of the said tailzie and provision would have succeed-

ed to the said lands and estate failzieing the said persons contraveeners, and the heirs of their bodies; and all dispositions and other deeds whatsoever, made or done contrair to the said provision and destination, with all that shall follow yron, shall be *ipso facto* voyd and null without any declarator, and shall noways affect nor burden the said lands, barrenie and oysr above written, or any part thereof, as if the same had never been done."

The Earl of Buchan, the heir in possession under this entail, brought the present action of declarator, in which—subsuming that the bond of tailzie does not contain effectual irritant and resolute clauses against "selling, disposing, or wadsetting" the lands, or "setting tacks" for a longer period than the lifetime of the heirs in possession, or "contracting debt for which the same may be apprized or adjudged, or alienating or affecting the said lands, barony and others in any manner, or on any motive whatsoever"—he concluded to have it found and declared that he had full power, at pleasure, to alter and infringe the order of succession—to sell, alienate, dispone and convey the lands, or any part of them, for a price or onerous consideration, without any obligation to reinvest the same—to contract debts that would affect the lands,—and to alienate and dispone them gratuitously in favour of any person or persons whatsoever.

The record having been closed on summons and defences, and mutual cases lodged, the Lord Ordinary made avizandum to the First Division, and issued the following note:

"This question is taken to report as it is prepared for judgment by elaborate cases on both sides, which are printed, and ready for the consideration of the Court; and both parties expressed a desire to obtain a judgment with as little delay as possible.

"The question relates to the validity of the entail of the estate of *Strathbrock*, which has been for some time an inheritance in the family of the noble pursuer; and it is one of the many cases now raised on exceptions taken to the phraseology and efficacy of the statutory clauses. These are objected to on grounds which the Lord Ordinary has not been able to satisfy himself can be sustained without giving a greater effect to a verbal and hypercritical construction than the Court has ever yet admitted in any preceding cause.

"The entail is said to be defective in the *resolutive* and *irritant* clauses, each of which, therefore, require to be carefully examined.

"1. The *resolutive* clause follows the prohibitory, (see printed entail, p. 6, E F), and it is a fundamental point of the case, deserving notice, that the *prohibitory* clauses are *admitted* to be complete, embracing the three heads of prohibition authorised by the Act 1685.

"It is next important to remark, that the *resolutive* and *irritant* clauses, in point of collocation in the present deed, *immediately follow the prohibitions*; after an enunciation of the prohibitions, the *resolutive* clause proceeds thus:—'And if my said daughters and their heirs, or any other the heirs of tailzie, &c., &c., shall in any time coming *failzie herein*, or do any thing contrair to this my destination and appointment, then and in that case the person or persons sva failzieing, and doing on the contrair hereof, shall amitt and lose their right,' &c., &c.

"And the *irritant* clause declares, that 'all *dispositions and other deeds whatsoever*, made or done contrair to the said provision and destination, with all that shall follow thereon, shall be *ipso facto* void and null.'

"With regard to the first of these clauses (the *resolutive*), the Lord Ordinary is of opinion that it must be held as a general, and not as an enumerative clause. It bears a reference to the whole of the preceding part of the deed; and the provision as to any of the heirs who shall *failzie herein*, seems alike comprehensive and unqualified, as well as the declaration that 'the

persons saw failzieing and doing in the contrary hereof, shall amit and lose the right,' &c.

"This provision hardly admits of any other construction than this, that if any heir 'shall failzie herein by acting contrary to any part of the preceding deed,' or if they shall fail 'to observe the conditions and limitations imposed on them,' they should amit and lose their right, &c., &c. These exegetical words, it is well known, are used in many tailzies. But when the clause is directed in short and unqualified terms against all who 'failzie herein,' it is equally effectual, as it applies to all failures of whatever kind they may be, contrary to any conditions of the tailzie.

"No doubt the resolute clause also contains the alternative words applicable not only to the heirs who shall 'failzie herein,' but also who 'shall do any thing contrary to this my destination and appointment;' but it is not thought that these words can be held, on any fair construction, as qualifying the general term which precedes it. The reference to 'my destination and appointment' cannot be viewed as applying to the clause of destination only, as, even in the strictest construction, the word 'appointment,' which is also used, is a peculiar and generic term, referring to the constitution or appointment of heirs under all the preceding provisions and conditions of the settlement. Suppose it had been declared that the heirs who shall do any thing contrair 'to my settlement hereby made,' shall forfeit their right, &c., that provision would certainly have been sufficiently explicit to embrace the whole of the preceding clauses of the deed; but the Lord Ordinary has not been able to satisfy himself that the term 'appointment' is not as effectual and comprehensive as 'settlement.' More especially ought that construction to be adopted when the preceding words are taken into view, which apply, without exception or limitation, to all 'who shall failzie herein.'

"2. The objection to the irritant clause is different, but it depends much on the right construction which is due to the resolute clause. The irritant follows the resolute clause, and it provides, that 'all dispositions and other deeds whatsoever, made or done contrair to the said provision and destination, with all that shall follow thereon, shall be ipso facto void and null,' &c. &c.

"The objection to this clause seems to be founded on the plea which was sustained against an entail in the case of Speid (21st February 1837), in which an irritant clause, directed against all who should 'act and do in the contrary of the provision above set forth,' (thus using the term in the singular number), was held void for uncertainty, as it was not made perfectly clear to which of the foregoing provisions it applied.

"Without impeaching the authority of Speid's case (which was not an unanimous decision, and was not carried to appeal), it appears to the Lord Ordinary, that the very strict rule of construction there adopted, cannot be extended to any other entails where there is any essential difference in the structure of the deed from that on which the question arose in Speid's case. The Lord Ordinary views the present as an entirely different deed. In Speid's case, the irritant clause followed the prohibitory, and preceded the resolute: and certainly when there were a great variety of provisions, and when it was declared in the next sentence, that any who acted contrary to the provision above set forth only—there was room for arguing that the maker had not pointed out with precision which of the provisions he intended to irritate.

"But the present is a very different case. Here the irritant clause immediately follows the resolute, and, like that clause, it is general and not specific. And the argument sustained in Speid's case is inapplicable here; because, although the word 'provision' is used in the singular number, it refers, from its collocation and grammatical construction, to the general provision in the resolute clause immediately preceding, which was a general provision restricting the right of all heirs who should 'failzie herein.' In short, the irritant clause just irritates all the deeds of the heirs whose rights shall fall within the forfeiture of the resolute clause,—and that is sufficiently broad to apply to every act and deed at variance with the entail.

"Besides, in this particular tailzie, and in the resolute and irritant clauses themselves, the term 'provision' is evidently used in a generic sense. Thus, in the resolute clause, the deed of

tailzie is referred to as 'this present bond of provision,' and, in the same sentence, it is declared that the estate, in case of contravention, shall pertain to 'the next person for the time who be vertue of the said tailzie and provision would have succeeded to the said lands,' &c. Hence, when it is further declared in the irritant clause, that 'all dispositions made and done contrair to the said provision and destination' shall be void and null, it seems clear, from the use of the term in the immediately preceding sentence, that the maker of the deed used the term 'provision' as synonymous with 'tailzie.' This is not a matter of remote inference. Any other interpretation of the term would, it is thought, be contrary to the plain and unmistakable import of the deed.

"If these views of the leading pleas in this declarator be correct, it is unnecessary to enter into the other questions discussed in the revised cases. But if the Court shall be of opinion that the entail is ineffectual from any defect in the resolute or irritant clauses, then the extent of the heir's powers to make gratuitous alienations will fall to be considered. As the Lord Ordinary has called the attention of the Court to this subject in sundry recent cases, particularly in those of Eglington, Polmaise, and Duthie, it is sufficient to suggest that these cases should be kept in view in deciding the present."

The Court ordered a consultation of the whole Judges.

The following opinions were returned:

Lords Murray, Cuninghame, Cockburn, Moncreiff, Meadowbank, Medwyn and Jeffrey:

"We agree in the opinion expressed by the Lord Ordinary. The entail prohibits selling, disposing, contracting debt, 'or to do any other fact or deed in prejudice of the said tailzie, or of the persons above named.' The resolute clause is immediately connected with the prohibitory clause, and provides, that if the heirs shall 'failzie herein, or do any thing contrair to this my destination and appointment,' their right shall be resolved. This is not ambiguous. It provides for the heirs either failing in what the deed enjoins, or acting in opposition to what the granter had appointed by it. The irritant clause is connected with the resolute, and declares that 'all dispositions, and other deeds whatsoever, made or done contrair to the said provision and destination,' &c., shall be void and null. The terms here used, 'said provision and destination,' are as comprehensive as those of destination and appointment, and comprehend the whole entail. This case is therefore materially different from that of Speid (21st February 1837, 15 Shaw, 618). There the deed contained complex clauses, which formed distinct and substantive provisions in the entail, and the irritant clause was so framed that it could only apply to one of them, but the deed left it altogether uncertain to which particular provision it applied. Here the deed, although made before the Act 1685 was passed, has been framed with greater clearness, and is much in accordance with the language and enactments of that Statute, which sanctions tailzies 'with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the saids lands, or any part thereof, or contract debt, or do any other deed whereby the samyn may be apprysed, adjudged or evicted from the other substitute in the tailzie, or the succession frustrate or interrupted, declaring all such DEEDS to be in themselves null and void,' &c. The Statute was probably framed having that or some similar deed in view."

Lord Ivory:

"I am, on the whole, inclined to think that this is a good entail. The only point, indeed, on which I entertained a doubt was, whether the irritant clause was sufficiently expressed to reach the contraction of debt: And upon that head, though my scruple has finally given way, I cannot help still thinking that the case is a very narrow one.

"Looking, however, to the whole context, and observing—(1.) that the prohibitory clause classifies, as it were, the 'contracting debt' under the same general category with those non-enumerated cases of contravention, which it describes as the 'DOING any OTHER fact or DEED in prejudice of the said tailzie;' and, (2.) that the resolute clause strikes at the contrac-

tion of debt (as well as the other matters prohibited) under such general words as 'failzie herein, or DO any thing contrair to this my destination and appointment;' or again, 'failzieing and DOING in the contrary hereof.'—I have finally come, though still not without hesitation, to hold that the irritant clause, in declaring that 'all dispositions and other DEEDS *whatsomever*, made or DONE contrair to the said provision and destination, shall be void and null, and shall noways affect nor burden the said lands,' is sufficient to meet the case of debt,—as a 'DEED in prejudice of the said tailzie,' under the terminology of the *prohibitory* clause,—as a 'thing DONE contrair to this my destination and appointment,' or 'DONE in the contrary hereof,' under the terminology of the *resolutive* clause;—and finally, under the terminology of the *irritant* clause itself, as a 'DEED *whatsomever* DONE contrair to the said provision and destination,' and calculated to 'affect and burden the lands;'—And that, on the whole matter, the words 'other deeds *whatsomever*,' as they occur in the irritant clause, are not to be construed in the mere limited sense of deeds *ejusdem generis* with the 'dispositions' mentioned in a preceding portion of the clause,—that is to say, as deeds in the technical sense of *written instruments*, in contradistinction to the more natural sense of ACTS or DOINGS of the party.

"The words 'the said provision and destination' as they occur in the irritant clause, I hold with Lord Murray to be synonymous with the words 'this present bond of provision'—or 'this my destination and appointment'—or 'the said tailzie and provision'—or simply 'the said tailzie,'—all of which expressions occur in close juxtaposition in this part of the deed; and therefore it follows, that the words 'deeds *whatsomever* done contrair to the said provision and destination' are not to be confined merely to deeds done in alteration or prejudice of the destination or order of succession, but embrace *debts* as one of the forms of 'deeds done' generally as a contravention of the entail.

"I may just add—1. That even were the entail to be held defective as regards the *contraction of debt*, I can see no ground whatever for sustaining the conclusions of the libel in any other respect: But, 2. I have great doubt whether, in any view of the case, the present pursuer would be entitled to succeed in this action. The ground of action, as he has laid it in the summons, raises a question exclusively *inter heredes*. It is not set forth that any *sale* of the estate has been attempted, or that *debt* has been contracted, or that a *gratuitous alienation* has been executed, or that any thing has been done to affect or alter the *order of succession*. The fact may or may not be that some of those things have been done, but the summons does not raise the point; and there is here, accordingly, no question with any *third party*, whether as *creditor* or otherwise. Now there can be no doubt that the entail, *under the prohibitory clause alone*, is effectual at all events *inter heredes*. And, to borrow the words of Lord Moncreiff's opinion in the case of *Aboyne* (now also before the consulted Judges), 'it is a mistake to say, that if there be an effectual entail *inter heredes*, the Court will try a question concerning the possibility of a valid sale, &c., being made *where no sale, &c., has been attempted*. They have repeatedly refused to do so.'

The Court assoltized.

Lord Ordinary, Cuninghame.—Act. Rutherford, Park; C. H. Miller, W.S., Agent.—Alt. Solicitor-General (M'Neill), Marshall; Nairne and Bertram, W.S., Agents.—B. Clerk.—[H.B.]

23d June 1842.

FIRST DIVISION.—(H.R.)

NO. 229.—THE EARL OF BUCHAN, Pursuer, v. HARRY SHIPLEY ERSKINE and OTHERS, Defenders.

Entail—Irritant Clause.—A clause irritating "all the debts and deeds" of the heirs of entail, and also "all adjudications or other legal diligence" used upon the same, found to be an effectual irritancy.

The irritant clause in the entail of Dryburgh provides and declares, that

"all the debts and deeds of the said whole heirs of tailzie and substitutes above mentioned, or of any one of them, contracted, made or granted, as well before as after their succession to the lands and others above disposed, and all adjudications or other legal execution or diligence that shall happen to be obtained or used upon the same (excepting as is above excepted), shall not only be void and null, with all that shall follow, or may follow thereon, in so far as they might any way affect the said lands and others."

The Earl of Buchan, the heir possessing under the entail, brought the present action of declarator, subsuming that the above clause does not contain an effectual irritancy, and concluding as in the previous case.

The Lord Ordinary, in making avizandum to the First Division, issued the following note:

"This case is taken to report from a desire to accommodate the parties, who have printed elaborate cases on the question at issue, and have united in a request, with reference to the interest of creditors, that the cause may be put into the course of final decision as speedily as possible. In acceding to this request, the Lord Ordinary must add, that he does not view the question at issue as attended with any serious difficulty.

"The action relates to the validity of the entail executed by the late Lord Buchan, of the estate of Dryburgh, in 1810; the chief object of the declarator being to have it found and declared that the *irritant clause* of that deed is partial or incomplete, and ineffectual. That clause is repeatedly brought into view in the argument of both parties (revised case for pursuer, p. 3), but notwithstanding the ample commentary on the deed of tailzie, and the learned exposition of the authorities given in the revised case for the noble pursuer, the Lord Ordinary must own that he conceives that no ingenuity can successfully assail this irritant clause.

"It is hardly possible for a provision more general and comprehensive to be put into legal language than that which forms the subject of the present question. It provides and declares, 'that all *debts and deeds* of the said whole heirs of tailzie and substitutes above mentioned, or of any one of them, contracted, made or granted, as well before as after their succession to the lands and others above disposed, and all adjudications or other legal execution or diligence that shall happen to be obtained or used upon the same (excepting as is above excepted), shall not only be void and null, with all that has followed or shall follow thereon,' &c. &c. When it is thus declared that all *debts and deeds* of the heirs, contracted, made or granted, shall be null, under the exceptions before specified, that provision is of itself a complete irritant clause, voiding all debts contracted, or deeds of sale, alienation or alteration of whatever kind, that may be attempted by any of the subsequent heirs. So far the case bears a strong similarity to the case of *Finzean* (18th June 1840), and to the late case of *Auchendoir*, (26th November 1840.)

"It is argued, however, on the part of the noble pursuer, that as the provision in this irritant clause voiding all debts and deeds, is accompanied with the farther declaration, that 'all *adjudications*, or other legal execution or diligence that shall happen to be obtained or used upon the same (excepting as above excepted) shall be void,'—that therefore such debts and deeds only were vacated as may be the subject of adjudication or legal diligence. But the Lord Ordinary does not think this a legitimate construction, in the most critical view of the clause. He conceives that the general voidance of all debts and deeds 'contracted, made or granted,' applies to all *voluntary* acts of contraction, alienation or alteration, excluded in the prohibitory clause; and it surely cannot derogate from that irritancy, that the maker of the tailzie, in addition to the nullity of debts and deeds, provided (perhaps with superfluous anxiety) that all *adjudications* and other *legal diligence* used for the same should also be void.

"The plea of the noble pursuer proceeds on the supposition, that there may be prohibitions for which adjudications could not be led, which, according to his Lordship's construction of the irritant clause, would thus be unprotected by any effectual voidance. But that plea is not fairly maintainable. It is mani-

fest that adjudications may be led on acts and deeds done under each of the heads of prohibition authorised by the Act 1685. If debt is contracted, adjudications may of course be led for it; if sales or alienations be made, or if deeds of alteration of the succession be granted, adjudications in *implement* may be led on the deeds by which these acts are attempted to be carried into effect, and therefore, it forms no ground for any presumed limitation or qualification of the debts and deeds, which are all irritated under the first branch of the clause, to find that adjudications led for the same are also specified as void in the subsequent part of the same sentence.

"The Lord Ordinary holds the present question as decided by the case of *Elibank* in 1833, brought fully into view in the defender's revised case (p. 11-14), in which the entail was supported after a very full argument. It is contended here, indeed, that certain words have been omitted in the Dryburgh entail which were inserted in the corresponding clause of the *Elibank* entail, as well as in the form of entail published in the Juridical Styles; but the words omitted do not appear to be in the least degree material either to extend the scope of the irritant clause or to illustrate the meaning of the maker. All the material terms used in the *Elibank* entail occur here; and it is thought that both the note of the Lord Ordinary, and the opinions of the Court delivered in the *Elibank* case, apply with equal force to the present question."

The Court having ordered a consultation of the whole Judges, the following opinions were returned:

Lords Murray, Moncreiff, Meadowbank, Medwyn, Jeffrey, Cockburn and Cuninghame:

"The pursuer, in this case, maintains that the irritant clause does not apply to sales and alienation of the estate, or to alterations of the order of succession. The entail contains direct prohibitions against altering the order of succession, against selling and alienating, and against contracting debt, or doing any act that shall be the ground of an adjudication. The irritant clause, the validity of which is questioned, declares, that 'all the debts and deeds of the said whole heirs of tailie and substitutes above mentioned, or of any one of them, contracted, made or granted as well before as after their succession to the lands and others above disposed, and all adjudications or other legal execution or diligence that shall happen to be obtained or used upon the same (excepting as is above excepted), shall not only be void and null, with all that shall follow, or may follow thereon, in so far as they might any way affect the said lands and others. But also,' &c.

"The pursuer contends, that it is only in so far as there are adjudications or other legal executions, that the debts and deeds are made void and null. But that construction is contrary to the express terms of the clause, which first enumerates all debts and deeds, and next adjudications, and declares 'that they shall not only be null and void, so far as they affect the lands, but the rights of the heir forfeited.' There is no room for holding that the irritancy applies only to debts and deeds on which adjudications happen to be obtained. In plain and unavoidable construction, the clause applies directly, in the *first* place, to the debts and the deeds of the heirs of entail, and it *next* applies to adjudications or legal execution that shall happen to be obtained. The irritancy is as clearly applicable to the one as to the other. It was perhaps superfluous, as the Lord Ordinary has observed, to declare that the adjudications and legal diligence that might be obtained were to be null and void,—but the nullity is noway confined to these adjudications, but as clearly applies to the debts and deeds, in so far as they might affect the lands, as to the adjudications.

"*Second*, The pursuer has stated as another ground of action, that the irritant and resolutive clauses are not inserted in the precept of sasine. As they are contained in the deed of which that precept forms a part, and which orders the sasine to be granted on the conditions therein specified, and no otherwise, they form part of that precept. Lord Kilkerran's report of the case of *Kynninmound* shows that this construction was recognised in this Court nearly a century ago, and it does not appear to have been ever disputed since.

"We are therefore of opinion, that the objections made by the pursuer to this entail are not well founded."

Lord Ivory:

"I concur. On the first point, more especially, the cases of *Elibank* and *Auchendoir* are substantially in point.

"*N.B.*—This case is also open to the remark which I have already made in *Strathbrock* (between the same parties), in respect of its raising a question solely *inter hæredes*."

The Court assailed.

Lord Ordinary, Cuninghame.—*Act.* Rutherford, Park; C. H. Miller, W.S., *Agent.*—*Alt.* Solicitor-General (M'Neill), Marshall; Nairne and Bertram, W.S., *Agents.*—*B. Clerk.*—[H.B.]

23d June 1842.

FIRST DIVISION.—(H. B.)

No. 230.—THE COMMERCIAL BANK OF SCOTLAND, *Raisers*, v. MRS JOAN BLACK or HAINING, *Claimant*, and JOHN HAINING, *Claimant*.

Husband and Wife.—*Jus Mariti.*—*A sum of money, identified as the amount of a bequest to a wife, independent of her husband, not chargeable with his debts or engagements, and payable on her receipt alone, and lying in bank on a receipt in her name—held to be her sole property, exclusive of the jus mariti.*

Captain John Stothart, by his last will and testament, appointed his executors to place at interest on Government, or real securities in any manner they should think proper, the proceeds of one-third part of his whole estate and effects,—the interest to be paid to his father, Joseph Stothart, during his lifetime, and after his decease the principal to be paid to his niece, Joan Black,

"provided, or as soon as, she has attained the age of eighteen years, independent of her then present, or any future husband or husbands, and without being subject or liable to, or charged or chargeable with his or their contract, debts or other engagements,"—"her receipt alone for the same" being "a good and sufficient discharge," "notwithstanding of her then present or any future coverture."

John Stothart survived his father, Joseph Stothart, and died in 1803; and in 1812, Joan Black having attained her eighteenth year, became entitled to payment of her uncle's bequest. It was, however, allowed to remain in the executor's hands till 1816, when Joan Black was married to Robert Haining, and then its amount (£600) was lent out by the executor on heritable security in her own name, and for her exclusive behoof. In 1818, £100 of the bond was paid up, and in 1838 the remaining £500, which was thereupon deposited in the Commercial Bank upon a receipt taken in Mrs Haining's name. The sum remained thus deposited; and the marriage having been dissolved in 1839 by the death of Robert Haining, intestate and without issue, a competition arose between John Haining, the brother of the deceased, and the widow, Mrs Haining,—the former insisting that the £500 formed part of the moveable estate of the deceased, and the latter claiming it as her exclusive property.

To determine the preference, the present multipointing was raised by the Commercial Bank.

The Lord Ordinary pronounced an interlocutor preferring the claim of Mrs Haining, and stated in a note:

"1. The identity of the sum *in medio* with the sum bequeathed by her uncle to Mrs Haining, is clearly proved, independently of the admission on the record, by her competition in this multipointing. 2. There was an unquestionable exclusion of the *jus mariti*, in so far as this sum was concerned. 3.

And there is nothing whatever to show any intention on the part of the wife to abandon this privilege, and to make the money a part of the goods in communion."

John Haining reclaimed. At advising,

Lord President.—I have no difficulty. The claim depends on the terms of the bequest in Captain Stobart's settlement, and to these terms I cannot give any other interpretation than that the testator meant to confer the sum on his niece, exclusive of any right or claim on the part of her husband. He does not use the common legal words—"exclusive of the *jus mariti*;" but he uses others equivalent to them, and equally clear and intelligible. It is impossible to adopt the idea that the words have merely the limited effect of excluding the husband's curatorial powers. The sum bequeathed remained in the executor's hands four years after it became payable. Then the lady married, and the money was lent, it is said by the executor, on heritable security in the lady's name. Take the fact to be that it was not lent by the executor but by herself—still there is no reference to the husband; and the bond is taken in terms conformable to the uncle's will. Then the bond is paid up, and the amount deposited in bank in the lady's name. The money is thus clearly distinguished as the proceeds of her uncle's bequest; and the decisions reported by Baron Hume, p. 218, show that no act of the husband alone could alter the destination of a sum thus conveyed, exclusive of the *jus mariti*. I am clear that the interlocutor is right.

Lord Gillies.—I concur entirely, and have nothing to add. I was glad to find the decisions in Baron Hume; for there appeared some room for doubt as to the effect of the changes which the sum had undergone; but these decisions appear to be *a fortiori* to the present case.

Lord Mackenzie.—I concur, and for the reasons stated. I may only add, that the question is not with the husband's creditors, but his heir, and that the widow's right might have been pleaded much higher. At the utmost, her allowing the sum to pass into the husband's hands would only have been a *donatio*, and as such was liable to recall. Here the wife is claiming the money; and there cannot therefore be any doubt as to the fact of revocation. The object throughout was to fulfil the uncle's intentions, and keep the money from the husband's control. Had he defeated this intention, he would have been in *pessima fide*, and of course his heir could not have been permitted to profit by it.

Lord Fullerton.—I also concur, on the ground, first, that the husband's right was excluded by the testator; and, secondly, that the sum in question is clearly identified with that which was bequeathed. The cases quoted from Baron Hume are *a fortiori*, and prove that the original exclusion of the husband's right cannot be removed without an express consent of the wife to that effect. Here there is nothing of the kind, but a great variety of circumstances to prove the contrary.

The Court adhered.

Lord Ordinary, Cockburn.—For *Mrs Haining*, Inglis; John Walker, W.S., Agent.—For *John Haining*, Whigham; John Jopp, W.S., Agent.—For *Commercial Bank*, M. Bell.—B. Clerk.—[H.B.]

24th June 1842.

SECOND DIVISION.—(G. D. F.)

No. 231.—*JANET YOUNG or STEEDMAN and OTHERS, Suspenders, v. ALEXANDER MALCOLM and OTHERS, Respondents.*

Title and Interest to Sue—Trust—Society—Corporation—Pactum Illicitum—Nobile Officium—A public society, denominated the "*Prime-Gilt*," existed in Kirkcaldy for upwards of two centuries, and the funds, which arose from rates levied on masters and mariners, were dedicated to the support of the contributors in necessity, and their widows, &c. Owing, it was alleged, to difficulties in the way of levying any longer the rates on common mariners, and other causes, the managers of the society called a meeting, at which, on the ground that it was

a private society, it was resolved to realise the property of the society, and to divide it equally among the members, providing for any widows on the fund, but refusing to recognise the right of the mariners, or thereafter to receive their rates. In a conjoined process of suspension, reduction and declarator, brought in regard to these proceedings, at the instance of certain widows on the fund, and common mariners who had long contributed their rates—the title of these parties to sue was sustained by the Court, and interdict granted against the resolutions and proceedings of the managers; and found that the property in possession of the defenders was held in trust for the *Prime-Gilt*, and the persons or members entitled to be members thereof, and such parties as may hereafter become members, or as are or may be entitled to derive support or assistance from its funds, and that the defenders are bound to denude of, and convey the property of the society in trust to such person or persons as the Court may name, and in such terms, and under such conditions as the Court may hereafter direct.

There has existed in the port of Kirkcaldy for upwards of two centuries, a public society, denominated the "*Prime-Gilt*," or "*Prime-Gilt Box*," similar in its objects and origin to the Trinity House of Leith, and other such institutions in various ports of the country. It was alleged by the suspenders in the present action, that it originally possessed a public charter or Seal of Cause, which, however, no longer existed; but the records drew back to 1614, from which, as the suspenders alleged, the purposes of the society were sufficiently obvious. They averred, that for upwards of two centuries the society, as empowered by their Seal of Cause, levied certain rates or duties, as its principal source of support, from the wages of the masters and mariners employed in vessels at the port of Kirkcaldy, whether belonging to the port or not, or whether in the foreign or coasting trade; and these rates would seem to have been regulated, declared and levied, at least, as it would appear at one time, from some of the documents produced at meetings of the body, described to consist of "the haill maisters, owneris of ships, sailers, and hyresmen within the burghes." The mode of levying was said to be this:—A pass-book was generally kept for each vessel, in which was entered a separate and distinct statement, for each voyage, of the names of the officers and seamen, and the sums contributed by or deducted from the wages of each for the *Prime-Gilt Box*. At the end of the year, these sums were paid over to the treasurer of the fund, who docketed each statement in the book. In these entries the duty or levy was called "*poors' money*." In some instances, 8d. per pound was levied on wages,—at other times, 4d.; but in 1827–8, when the present cause of action arose, the rate stood at 6d. per pound. Strangers—that is to say, mariners not residing at the port—were assessed in half the ordinary dues; and it was averred that the Lords of the Admiralty, before settling with the owners of vessels belonging to the port, who had been employed by their Lordships, required evidence that these rates had been paid. In regard to the objects of the institution for which these rates were collected and paid into the "*box*" of the society, the suspenders alleged that the object was principally for the support (at the sight of the box-master, according to certain rates) of old and disabled seamen,—their widows and orphans,—and the relief of shipwrecked mariners,—and sometimes also charity was bestowed from the box on kindred subjects of necessity which were worthy of support; but the funds

were never diverted from these objects, nor applied towards the personal use of any of the managers, unless in a state of helplessness, &c. The surplus, after meeting the demands of charity, was invested, from time to time, in the purchase of heritages; and from some of the productions, it would appear that the titles had been taken to the

"present boxm^r of the Prime-Gilt Box of Kirk^d, for himself and in name of the remanent masters, mariners, and owners of the ships within the said burgh, and the said masters, mariners and owners, for themselves, and as managers for the poor of the Prime-Gilt Box."

In the course of time, the property and effects of the society were said to have accumulated to the amount of several thousand pounds.

It did not appear from the statement of the suspenders who the parties were who were entitled to enter the society as members, nor the exact rule according to which support was distributed; for, besides the want of any copy of the charter, which was said to have been lost, there was no copy of the regulations or articles under which the management had proceeded.

In 1827, the parties who were then in the management entered into a deed or contract, by which they agreed to remodel the society, thenceforward to be carried on as a new society. By it they declared that the parties who then subscribed the contract were to be the constituent members; and also, that for the future the association should consist exclusively of shipowners and shipmasters residing in the port; and by a subsequent resolution, they transferred the whole funds and property of the "Prime-Gilt" over into the possession of the new body, for answering its purposes. It was also provided, that with the exception of parties receiving aid at the time, as to whom the society reserved to itself a right to reduce or alter the allowance if they saw fit, no parties were to be entitled to aid except members, their widows and orphans, and that the funds should be wholly applied in providing for them, with the exception of such sums as might be paid to shipwrecked seamen.

The suspenders alleged that this step, which was taken under pretext of remodelling the society, had the effect, in reality, of entirely altering and setting at naught the old constitution: That it was agreed to without any notice to the parties interested, many of whom were abroad, and that it entirely limited the persons who were entitled to be connected with the society. After the above procedure, the managers then, as the suspenders averred, in furtherance of their own purposes, and by resolutions adopted in December 1838, cut off all parties, but without notice from the society, who were in arrear. In consequence of this step, the association came to be reduced to eight in number; two of whom, Messrs Brown and Mackie, are since dead. The remaining parties, several of whom only lately came to be introduced into the society, were—Alexander Malcolm, the box-master; his son, John Malcolm; his brother-in-law, George Oliphant; Robert Tod, Oliphant's nephew; Thomas Bell, Tod's brother-in-law; John Bell, son of Thomas Bell, and Tod's nephew;—Malcolm senior and George Oliphant being married to sisters.

After these measures, the parties now in the management were proceeding to realise and sell the pro-

perty and effects of the society, for the declared purpose of winding up and apportioning the fund among themselves. In consequence of this the suspenders—who are widows who had been receiving aid from the society, and mariners who had contributed, as they alleged, for a great length of time, but whom the respondents refused any longer to recognise, or to receive their rates,—feeling themselves aggrieved by the proceedings of the respondents, presented this note of suspension, in which they prayed the Court

"to suspend the proceedings complained of, and to interdict, prohibit and discharge the said respondents from dissolving the said Prime-Gilt Box Society, and from selling or disposing of the property belonging to the said Prime-Gilt Box or Prime-Gilt Box Society; as also from appropriating, dividing, or otherwise disposing of the property, funds and effects of the said Prime-Gilt Box, to the private and personal use and benefit of the respondents as individuals."

In their answers the respondents did not deny that the "Prime-Gilt" had existed for upwards of two centuries, and that from the funds in the hands of the managers, received very much in the way pointed out by the suspenders, charity was bestowed on a variety of objects; but it was denied that the society was ever incorporated, or possessed a Seal of Cause, or that, like certain benefit societies, its funds were held exclusively for the objects set forth by the suspenders. In illustration of this they adduced from the extracts in process various instances where the funds had been applied to objects which were not of a charitable nature. It was also denied that common sailors were ever considered as constituent members, though it was admitted that they contributed to the funds; but it was said that these contributions were levied by the masters of their own accord, for the poor, and not under any authority of the society for its behoof; and that latterly the subject had given rise to misunderstandings with the mariners, who refused any longer to allow of any such deductions. The respondents averred that the society was entirely private, and entitled to manage its own concerns by any rules or regulations they thought proper; and that from time to time it had been suggested that a new constitution should be adopted. Thus, in 1786, it was stated that the society had remitted to the box-master and three other members to draw up a new form of laws; that this was not done; but the subject was renewed from time to time, till at last, in 1826, it was resolved, instead of applying to Parliament, which had been in contemplation, that the society should be regulated by private laws, and they accordingly appointed a committee to prepare a set of laws for consideration. New laws were accordingly adopted, and after due intimation, as the respondents averred, received the approbation of the whole constituent members, being eleven in number. Thereafter, in 1839, at a general meeting of the body, five out of the eight members then constituting the society, agreed to wind up the concern, and to realise and divide the funds among the remanent members; and this, the respondents also averred, was resolved upon after due intimation to all parties. They stated that they never intended to deprive any of the complainers who derived benefit from the funds or property of the late association, at the date of dissolution, of any of their rights or privileges; and on the contrary, by their recorded resolutions, the respondents reserved to widows

and all others the full benefit derivable by them from the funds of the association. From these resolutions the respondents had no intention of departing; and they would amply secure to these parties the whole benefit which they could have derived from the funds of the association had it remained undissolved. This might be done in various ways; and, *inter alia*, by purchase of annuities from insurance associations, or the National Security Savings Bank. The respondents stated their readiness to secure the rights of these parties at the sight, and to the satisfaction of the Court.

The suspenders *pleaded*—1. As the respondents hold the property of the Prime-Gilt Box Society as trustees in trust, not merely for the present members, but also for all those who may have claims on the society, or are entitled to become members thereof, any attempt to dissolve the society, and to appropriate its funds among the respondents individually, is illegal, and ought to be interdicted. 2. In respect they are now endeavouring to sell the property, with a view to the illegal and unjust appropriation of its funds among themselves as individuals, there are sufficient grounds for interdicting the sale. 3. The Prime-Gilt or Gilt-Box is an incorporation, and its constituent members are not merely masters but mariners. Its object is the provision of poor and disabled seamen, and the widows and orphans of mariners, with casual support of shipwrecked sailors; and its funds and property having been realised by rates leviable for these specific uses, cannot be legally diverted by its managers into sources of individual gain. 4. The change in the constitution and purposes of the society in 1828, whereby common seamen, from whose earnings contributions had been exacted, and for whose benefit the society was mainly intended, were excluded, was unwarrantable and illegal; and all of them have now, as before, a common interest in insisting for the continuance of the society, and in preventing the gross misapplication of its funds contemplated by the respondents. 5. All and each of the complainers have a sufficient interest to insist in the present proceedings; and, as some of the complainers are present claimants on the fund, the respondents are expressly debarred, by the present regulations of the society, from dissolving it without their consent in writing.

The respondents *pleaded*—1. The Prime-Gilt Box Association was not a corporation; nor was it by any law, public or private, declared to be a society of perpetual succession or endurance. 2. The members of the association had ample power to make the deed of 1828; and the regulations and stipulations contained in that deed were valid and binding until altered by the members. 3. The constituent members of the association had full power to dissolve it, to convert the joint property into money, to satisfy and provide for payment for all debts and obligations existing against the association, and to divide the residue among the members. 4. The complainers not being members, have no title to object to the dissolution of the association; nor did the 21st article of the contract of 1823 vest in persons having merely a *jus crediti* in the funds a right to object to the dissolution of the association, and the sale of its property, on the grounds now maintained by the complainers. 5. Neither have the complainers any proper or legitimate interest to object to

the respondents' resolution of January 1839, seeing that the full rights of parties deriving, or entitled to derive, benefit from the funds or property of the association at the date of dissolution, are thereby preserved entire and uninjured. 6. The complainers are not entitled to found on alleged grievances of persons who are not complainers or parties to the present suit.

The suspenders also raised a summons of reduction, which was held as repeated in the process of suspension, for the purpose of setting aside the resolutions and proceedings in reference to the dissolution of the Prime-Gilt, and the constitution of the new society, and also of the titles to certain heritage made up in the persons of the new society. The reasons of reduction were much of the same description as the pleas stated in the suspension; but, combined with the reduction, they concluded that it should be declared,

"that the pursuers are not in any respect bound thereby (*i. e.* the new constitution), but are entitled to all the rights, privileges, emoluments, and benefits arising to them as members, widows of members, and contributors to the funds of the said Prime-Gilt Box, as if the said pretended contract, laws and regulations, and minutes, and resolutions, had never been made or entered into; and that the defenders hold the property of the Prime-Gilt Box as trustees, in trust, not merely for the present members, but also for all those who may have claims on the society or incorporation, or are entitled to become members thereof: That the said society is still subsisting for the purposes for which it was originally instituted, and is not dissolved, or in any way put an end to; and that its funds and property are applicable to these original purposes, and not to the private or personal benefit of the defenders."

The Lord Ordinary pronounced the following interlocutor:

"29th January 1842.—The Lord Ordinary having heard parties, and considered the conjoined processes, sustains the title of the pursuers, and decerns: In the suspension, sustains the reasons, and declares the interdict perpetual: In the declarator declares, reduces and decerns, in terms of the libel: Finds the defenders liable in expenses; allows an account thereof to be given in, and when lodged, remits the same to the auditor to tax and to report.

Note.—The Lord Ordinary is not satisfied that this is a corporation; but he is clear that it is a society, with funds provided for a *permanent* object, of which funds the defenders are the trustees, and that they cannot appropriate these funds to themselves.

"The precise origin, and purpose, and first constitution of the society, seem to be lost in the obscurity of antiquity; but throughout all the irregularities of above two centuries, it is clear, 1st, That one great object has always been, to provide for the relief of the poor sailors of Kirkcaldy, and their families: 2d, That the contributions have alone been made and taken for this particular purpose, not merely for the relief of the contributors, or of existing sailors, but for the formation of a fund for the relief of this class of persons in all time coming: 3d, That though some of this class may have formed themselves into what they called a society or incorporation, still, *quoad the fund*, they have always been, and now are, mere trustees.

"The substance of (what these trustees (the defenders) have lately done or attempted is, that they have first, by certain new rules in 1828, narrowed the number of the society, till at last it is composed solely of them six selves—so related as to be almost one family—and that, then, they have divided the whole £3000 of which the stock consists, by each taking £500 to himself.

"A court of justice cannot support the managers of a charitable fund in so bold an experiment.

"It is because the Lord Ordinary holds this to be the correct view of the nature of the institution, that he thinks that all the pursuers have a good title.

"The title of the five widows who are actually at present an-

annuitants on the fund, is clear. Have these annuitants no title to object to the destruction of a fund created partly for their relief? It is said that their interest has been secured, and that if it be not adequately secured, the defenders are ready to do so to the satisfaction of this Court: but so long as they are alarmed, they have a title to complain. The very admission that the Court may control their alleged security, is a recognition of their title to seek the Court's protection. And, moreover, they have a title and interest to have the fund preserved, liable to increase. Future contributions may raise it, and thus augment their annuities; but the defenders prevent this for ever, for they dissolve the society.

"Then there are six or seven sailors, who, it is admitted, did at one time belong even to the society, but who, the defenders say, were justly expelled from failure to pay their dues. The facts as to these expulsions are disputed; but that of Captain Beveridge, who got no notice, is clearly very questionable. But let all these expulsions be assumed to be legal, still they were only expulsions from the society. These persons, being sailors who had long contributed, are of the class for the relief of which all the contributions were taken, and they are entitled to object to their misapplication.

"The four seamen's widows are in a similar position."

The respondents presented a reclaiming note of a qualified nature, praying the Court

"to alter the foregoing interlocutor, in so far as it relates to several title-deeds of heritable property libelled, the resolution of 28th December 1827, and the laws and regulations of the society of 1828, specified in the summons of reduction; and also in so far as the defenders are found personally liable in the expenses of process; to assolisie the defenders from the conclusions of the action, so far as regards these title-deeds, resolutions and laws; and to find the expenses of process payable out of the funds of the Society."

The Court pronounced this interlocutor:

"Of consent, vary the interlocutor reclaimed against, so far as it might be held to reduce and annul in toto the titles to the properties libelled; and find that the writs and titles called for are valid and subsisting, to the extent that they are necessary for supporting the feudal rights standing in the persons of the defenders, or of vassals holding of them: But find that the whole property of the society, heritable and moveable, is held in trust for the society, called the Prime-Gilt Box of Kirkaldy, and the parties now members are entitled to be members thereof, and such parties as may hereafter become members, or as are or may be entitled to derive support or assistance from its funds; and that the defenders are bound to denude of, and convey the property of the society in trust, to such person or persons as the Court may name, and in such terms, and under such conditions as the Court may hereafter direct: *Quoad ultra*, refuse the reclaiming note, and remit to the Lord Ordinary to hear parties farther, and make the necessary inquiries with a view to the adjustment of the rights of parties, in consistency with the nature and purposes of the institution and its altered circumstances: Find the defenders liable in additional expenses; allow an account," &c.

Authority for Respondents.—Prestonpans, 10th February 1801.

Lord Ordinary, Cockburn.—Act. A. Anderson, Patton; H. Tod, W.S., Agent.—Alt. Dean of Faculty (Wood), Hector; W. Pollock, S.S.C., Agent.—N. Clerk.—[G. D. F.]

25th June 1842.

SECOND DIVISION.—(G.D.F.)

No. 232.—THE REV. DAVID DEWAR and OTHERS, Pursuers, v. THE REV. JOHN CRUICKSHANK and OTHERS, Defenders.

Process—Expenses—Suspension and Interdict—Church—Implied Condition—Where a party, duly cited in a process of suspension and interdict, allowed the interdict obtained therein in absence against him to become final, and the suspender did not

ask expenses, but the respondent afterwards brought a reduction of the process and whole procedure.—Held that the defender in the reduction (the suspender) was not bound to go into the merits of the reduction till the pursuer paid him, in the first place, the expenses he had incurred in the process of suspension: the ground of decision apparently being, that it was to be implied that the claim for expenses which the respondent passed from, was relinquished only on condition that the interdict was to be obeyed—not challenged.

The pursuers, who are the minority of the Presbytery of Strathbogie, brought the present action, calling for reduction of the procedure in the application for suspension and interdict presented by the defenders, who are the majority of said Presbytery, the interdict in which became final by interlocutor of Lord Cunningham, dated 17th March 1840. The proceedings in this suspension are fully reported previously; and it appears that the suspenders were paid the expenses incurred by them, as decerned for—(see *ante*, Vol. XII. pp. 249, 344.) The pursuers also called for reduction of the procedure following on a second note of suspension and interdict, presented by the same parties on 11th June 1840 (advised 11th July 1840), and which also had become final—(see *ante*, Vol. XII. p. 635.) It appeared that the Lord Ordinary in this case passed the note, on which the interdict afterwards became final, and of consent found no expenses due. The grounds of the present reduction were, that the proceedings were in absence, and also, that the Court had no jurisdiction in the matters raised by the several suspensions.

The defenders lodged preliminary defences to the action, in which they set forth, that the pursuers were duly cited as parties to the proceedings in the Bill-Chamber and the Court, the interlocutors and decrees in which are now brought under reduction. They made no appearance, but allowed those interlocutors and decrees to be pronounced in absence. The defenders accordingly maintained, that before the pursuers could be heard upon the grounds of the present action, or require the defenders to satisfy the production, they must, in conformity with the established rule of practice, pay the whole of the expenses incurred by the defenders in the Bill-Chamber and the Court, in the proceedings complained of: Smyth, 9th March 1826; 4 Shaw, 397. So soon as this should be done, the defenders would then satisfy the production, and state their defences on the merits of the reduction.

A supplementary reduction of certain other interlocutors was brought by the pursuers, and supplementary defences applicable to it was also lodged, but as the judgment of the Inner-House does not refer to this latter procedure, it is unnecessary at present to refer to it.

The Lord Ordinary pronounced the following interlocutor:

"3d March 1842.—The Lord Ordinary having heard the parties on the dilatory defences, repels the defence against the original action, and also repels the defence against the supplementary action, in so far as it is dilatory, reserving it, *quoad ultra*, to be discussed along with the merits.

"Note.—The expenses sought for from the pursuers, before they be allowed to proceed with the original action, were incurred in two suspensions, in which, though personally cited, the pursuers made no appearance.

"Now, it is admitted that the expenses under one of these have been paid, and the Lord Ordinary is of opinion that the

defenders' claim for the expenses under the other is excluded by the terms of the last interlocutor under that suspension (17th March 1840), which, 'of consent of the suspenders, finds no expenses due.'

"The defenders, after thus declining to take expenses, and getting it fixed against themselves that none were due, and possibly allowing thereby the pursuers to continue absent, cannot be allowed to claim expenses now; no more than if these expenses had been found due, and on their own motion, modified, they could now claim a larger sum.

"Whether there be or be not anything in the defence against the supplementary summons, the Lord Ordinary does not say. But he is clear that there is nothing that is properly dilatory."

The defenders reclaimed, stating, that the expenses which they now demanded were those incurred in the second suspension, in which, of consent, the Lord Ordinary had found none due. They argued, that their meaning was, that they consented at the time not to ask expenses provided the respondents (present pursuers) obeyed the interdict, and nothing else; and that it must be implied as a condition, that since they refused to obey it—that is to say, as they had now brought it under challenge—they could only be allowed to do so by paying the costs as a penalty.

The Court

"Recal the interlocutor complained of, and sustain the dilatory defence in the original action of reduction: Find the defenders entitled to the expenses incurred in the discussion of the matters brought under review by their reclaiming note; and allow the account," &c.

Lord Ordinary, Cockburn.—*Act.* R. Bell, Moncreiff; William Young, W.S., *Agent.*—*Alt.* Whigham, Pyper; A. Peterkin, S.S.C., *Agent.*—*T. Clerk.*—[G.D.F.]

29th June 1842.

FIRST DIVISION.—(H. B.)

NO. 233.—JOHN BLACK, *Claimant and Respondent*,
v. DANIEL M'FARLANE, *Claimant and Advocate*.

Debtor and Creditor—Account—Submission—Circumstances in which a clerk to a submission obtained full payment of his account out of a fund consigned by one only of the submitters.

Daniel M'Farlane and Hugh Cameron entered into a submission to Thomas Carmichael and Thomas Aitken. The submission expired without any decree-arbitral having been pronounced, and John Black, who had acted as clerk to the submission, claimed payment from the submitters of his account, amounting to £28. 4. 4½. Payment being refused, and Black having arrested M'Farlane's funds, it was agreed to submit the account to the original arbitrators—M'Farlane consigning £28 in their hands to await their decision, and Black discharging the arrestment of his funds. The submission having fallen, the arbitrators brought a multiplepoinding, in which they called M'Farlane and Black as claimants, and consigned the £28 as the fund *in medio*.

Black *pleaded*, that the fund *in medio* was his property, in respect that it had been consigned for the special purpose of liquidating his account; and, more particularly, that he had discharged his arrestment on the faith that it had been consigned for his behoof.

M'Farlane *pleaded*, that he was entitled to repetition of the consigned money (the object of consignment having been frustrated), or at least, that as Cameron was equally liable for the account, he could not be decerned against for more than his share.

The Sheriff preferred Black; and M'Farlane having

advocated, the Lord Ordinary pronounced the following interlocutor:

"15th March 1842.—The Lord Ordinary having heard counsel in this advocacy, and thereafter considered the record and whole process, approves of the interlocutor of the Sheriff, and remits the cause *simpliciter* to the Inferior Court; finds the respondent entitled to expenses, as the same may be taxed by the auditor, and decerns.

"*Note.*—The Lord Ordinary has no doubt of the soundness of the Sheriff's judgment.

"The only plea on the part of the advocator which at first sight seems plausible is, that a fund belonging to M'Farlane, as an individual, has been adjudged by the Sheriff to the creditor of a partnership of which he was a member, while Cameron, the other partner, against whom he has relief, was no party to the action in the Inferior Court.

"But the answer made seems to be quite satisfactory. Mr Black, the respondent, had at one time an ordinary action against both parties. On that libel he raised *arrestment*, and attached M'Farlane's funds. Thereafter, M'Farlane, by himself alone, consigned the fund in the hands of the raisers of the multiplepoinding, and empowered them to decide on Mr Black the respondent's claim. As they differed in opinion, and gave no decision, no other course could be followed than that taken here, viz., to bring a process of multiplepoinding to try Black's right to the consigned fund. In such a case, it seems clear that M'Farlane, the consigner, was bound to take the same place and *onus* in the process that he previously undertook in the submission, and to meet the respondent singly, in so far as he chose to oppose his claim.

"The Lord Ordinary's idea is this:—The fund *in medio*, by deposition with the arbiters, was *specialty appropriated* to Mr Black's claim, as clerk of a prior submission, if he had any legal claim under his action. The latter point was referred to the arbiters; and when they declined, or could not agree upon it, the claim must be determined by the law. The respondent could never be deprived of his preference over a fund deposited for his behoof, in consequence of a discharged *arrestment*, unless his claim itself was found to be competently extinguished.

"The advocator pleads, that it is hard his funds should be taken in payment of a company debt, without his getting any contribution from his copartner. But if the advocator wishes relief against his copartner, he must just secure that in the same way he would have done if the arbiters had decided against him in the submission. He must then have raised an action of *relief* against Cameron, and he is not put to more hardship by the proceedings in this process. It appears that Cameron resides beyond the jurisdiction of the Sheriff, and it possibly might have required a process before the Supreme Court to have had him and the advocator competently cited in the same action. That would have been an oppressive step for the respondent to take unnecessarily; and accordingly, it does not appear that the advocator insisted *in limine*, in the present action, that Cameron should be cited. If he had, the plea does not seem well founded.

"On the merits of the case, as well as the form, the Lord Ordinary is of opinion that the judgment of the Sheriff is well founded. He cannot have a doubt that the clerk of a submission, which lapses by an irreconcilable difference between the arbiters, or from any other cause not imputable to the clerk, has a legal claim against the parties for his professional labour and expenses, and no grounds are assigned in the record for holding that claim as not maintainable in the present case."

M'Farlane reclaimed, but the Court *adhered*.

Lord Ordinary, Cuninghame.—*For John Black*, Solicitor-General (M'Neill), Macfarlane; John Duncan, W.S., *Agent.*—*For Daniel M'Farlane*, G. Bell; William Muir, S.S.C., *Agent.*—*B. Clerk.*—[H.B.]

29th June 1842.

SECOND DIVISION.—(G.D.F.)

No. 234.—DAVID ANDERSON, Pursuer, v. JAMES WRIGHT, Defender.

Bill of Exchange—Indorsation—Assignment—Obligation—Stamp.—The drawer of a bill of exchange discounted it at a bank, and thereafter retired it with the proceeds of another bill discounted by the bank. He afterwards transferred it to the bank agent, with an acknowledgment indorsed upon it, that it had been retired with the funds of the bank agent, for repayment of which he, the drawer, bound himself with the acceptor. In an action by the bank agent against the acceptor—Held that this was not an indorsation to the bank agent, but a separate obligation, which, 1st, was not binding on the acceptor, in respect he was not proved to have authorised the drawer to grant it; 2d, was not, as an obligation, receivable in evidence, or actionable, in respect of not being duly stamped; 3d, not being a document in re mercatoria, could not prove its own date; and, 4th, could not be regarded, and was not libelled, as an assignment, nor stamped as such.

Sequel of case ante, Vol. XII. pp. 547-550, which see.

Since the previous report of this case the Lord Ordinary pronounced the following interlocutor:

" 25th January 1842.—The Lord Ordinary having heard parties' procurators, and made avizandum, and having thereafter called the case, Finds that it is now a settled point in the cause, that 'the pursuer is not entitled to hold the bill in question with the privileges of a bona fide onerous indorsee, or to maintain action upon it against the defender otherwise than in the right of James Miller the drawer thereof, and subject to all objections competent to the defender against the said James Miller.' (Lord Moncreiff's interlocutor of 28th January, adhered to by the Court, 17th June 1840): Finds it, moreover, to be legally established by the evidence already in process, that the said bill having been discounted by Miller with the Western Bank, it was, on the 7th July 1834 (at which time it lay past due and unretired), paid to the bank by Miller, and so came into the possession of Miller as a retired bill: Finds, that up to this time the pursuer had never had right to said bill, and that if he now have such right, he must have acquired the same by some act of transfer on the part of Miller of a date posterior to the said 7th July 1834: Finds that the only title by which he alleges himself to have so acquired right, as the same is set forth in his libelled summons, is, 1st, The said bill itself, as having been 'indorsed by the said James Miller to the complainant;' and 2d, 'The said James Miller's holograph obligation on the back thereof, of date the 5th day of July 1834.' But finds, as to the first, that the said bill was never indorsed by Miller to the pursuer,—the only indorsation having been an indorsation by Miller to the bank, and that indorsation having become *functio officio*, and extinct when the bill was retired from the bank with the funds of Miller,—the pursuer himself being in the knowledge of its having been so retired: And as to the second, finds that it is in no sense to be considered as an indorsation of the bill at all, but is a distinct and separate obligation *per se*, whereby Miller is made to 'bind and oblige himself, along with the acceptor, for the amount of the bill and interest thereon from this date till paid;' Finds, more especially as to this obligation, 1st, That even if valid otherwise, it is not binding on the defender, who is not proved to have given any authority to Miller to execute the same in his behalf: 2d, That as an obligation apart from the bill, it is not receivable in evidence, and cannot be read by the Court, in respect of its not being duly stamped; 3d, That it is not such a document as is entitled to privilege as a writing *in re mercatoria*, and so, *inter alia*, does not prove its date; and that, moreover, the date which it actually bears, viz., 5th July 1834, is proved by the evidence already in process not to be a true date, the bill upon that date being still in the hands of the bank unretired, and only having been so retired on the 7th July, being two days thereafter: 4th, That neither is it habile to prove the averment expressed in it, that the pursuer had advanced his own funds to retire the bill, this being but the averment of Miller, plainly in arrangement with the pursuer, and it being, moreover, proved by evidence in process, which the pursuer

cannot repudiate, that the bill was paid to the bank by other means: Finally, that in the most favourable view of the said writing, it is not to be regarded as an assignment of the bill, and indeed is not so libelled on, but is a substantive obligation to pay the amount of the bill, and can competently only be so dealt with. Besides, that even if it were to be regarded as an assignment, it is not stamped as such, and therefore can receive no effect in judgment: Finds, in these circumstances, that the pursuer has failed to substantiate his title on either of the grounds libelled: Finds, *separatim*, that in the absence of legal evidence as to the date of his acquiring right to the said bill as alleged, the legal *onus* of which proof lies with the pursuer, and still more in the absence of any evidence that the pursuer's right as constituted by force of the said obligation, viewed in the light of an assignment to the said bill, was ever intimated to the defender, so as to have the legal effect of an intimated assignment, there are no grounds for presuming in favour of any date prior to the time when notice was first given to the defender that the bill was outstanding; and that this not having taken place until after Miller had declared his bankruptcy, and communicated to his creditors a holograph statement of his debts, in which the very bill now in question is set forth as a debt due by him to the defender, thereby dealing with it as having been from the first an accommodation to himself, the pursuer is not entitled, in the face of such an acknowledgment, to call in question the fact that the said bill was from the first a bill granted without value as between the defender and Miller: Finds more especially, that the pursuer having himself pleaded upon the state of matters as thus declared and acknowledged by Miller, and having done this absolutely and unqualifiedly, without any contrary protestation on his part, not only in the record as closed upon condescence and answers (condescence, arts. 12 and 13), but likewise in various passages in the replies which he subscribes as 'drawn by himself,' thereby making the same his proper writ, it is no longer open to him to dispute the state of the fact as thus set forth: Finds, therefore, that it has been sufficiently established (even supposing the *onus* in the circumstances to have lain with the defender) that Miller was not creditor in the bill for value: And upon the whole matter, assoiliizes the defender *simpliciter* from the conclusions of the libel, and decerns: Finds him entitled to his expenses both in this Court and the Court below; appoints an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report.

" Note.—The Lord Ordinary, in the greater number of the above findings, has but embodied the views upon which Lord Moncreiff (with whom he in all points unqualifiedly concurs) rested his judgment of 28th January 1840; and he has done this mainly in order to apply these views to the questions now more immediately decided; 1st, As regards the pursuer's own title to the debt; and 2d, As regards the party on whom the legal *onus* falls to be imposed, of proving *ultra* (if that be necessary) how far the bill was originally held by Miller for value or not.

" Some of the points that have been made the subject of findings, are possibly more clear than others. But if it be once determined that the pursuer took nothing by the *blank indorsation*, it is thought to be pretty plain that the obligation subsequently written by Miller on the back of the bill, cannot be received as affording (*in hoc statu* at least) legal evidence of title. The case might have been more doubtful had the pursuer chosen to stamp the document (whether as an obligation or assignment), and thereafter undertaken a proof, 1st, of Miller's authority to subscribe for the defender; and, 2d, of the actual advance of funds on the pursuer's part. But even then, the false date assigned by him to the alleged transaction, and the contradiction otherwise afforded by the evidence already in process, to his allegations as to the means by which the bill was retired, must have left him in a position of the greatest difficulty.

" The Lord Ordinary had at first some hesitation as to the second alternative branch of the interlocutor. He is aware that, 'in the matter of probation,' it is not open to prove by the *oath of the cedent*, so as to affect the assignee, after the cedent has been fully divested by intimated assignment.—*Ersk.* III. 5, 9. Stair, III. 1, 18; and he felt the full force of this analogy, as applied to the case of a writing under the cedent's hand, not obtained and not existing until after the like divestiture. If, therefore, he could have held the writing on the back of the bill equi-

valent to an assignation, and had seen satisfactory evidence that it truly bore date, and had been intimated prior to Miller's declaration of bankruptcy, when (in the holograph state of his debts) he acknowledged the bill in dispute to be an accommodation, the Lord Ordinary would perhaps have hesitated before finding such an admission by Miller to be *per se* probative of the fact. But it is thought the uncertainty, in the first place, in which the pursuer has left the case as to the real date of the obligation, but secondly, and still more, the total absence of any evidence whatever as to the supposed assignation thereby effected having been intimated until some time posterior to Miller's bankruptcy, by which time Miller's written admission of the true relation in which he stood towards the bill had gone forth, must operate here as most important considerations. For even the oath of the cedent is operative against the assignee if emitted 'before the assignation be intimated,'—*Ersk. and Stair, suprà, citing Pitfodds*, 15th February 1662, D. 12,454. And seeing that, 'except in the matter of probation, all exceptions competent against the cedent before the assignation or intimation, are relevant against the assignee' (*Stair, III. 1, 20*), and that, even in the matter of probation, they may be established by the cedent's oath if emitted before intimation, it would seem to follow that the cedent's writ, executed and given forth before the assignation is intimated, must be no less operative in a question with the assignee.

"The part of the interlocutor most open to observation is, perhaps, its concluding finding as to the effect of the pursuer's admissions upon the record, and in his replies. And had the matter stood simply upon these, without any thing else to fortify and bear them out in the other circumstances of the case, the Lord Ordinary might possibly have deemed it advisable, before answer as to this particular branch of the case, to have allowed the pursuer a proof *prout de jure*, with a view to strengthen, if he could, his general position. This, however, would have implied the necessity of a jury trial, and therefore was not to be resorted to unless of strong necessity. Accordingly, as the judgment otherwise had been given for the defender, and as the case, even in this aspect of it, derived, from the important bearing of the whole other facts and circumstances, a strength which it might not have possessed if standing isolated and alone, the Lord Ordinary thought it just as well to exhaust the matter by a finding expressive of his views on this point also. He is certainly satisfied (with the former Lord Ordinary), 'from the statements in the record, that the pursuer cannot seriously allege that the bill was a bill for value as between the drawer and acceptor.'"

The respondent reclaimed. At advising,

Patton, for the respondent, stated, that they had presented a reclaiming note against the Lord Ordinary's judgment, but as they considered that that judgment was a necessary sequence arising out of Lord Moncreiff's interlocutor of 28th January 1840, it was hopeless for them now to contend with the Court that Lord Ivory's interlocutor was ill founded. If Lord Moncreiff were wrong, then Lord Ivory's interlocutor would also be erroneous. But there was no other way for them to obtain a review of Lord Moncreiff's interlocutor, in the House of Lords, than by now reclaiming against Lord Ivory's, which was deduced from it; and accordingly, a reclaiming note had been presented, to enable the respondent to appeal, by their Lordships refusing it.

The Court were for refusing the note,—when

G. G. Bell and Cowan, for the advocate, requested that some notice should be taken by the Court of this in the record, as, if not, it would appear in the House of Lords that the case had been decided without hearing parties; and the House of Lords would, besides, see no grounds on which the Court here proceeded in refusing the reclaiming note, and might consider it was done without full consideration, and accordingly make a remit, which would be attended with great inconvenience.

Lord Justice-Clerk.—The Court cannot do what is now asked, nor can we ask the party to put in a minute to show what they have now said. The reclaimer had no course open to him but the one he has taken—to obtain a review of Lord Moncreiff's interlocutor. There could be no review in the House of Lords of a Lord Ordinary's interlocutor; and accordingly, the reclaimer has followed the proper course. But I have no hesitation in saying, for the satisfaction of the parties, and I am satisfied I speak the mind of the Court, when I say that the interlocutor of the Lord Ordinary is well founded, both in point of fact and in point of law. We cannot enter this on the record, but it will appear in the reports; and I have no doubt that will be enough to show that we have fully considered the case. I read over the whole of the papers last night.

Lord Moncreiff and *Lord Medwyn* concurred.

Lord Medwyn.—What has now been stated by your Lordship is enough; and I am sure, if it appears in the appeal cases, it will not be disputed.

Lord Meadowbank absent.

The Court refused the interlocutor.

Lord Ordinary, Ivory.—*Act. Patton*; *H. Tod, W.S., Agent*.—*Alt. G. G. Bell, Cowan*; *Campbell and Traill, W.S., Agents*.—*T. Clerk*.—[*G.D.F.*]

22d June 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 235.—*WILLIAM F. HOME, Esq., and DAVID MILNE, Esq., Appellants, v. JOHN PRINGLE (William Pringle's Trustee), JAMES HUNTER and OTHERS, Respondents.*

Trust—Trustees, Liability of.—Factor—Principal and Agent—

A trust-deed of a very extensive property, and involving very considerable trouble, provided the three trustees named in £100, to be divided among them annually, as a gratification for trouble. The deed contained a clause of the following nature: The trustees "shall noways be obliged to do diligence, otherwise than as he or they shall think fit, nor shall he or they be liable for omissions, but only each of them for himself, and his own actual and personal intromissions, nor shall they be farther liable for their factors than that they shall be habit and repute responsible at the time of entering upon their office." The trustees named in the deed appointed one of their own number to be factor, another to be cashier, and a third to be country agent; and they appointed an accountant, with a salary, to audit the accounts annually. The factor and cashier, by authority of the trustees, were to get an annual salary for these offices: that of the cashier amounted to £50. The trust-deed gave no authority for the creation of these offices in the persons of the trustees themselves. Considerable balances were allowed to accumulate in the factor's hands from year to year, with which circumstance the trustees were acquainted. Ultimately the factor became bankrupt, with a large balance in his hands—Circumstances in which held (affirming the judgment of the Court of Session), 1. That the trustees were not liable to make up the deficiency; and, 2. That the fact of one of the trustees being cashier, with a salary, and thereby having a special superintendence over the factor, did not of itself, without proof of wilful misconduct, infer liability against him.

The late Mr Home of Wedderburn, with a view to the settlement of his estates of Billie and Paxton, and of other property which he destined to be conveyed with them, executed an entail and relative trust-disposition on 16th July 1816, in favour of David Renton of Greystonelees, William Pringle, one of the deputy-clerks of Session, and John Renton, W.S., each of those parties to be sole trustee in succession; but with a declaration, that failing the trustees, or their nomination of a successor, the trust should not thereby become void, but should subsist and devolve upon, and vest in the Sheriff-clerk of the county of Berwick. The

trust was executed generally for payment of annuities, legacies and donations; for payment of public burdens on the estate, and of debts which the testator left to a very large amount; for the accumulation of the rents and revenues of the trust, in order to replace, by the purchase of land of equal value, any part of the estate which the trustees, under powers to that effect, might think it necessary or expedient to sell, in order to the liquidation or payment of debt; and finally for denuding of the whole in favour of such heirs of entail, and under such conditions as the granter should appoint in any deed of nomination which he might please to execute; the heir of entail, if major, being put in immediate possession of the mansion-house and estate of Paxton.

The trustees were to have power to

"name and remove factors from time to time, with such powers, and liable to such diligences as the said trustee or trustees shall think proper, and to give such salaries to the factors, and gratifications to any other persons who shall be employed in relation to the premises, as the said trustee or trustees shall think expedient at the time, and to settle accounts annually with the said factors, and upon payment of what shall be found due, to exoner and discharge them of their intromissions and management; and within six months after each clearance with the factors, the said David Renton, William Pringle, and John Renton, or other trustee or trustees acting in the order above mentioned, for the time, shall make up the accounts of his or their intromissions during the period of the factors' accounts, and get the same examined and approved of by an accountant of character in Edinburgh; and if the account is approved of by the said accountant, such approbation is hereby declared to operate as a full exoneration of the said trustee or trustees for their whole management during the currency of said account."

The following protecting clause was inserted for behoof of the trustees:

"It is here further provided and declared, that the said David Renton, William Pringle, and John Renton, or other trustee or trustees named, or to be named as aforesaid, shall noways be obliged to do diligence, otherways than as he or they shall think fit, nor shall he or they be liable for omissions, but only each of them for himself, and his own actual and personal intromissions, nor shall they be farther liable for their factors, than that they shall be habit and repute responsible at the time of entering upon their office."

The second purpose of the trust was thus expressed:

"For payment of all the public burdens affecting the estates hereby conveyed, and the due and lawful interest of all bonded debts, or other debts due by me; and of all necessary charges and expenses to be disbursed by the said trustees or their factors, in executing this trust-right; which charges and expenses are to be taken on the honest word of the acting trustee or trustees for the time, and not to be subject to challenge on any account or pretext whatever: and for payment of such salaries and gratifications as the said trustees shall give to factors, lawyers, arbiters, or others, who shall be employed with relation to the management of this present trust; and of the yearly sum of £100 Sterling, as a gratification to the acting trustee or trustees for their trouble in the management; it being hereby declared, that in case there be at any time more than one acting trustee, the said yearly sum of £100 Sterling shall be equally divided among the said acting trustees."

A deed of nomination of heirs was executed of the same date with the trust-disposition, but afterwards another deed of nomination was executed in favour of the present pursuer, Mr Home; and on 6th August 1819, a supplementary trust-deed was executed, recalling the nomination of trustees in the deed of 1816, and conveying the estates of the truster

"to and in favour of William Molle of Mains, the said Wil-

liam Pringle, and James Hunter (defenders to this action), writer in Dunse, and to the survivor or survivors of them who shall accept. Declaring, that a majority of my said trustees, accepting and surviving, shall at all times form a quorum for executing the purposes of the said trust, ratifying and approving the said nomination, and declaring that the said William Molle, William Pringle and James Hunter, as trustees foresaid, shall have the same powers, and be subject to the same declarations, conditions, provisions, and reservations, as if named and appointed as such in *gratuo* of the foresaid trust-right, to which this supplementary trust-deed has an express relation, excepting in so far as altered by these presents."

Mr Pringle, who was a depute-clerk of Session, was the personal friend of the truster, and he was, it appeared, his creditor to the amount of £9000. Mr Molle was a deputy-lieutenant of the county of Berwick, where he possessed extensive estates in right of succession, and practised as a writer to the Signet in Edinburgh. He enjoyed a close intimacy with the trustees, and at the time of accepting the office of trustee, he was habit and repute solvent, and continued in exuberant credit with the public till the very day of his bankruptcy, in the end of 1830. Mr Hunter, like the other trustees, was the friend of Mr Home, and was in practice as a country writer at Dunse, in the vicinity of Mr Home's residence.

In February 1820, Mr Home died, on which event the three trustees accepted and entered on their office. In virtue of the settlements, it appeared that the pursuer, who was a practising attorney at Berwick-on-Tweed, was the first-named substitute under an entail which the truster took his trustees bound to execute, after the purposes of the trust were accomplished.

The minute of the first meeting of trustees (17th March 1820), bears,

"that the trustees hereby appoint Mr Pringle to be their ~~cashier~~; Mr Molle to be factor; Messrs Molle, Turnbull and Brown, writers to the Signet, to be agents in Edinburgh, and Mr Hunter to be agent before the Sheriff, Commissary, and other Courts in Berwickshire, and they directed a factory to be made out in favour of Mr Molle."

Mr Hunter was prevented attending this meeting, but he acquiesced in the proceedings. A factory was executed in March 1820, in common form, in favour of Molle; but no writing was prepared nominating Pringle or Hunter to the respective functions assigned to them by the trustees. The trustees likewise appointed James Brown, accountant in Edinburgh, to be the auditor under the trust; and he directed the several parties under the trust to make up their accounts to the 31st December annually, and to transmit them to him for examination and approval. In the appointment to the different offices of factor and cashier, the trustees had not fixed the quantum of remuneration, but left it to the judgment of the auditor, who accordingly fixed the factor's salary at £180 per annum, the cashier's at £50, and by a reference to a third party, the auditor was to be allowed £73. 10s. per annum. These several sums were annually paid over to the different parties, so long as they continued in the management.

In consequence, as it was stated by Pringle and Hunter, of their calling upon Molle to pay up a considerable balance due by him to the trust, and his failing so to do, or evading payment, they, in October 1830, executed a revocation of the factory in his favour. This step had the effect of obliging Molle, very unexpectedly, to declare himself bankrupt.

The present action was accordingly brought by W. F. Home, as the party beneficially interested in the trust and entail, and likewise in name of D. Milne, advocate, who had been appointed judicial factor on the estate being sequestrated subsequent to the crisis occasioned by Molle's bankruptcy. The summons contains, *inter alia*, the following statement:

"That on the 22d March 1820, a deed of factory was granted by the said trustees in favour of the said William Molle, constituting him factor over the said trust-estates, with power to collect the whole rents, profits, and issues thereof, and taking the said William Molle, as factor, bound 'to hold just count and reckoning with us for his whole intromissions in virtue hereof, at all times, when required, and shall make payment to us, or our order, of whatever balance shall then appear to be owing by him to us.' In virtue of which appointment the said William Molle had personal intromissions with the trust-funds to the amount of about £8000 yearly; but he did not find, nor was he required to find, any caution or security whatever for his intromissions and management: That his co-trustees had no annual settlement of accounts, or clearance with the said William Molle, their factor, nor did they ever insist for payment of the large balances which his co-trustees knew were improperly retained by him, and applied to his own private purposes; although it was the duty of the said William Pringle and James Hunter to insist on an accounting, and on a clearance with the factor annually, upon payment of the balance due by him; more especially, it was the duty of the said William Pringle, as cashier, to superintend the cash operations of the factor in the most rigid manner, and to insist for, and to obtain from the factor, such an accounting and clearance annually: That at intervals of years, but not in terms of the direction and provision of the trust-deed to that effect, the trust-accounts were laid by the said William Molle, William Pringle, and James Hunter, before an accountant in Edinburgh, who, in April 1828, wrote to the said William Molle:—'I beg to mention that I have now completed my audit of the Billie trust-accounts for the year eighteen hundred and twenty-six, and prepared the usual states; but before closing them, it will be necessary that some arrangement be come to for the settlement of the balance on your accounts. It occurs to me, that the best plan is for you now to pay up the balance with interest, which I can state in a note in my report. Feeling the responsible and delicate situation in which I am placed, I could not docket the accounts as approving of them, till a settlement takes place.' That the balances due by the said William Molle on the accounts of 1826, and years preceding, were never paid, and the amount of them continued yearly to increase, as was well known to the said William Pringle and James Hunter, without either payment or caution ever being required by his co-trustees, who were perfectly aware of their extent and misapplication, and who, nevertheless, wilfully and purposely violated their duty, by abstaining from calling the said William Molle to account, and from dismissing him from the said office of factor, upon his failure to account duly in terms of the trust: That the said William Molle was, notwithstanding this defalcation, and his embarrassed circumstances, known to his co-trustees, most improperly and culpably permitted by his co-trustees, the said William Pringle and James Hunter, to continue in the office of factor, and to intromit with the trust-funds, without any caution or control whatever, and the grossest system of malversation and neglect prevailed, with the knowledge and connivance of the said William Pringle and James Hunter, in every department of the trust."

The summons then libels several letters passing between Pringle and Hunter, tending to show their knowledge of Molle's circumstances, and then it proceeds:

"That at length the said James Hunter and William Pringle, who had been guilty of the most gross and culpable negligence, and of wilful and corrupt violation of their duties as trustees, began to take serious alarm on their own accounts, and deemed it prudent to recal the factory granted to the said William Molle, which they did by a letter addressed to him by them, as late as the 29th October 1830."

In consequence of that communication the libel stated, that Molle intimated his bankruptcy, and confessed to a balance due by him to the trust of £5729,

"after most unwarrantably taking credit to the amount of about £11,000 for salaries and emoluments to trustees, factor, cashier, and law-agents (the whole duties of which offices he and the other trustees had grossly abused and neglected), so that after the disallowance of these illegal and unjustifiable charges, which were made under the pretence of being a recompense for business and duties honestly performed, and for supporting interests, which, in truth, were wholly neglected and betrayed, the balance due to the trust-estate, at the period of the said William Molle's bankruptcy, was £16,729, (exclusive altogether of fraudulent transactions with debtors to the trust-estate, which the said James Hunter himself judicially stated at £9072.)"

The summons concluded for payment of the £5729, and farther, of £11,000

"improperly taken credit for by the said trustees in the name of salaries, and as reimbursement in the alleged management of the said estate, and for discharging the duties of trustees, cashiers, factors, and agents, which, in truth, they abandoned and neglected, and for accountants and others who were not employed in terms of the trust, or for its purposes, with interest of the several sums charged by the said trustees in name of salary to trustees, cashier, factors, and others, as aforesaid, since the said sums were respectively received by them, until payment thereof."

Defences were lodged to this action in name of the representatives of Pringle and Hunter,—these parties having meantime deceased. A record was made up, in the course of which documentary evidence was lodged by all parties, extending to upwards of five hundred pages of print. Among the documents produced, the trust-accounts, for the period embraced down to Molle's bankruptcy, were lodged in process, audited by Mr Brown.

The gross rental of the estate amounted to about £8000; the personal funds to £21,000, and the debts to about £68,000. It was stated, that the period at which the accounts had to be rendered to Mr Brown, viz., the 31st December, was attended with inconvenience, and that much misapprehension existed as to the apparent large balances, seemingly in the hands of the factor as of that date. There were on the estate about one hundred feuars, and from seventy to eighty tenants, and in most instances, the rents were payable at Candlemas and Lammas.

The following is a list of the balances stated to have been in the hands of the factor, as at 31st December of each year:—31st December 1822, £983; 1823, £764; 1824, £910; 1825, £2258; 1826, £1970; 1827, £1851; 1828, £2172; 1829, £1634; 1830, £3775. In regard to these balances, parties entered at length into statements and arguments, either to show that they ought not to have existed at all, or to explain their existence as at these dates; but it seems sufficient to advert to such of those statements only as will illustrate the views of the Court and the principle of decision. It appeared from notes issued by the auditor to the trustees, as well as from notes appended by him to the accounts which were not settled on the expiry of each year, but at considerable distances of time after the 31st December in every year, that the auditor made them aware of the existence of such balances. In June 1828, the auditor wrote Mr Pringle, that the accounts for 1826 were extended, and ready for closing, whenever a settlement of the factory balance was provided for. In consequence of

this, Pringle wrote to Molle, calling on him to pay up the amount. In March 1829, Mr Brown wrote to Pringle in a similar strain, as to the then balance of £1971. In September 1830, Mr Pringle wrote Hunter in regard to the state of the trust, and expressed himself in a way which, the pursuer maintained, afforded direct evidence of Pringle's doubt of Molle's solvency; for he expressed himself distressed in regard to the balance in Molle's hands, and urged Hunter to address Molle on the subject. These notices by the auditor regarding the balances, were addressed to Pringle, and appended to the accounts, down to within a short time of Molle's bankruptcy. It further appeared, that in April 1830, when the balance seemed to have been largest, Pringle, at Molle's request, delayed sending in his accounts for crop and year 1829 to the auditor, till those of Molle were ready. On 29th April 1829, and previous to this time, Hunter had expressed from the country, great anxiety to see the accounts, and in May 1830, he complained to Mr Brown grievously of being kept in ignorance of the trust-affairs. It was only about the end of June that Mr Brown expressed himself as likely to complete the accounts, and call the annual meeting; but the accounts were not completed for a much longer period, and it was only on 21st September the annual meeting appears to have been held; and on perusing the account, Pringle wrote to Hunter the letter of 27th September, already referred to. When the large balance in Molle's hands was then ascertained, Pringle and Hunter wrote, individually and jointly, very urgent demands to get security or payment, and in consequence of their entreaties, Mr Molle's partner, on 30th October 1830, inclosed to Hunter, Molle's resignation, and stated that he meant to execute a trust-deed. Measures were then on the point of being taken against Molle, to benefit the trust-estate; but his estates were meantime sequestrated.

The pursuer *pleaded*—(1.) The late William Pringle and James Hunter, in consequence of having appointed their co-trustee, William Molle, to be factor, and without requiring him to find caution, and of their culpable neglect in not duly calling him to account, and allowing large balances to remain in his hands at his free disposal, were responsible for whatever sums he may, upon his bankruptcy, have been due to the estate. The said William Pringle was farther liable for the deficiencies of the said William Molle, in respect of his having held the office of cashier, and having culpably failed in his duty, as such, in calling the said William Molle to account for his intromissions as factor. (2.) The allowance given by the trustees to their co-trustee, Mr Molle, as factor, was unwarrantable under the trust, and exorbitant, and the allowance to Mr Pringle as cashier, and to other officers appointed by them under the trust, if not unwarrantable under the trust, were exorbitant in point of amount, or at least, one and all of the said allowances were not exigible, in respect of the duties of the offices to which they were attached, not having been duly and faithfully performed; and which last ground of objection is also applicable to the allowances charged by the said parties as trustees; and therefore, and for one or other of these reasons, Messrs Pringle and Hunter were bound to account, either for the whole sums intromitted with, whether by them or by Mr Molle, without deduction

of any part of these allowances, or without deduction of the greater portion of them. Or at all events, if credit is to be given for these allowances, or any part of them, it can only be upon the footing of the trust-estate being fully indemnified for the balances due by Mr Molle, and its being placed in the same situation in which it would have stood, had the said several parties diligently and faithfully discharged the duties of the offices, for the due performance of which the said allowances are charged.

Pringle's representatives *pleaded*—(1.) This action, as one of count and reckoning, ought to be dismissed; because, *first*, The accounts have, in terms of the trust-deed, been submitted to "an accountant of character in Edinburgh," and examined, approved of, and docketed by him, and they cannot now be re-examined, and the doquets set aside, because the trust-deed declares that the approbation of the accountant is to operate as a full exoneration "to the said trustee or trustees of their whole management during the currency of the accounts." And, *secondly*, The whole trust-accounts which are in process, in so far as the late Mr Pringle was concerned, were properly vouched, the allowances therein charged reasonable, and fixed on reference to accountants, and because the entire management of the trustees was correct and judicious. (2.) As an action for payment of any balance said to be due by the late Mr Pringle, as cashier, under the trust, the action ought to be dismissed, because no balance was due by him, but, on the contrary, when he resigned the office, a balance was due to him of £59. 7s. 8½d. (3.) As an action directed against Mr Pringle's representatives, for payment of the balance due by Mr Molle, it ought to be dismissed; because, *first*, The pursuer is barred, by personal exception (alluding to the fact of the pursuer having attended the meeting when Molle and Pringle were severally chosen factor and cashier; but the pursuer, according to his statement, had merely attended to hear what was done), from objecting to Mr Molle's appointment as factor, by having concurred in that appointment: *Second*, The trust-deed declares, that the trustees shall not "be farther liable for their factors than that they shall be habit and repute responsible at the time of entering upon their office;" and Mr Molle was habit and repute in good credit, not only at the time when he was appointed factor, but continued to be in credit to the day of his failure: *Third*, The trust-deed also declares, that the trustees "shall noways be obliged to do diligence otherwise than as he or they shall think fit:" *Fourth*, The trust-deed farther declares, that the trustees shall not "be liable for omissions, but only each of them for himself, and his own actual and personal intromissions;" and, *fifth*, Because all reasonable diligence was used by Mr Pringle to recover the balances due by Mr Molle.

In these pleas Hunter's representatives generally concurred, *pleading* separately, (1.) That there being a separate appointment of cashier under the trust, in whose nomination the pursuer concurred, and whose duty it was to superintend the factor, and levy and invest the balances due or accruing upon his accounts, any responsibility for these balances that may exist, must lie with the cashier or his representatives, and in no respect with the late Mr Hunter or his representa-

tives. (2.) Even if it could be supposed that any responsibility lay with the late Mr Hunter for the balance due on Mr Molle's factory accounts, he sufficiently discharged himself of that responsibility by adopting every step that was necessary, prudent, or practicable, under the circumstances, for preventing the existence or increase of that balance, and for recovering it when ascertained. (3.) Under the facts, circumstances, and correspondence above set forth, there are no relevant grounds in law or justice, on which a personal liability can be raised up, or inferred against the late Mr Hunter, for the balance due on Mr Molle's factory accounts; and the pursuer having totally failed to specify or condescend on any such grounds, or to state a relevant case in support of the conclusions of his summons, the defenders ought to be assolizied therefrom, with full costs. (4.) The alleged balances claimed by the pursuer, as due on Mr Molle's factory accounts, are fictitious, and grossly exaggerated; and the pursuer's objections to the particular items referred to by him, especially the allowances to the factor, cashier, and law-agents, under the trust, are wholly unfounded, unwarrantable and in direct opposition to the terms of the trust-deed itself on which he founds.

The Lord Ordinary pronounced the following interlocutor, and appended a note which contains a *resumé* of the whole case:

"17th March 1836.—The Lord Ordinary having heard parties' procurators on the closed record between the pursuers and the representatives of the late William Pringle, depute-clerk of Session, and of the late James Hunter, writer in Dunse, and having also considered the process and productions, Finds, that by the settlements of the late George Home of Wedderburn and Paxton, William Molle, writer to the Signer, the late William Pringle, and the late James Hunter, were appointed trustees for carrying those settlements into effect: Finds, that on the 17th of March 1820, being the first meeting of the said trustees after the truster's death, William Molle was appointed factor, and the said William Pringle cashier, each with a salary, in addition to the sum allowed to them by the trust-deed for 'their trouble in the management': Finds, that in virtue of this appointment, Mr Molle had large intromissions with the rents of the trust-estate: Finds, that from December 1822, large annual balances were due by the factor on his intromissions, and were never fully paid up: Finds that the management, in terms of the above-mentioned appointments, continued until the 29th of October 1830, when the said factory was recalled by the co-trustees, the late William Pringle and the late James Hunter: Finds, that on the following day, the bankruptcy of the said William Molle was declared, and that a large balance was then due by the said William Molle, as factor to the trust-estate, amounting, according to the pursuers' statement, to the sum of £5729 Sterling: Finds, that the object of the first conclusion of the present summons, is to fix upon the defenders, the representatives of the said William Pringle and of the said James Hunter, a liability for the said balance: Finds that the said late William Pringle being not only a trustee, but having been appointed cashier with an additional salary, undertook in that double character the special duty, and had the special means of superintending and controlling the actings and the accounts of the factor and co-trustee, Mr Molle: Finds it established by the documents in process, that the late William Pringle was apprised of the factor's irregularity in failing to pay up and account for the annual balances of his intromissions: Finds that the said William Pringle, though thus aware of the factor Mr Molle's violation of his duty, took no steps, either by requiring caution, or insisting for payment, or recalling the factory, for securing the trust-estate against the consequences of the irregularities of the factor, of which he was so cognisant: Finds, that in these circumstances, the late William Pringle did incur a liability for the loss ultimately occasioned to the trust-estate by the failure

of the said factor, William Molle: Therefore, finds the defenders, the representatives of the said William Pringle, liable for the balance due by the said William Molle as factor, and appoints the case to be called, that this balance may be precisely ascertained, but assolizies the said representatives from the other conclusions of the libel, and decerns; and in regard to the defenders, the representatives of the late James Hunter, assolizies them from the whole conclusions of the libel, and decerns: Finds them entitled to their expenses, and allows an account thereof to be given in, and to be taxed by the auditor.

"Note.—There are various conclusions in this summons which present no difficulty, and which, indeed, were hardly touched on in the argument before the Lord Ordinary.

"1st, Considering the large discretionary powers conferred by the trust-deed on the trustees, in regard to the expenses of management, the Lord Ordinary sees no ground for questioning the amount of the salaries allowed to the cashier, factors or agents; upon which it may also be remarked, that, comparing the present system of management followed by the pursuers themselves with that under the trust, the former is considerably the more expensive of the two. As to the appointment to those offices of persons holding the situation of trustees, the Lord Ordinary has to observe, that the impropriety, inexpediency and hazard of such a course, is well exemplified in the present case. Considering the evident consequences of such nominations, by which the interest of the same individual, as an officer under the trust, may, and in many cases must be placed in opposition to his duty as trustee, much might be said against their legality. But, taking into view the notoriety of the practice, and the extent to which it has been carried in this country without any attempt at challenge, the Lord Ordinary does not consider himself warranted in sustaining this circumstance as a substantive objection to the trust-management.

"2dly, In regard to the conclusion for 'malversations' committed by the trustees, it must be at once dismissed, as the record contains no specific statements of any malversations requiring further inquiry.

"3dly, The same remark applies to the general conclusion for accounting. The whole accounts, audited by an accountant of character, are now, and have been from the beginning, in process, and in so far as the Lord Ordinary is aware, there is no objection to any of the articles of them, except those connected with the balance due by the factor, Mr Molle. Indeed, from what took place at the debate, that appears to the Lord Ordinary to form substantially the only ground of dispute between the parties; and in regard to it, he has found it necessary to make a material distinction between the case of the late Mr Hunter and that of Mr Pringle. Against the former and his representatives, the claim seems to be groundless. Mr Hunter, though a trustee, took, or rather was allowed, little or no share of the management. He was resident in Berwickshire, and acted as the country agent of the trust. Mr Pringle and Mr Molle, the other two trustees, resided in Edinburgh; being a quorum, they had the means of carrying on the management without requiring the presence of Mr Hunter at their meetings, and the inference fairly to be drawn from the correspondence is, that they were not disposed to admit him into the management, farther than was absolutely necessary. Accordingly, the Lord Ordinary is satisfied, on a perusal of the documents, that the late Mr Hunter was, from the year 1822, entirely in the dark as to the true state of the factor's accounts, and the continued balances allowed to remain in his hands. It also appears, that from the 5th of February 1829, he made constant attempts, though unsuccessfully, to get access to those accounts; and it was not until the end of September 1830 that they were put into his hands. From that time he did every thing in his power to obtain payment from Mr Molle; and indeed, it is to his exertions that the ultimate recal of the factory may be ascribed.

"In these circumstances, considering the exuberant confidence reposed in the trustees by the trust-deed—the reliance Mr Hunter was fairly entitled to place in the acting quorum of the trustees, Mr Pringle and Mr Molle, two professional persons of the first respectability—the backwardness of those gentlemen to communicate with Mr Hunter—his ignorance of the factor's balances, and his anxiety and activity from the moment his suspicions

were roused, and his attention called to the matter—the Lord Ordinary must hold that Mr Hunter and his representatives are fully entitled to the benefit of the protecting clauses of the trust-deed; and he may further observe, that the charge made in this clamorous summons against the late Mr Hunter, of entering into a corrupt compact with the late Mr Pringle, by which he, Hunter, abandoned the action he had raised against Mr Pringle, in consideration of Pringle resigning the trust in his favour, seems most absurd and unwarrantable, now that it is established by the documents in process that Mr Hunter truly acted in those matters as the instrument of the pursuer, the heir of entail, and an instrument which, considering the somewhat extraordinary and unscrupulous proposals made to him in the course of those proceedings, the pursuer evidently viewed as completely under his power. Upon all these grounds, the Lord Ordinary has thought himself bound to award expenses to the representatives of Mr Hunter.

“The case of Mr Pringle is very different, though in one particular, viz., the fairness and good faith of his actings, his character stands perfectly unimpeached. The whole charges made against him in the summons, of wilful violation of his duty, and corrupt connivance at the dilapidation of the trust-funds, appear to be utterly without foundation, and might have been spared. At the same time, the Lord Ordinary is compelled to hold that there was such a constructive violation or neglect of his duty, as to render him liable for the consequences. It is true, that by the trust-deed the trustees are protected from any further liability for their factor than that he shall ‘be habit and repute responsible at the time of entering upon office;’ and it also appears that Mr Molle was habit and repute responsible, not only at the time of entering upon his office, but until a very short time indeed before the public declaration of his bankruptcy. But the present case, like every other of the kind, must depend upon its special circumstances. Now, here Mr Pringle was not merely a trustee receiving the allowance granted by the trust—he was the cashier appointed by himself and his co-trustees, with an additional salary. It was his duty, and he had the power to ascertain the state of the factor’s accounts, and to restrict his balances within a reasonable amount, whatever delay might occur in the formal auditing of those accounts by the accountant—a delay which, in this case, occasionally extended to years after the accounts were given in—the cashier, whose province it was to collect and apply the trust-funds to the proper purposes of the trust, was bound to inquire and to know how the factor’s accounts stood. It is proved by the documents in process that he did know, and that the irregularity of the large balances retained by the factor, was repeatedly noticed by the accountant. Mr Pringle’s case, then, is not merely that of a trustee relying on the circumstance of a factor being habit and repute responsible; for Mr Pringle, as trustee and cashier, had the means of knowing, and knew that whatever might be Mr Molle’s general character for solvency, he was in the habitual violation of his duty as factor, and was either unable or unwilling to account properly for the trust-funds. Having this information, Mr Pringle neither required caution, nor communicated the matter specially to his co-trustee Mr Hunter, for the purpose of recalling the factor; but knowing, as he did, at the end of the year 1829 the large balance in the account of that year due by the factor, he allowed him to go on collecting the rents for the year 1830, thus increasing the balance to a great amount, if not to the sum actually concluded for. It is quite possible, and indeed there is no reason to doubt, that this conduct on the part of Mr Pringle proceeded from an ill-founded reliance on Mr Molle’s solvency, and from a reluctance to take strong measures against a person with whom he was on a footing of intimacy and confidence. But it appears to the Lord Ordinary, that the consequences of this mistaken confidence must be borne by him, and not by the trust-estate, of which he was the guardian.

“Before concluding, the Lord Ordinary feels himself called upon to notice the enormous accumulation of documentary evidence with which this process has been encumbered. That of the pursuer extends to 300 pages of print, while on the part of the defenders there are about 200 more. It is true that this case, turning much upon written evidence, required the printing of documents to a certain extent. But he must say, that this

mass of pretended evidence, whether the indiscriminate admission or confused arrangement of its contents be considered, has had the effect of obscuring rather than of elucidating the points in dispute, and may form a fit subject of consideration in discussing the point of expenses.”

The pursuers reclaimed generally, as also Pringle’s representatives. At advising on 1st December 1837, the Court, on note for Pringle’s representatives,

“Recal the interlocutor reclaimed against, assolvie the complainers from the conclusion of the libel, and decern; but find no expenses due to either party.”

On note for Home, &c.,

“Recal that part of the interlocutor complained of, which finds the representatives of the late James Hunter entitled to expenses, and find no expenses due to either party: *Quoad ultra*, adhere to the interlocutor, and refuse the desire of this note.”

Mr Home, and David Milne, Esq., factor for the estate of Billie, appealed; and there was also an appeal by the defenders on the question of costs.

Lord Chancellor.—My Lords, it appears in this case, that by the first deed, of the 16th of July 1816, George Home disposed and made over his estates, to and in favour of three trustees, David Renton, William Pringle, the respondent, and John Renton, who were to execute and manage the trust in succession, without the interference of the others; and it was provided, amongst other things, that they should have power to name and remove factors from time to time, with such powers, and liable to such diligence, as the trustee or trustees should think fit, and to pay such factors such salaries as they should see fit, and to settle accounts annually with such factors, and upon payment of what should be found due, to exonerate the factors, and within six months after each clearance with the said factors, to make up their own accounts, and to get the same approved by an accountant of character in Edinburgh; and if such accounts should be approved by the said accountant, such approbation was to operate as a full exoneration of the trustee or trustees during the currency of such account; and it was provided, that such trustees should nowise be obliged to do diligence, otherwise than as they should think fit, nor should be liable for any omissions, but only each of them for himself and his own actual and personal intrusions, nor should they be further liable for their factors, than that they should be ‘habit and repute responsible at the time of entering upon their office.’ Amongst other trusts for the application of the income was the payment of the yearly sum of £100, as a qualification to the acting trustee or trustees for their trouble in the management. The trusts, it appears, only affected the rents, which were to be applied in payment of the debts and legacies of the trust; and the interest of charges, and public burdens and repairs, and the residue in payment of all remaining debts of the trust, and upon fulfilment of all the purposes of the trust, to convey to the party entitled under another deed, by virtue of which the pursuer is entitled to the estate as first heir of entail, for himself and the heirs whatsoever of the estate, to whom the trustees are to account for their intrusions and management. By another deed, dated the 6th day of August 1819, George Home appointed William Molle, the respondent, William Pringle, and James Hunter, trustees, in the place of those named in the former deed, but with a declaration that the majority should be a quorum for executing the trusts, and not in other respects altering the provisions of the former deed. Soon after the trusteer’s death in 1820, the three trustees met, and, Mr Home, the pursuer, being present, appointed William Molle to be factor, with a salary of £180 per annum, and William Pringle cashier, with a salary of £50 per annum; and on the 22d of March 1820, a regular deed of factory was granted to Molle accordingly. The real question in the cause, is the liability of Pringle and Hunter for the sum due from Molle, as trustee or factor, at the time of his insolvency in October 1830; and the grounds upon which the charge is sought to be maintained are, principally, first, that the appointment of one of the trustees to be factor, was of itself a breach of trust, and subjected the parties to it to all the con-

sequences resulting from it; and *secondly*, that there was such gross negligence in Pringle and Hunter, in permitting Molle to keep balances in his hand, as to subject them to liability for the balance due from him. Such, at least, are the points into which the claims of the pursuers are to be resolved, and which it is important to keep separate, in order to come to a right understanding of the principle of law applicable to this case, which has not, I think, been sufficiently done in some of the proceedings. As to the *first*, it is said that there is a difference between the law of England and of Scotland. In England, the appointment by trustees of one of their body to act exclusively in any part of the trust, under the authority of all, would, as to the others, have the effect of making the trustees appointing, responsible for the act of the one appointed,—that is, they could not treat acts done, or sums received by such appointee in the character so conferred upon him, as the acts or receipts of a co-trustee, for which they, as co-trustees, would not be liable, but as acts and receipts of their agent, for which they would or would not be liable, as there might be proof of culpable neglect in their dealings with such agent. The allowance of a salary to such appointee would clearly be a breach of trust, and would therefore be disallowed. But it is said that the practice, if not the law of Scotland, sanctions such appointment; and the case of *Montgomerie v. Wauchope*, Fac. Coll., 4th June 1822, is referred to in proof of that proposition. Nothing was decided in that case upon that point; but the Judges stated that such appointments were not inconsistent with the law of Scotland, and that a trustee appointed by his co-trustees was entitled to the usual remuneration of an agent or cashier. This is the real question, because it is not necessary to hold that the appointment is illegal in order to maintain the principle, that the party, who having accepted the office of trustee, which unless otherwise provided for by the trust must be performed gratuitously, accepts another office inconsistent with that of trustee, shall not be permitted to derive any emolument out of the trust-property in respect of such employment. That the office of trustee, and of factor or cashier to the property are inconsistent, cannot be disputed. If the execution of the trust require such appointments, it becomes the duty of the trustee to exercise his discretion and judgment in the selection of the officers, and his vigilant superintendence of their proceedings when appointed,—all which is lost to the trust when a trustee is appointed to the execution of those duties. Therefore, the Courts of Equity in England, in such cases, refuse to the trustee any remuneration which would come to others from the appointment, which produces the salutary effect of deterring trustees from making such appointment when not actually required; and when such necessity exists, preserves to the trust the superintendence and control of the trustees over the officer they may appoint. I should be sorry to give any sanction to a contrary practice in Scotland. There can be no reason for any difference in the rule upon this subject in the two countries. The benefit of the rule, as acted upon in England, is not disputed; and as there is no decision to the contrary, there cannot be any reason for sanctioning a contrary rule in Scotland. In the view I take of the present case, there will not be any necessity for expressing any further opinion upon that point. In England, the appointment of one of the trustees to act as receiver, and manage the property, and collect the rents, would not, *per se*, make the other trustee responsible for his acts, but it would make the trustee so appointed, the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts and receipts of a stranger appointed to such office, but not otherwise; and in Scotland, where such appointments are treated with more indulgence, the consequences cannot be more stringent. It appears, indeed, from the cases of *Sym v. Charles*, (8 S. and D., 741), *Moffat v. Robertson*, (12 S. and D., 369), *Ainalie v. Cheape*, (13 S. and D., 417), and *Deane v. Paterson*, (14 S. and D., 361), that the Court of Session have acted upon this principle. The *first* ground, therefore, upon which the appellant seeks to fix Pringle and Hunter with the balance due from Molle, I think wholly fails. But, *secondly*, considering Molle as the agent and receiver of the other trustees, have they, in their transactions with him, been guilty of such negligence as to make them responsible for the acts of their agent? For I have not been able to follow the reasoning by

which it seems to have been supposed that Mr Pringle, by accepting the office of cashier, incurred any additional responsibility as to the acts or receipts of Mr Molle. That office may, indeed, have afforded him opportunities of knowing the state of Mr Molle's accounts, and have given him earlier notice of his malversations,—and such knowledge and notice may be important in considering his liability; but such liability must attach to his office of trustee, and not of cashier. The question then is, what is the case established against Mr Pringle and Mr Hunter, of culpable negligence in dealing with their factor, Mr Molle? The trust-deed directs that the trustees should settle accounts annually with their factors, and upon payment of what should be found due, exonerate and discharge them from their intrusions and management, and within six months of each clearance with the factor, make up their own accounts, and get them approved by an accountant. This seems to assume that the account so to be settled with the factor, was to include the whole of his receipts and payments up to the time of the settlement; but that is not possible. It is the usual course that such accounts should be made up to a certain time, and there must necessarily be a running account not included in any such statement. No doubt this affords the means to a factor of keeping a balance in hand which does not appear upon the face of his accounts. He may delay receiving a sum of money until after the time to which the account is made up, in order to keep down the apparent balance. But however dishonest such contrivances may be in the factor, they cannot impose any responsibility upon the trustees by whom he is employed, unless they are parties to, or cognizant of them. And it is obvious, that in the management of a considerable property, it is indispensably necessary to have a certain balance in the hands of the manager to meet the current expenses. It appears, accordingly, that in Mr Molle's accounts for 1822, considerable balances were in his hands on the 31st of December of each year; but that in each of those years, such balances were more than paid by the month of March or April in the following year, excepting the year 1827, in which the preceding balance was not exceeded by subsequent payments till the month of September. It is true, that in the interval he had received sums equal to, or exceeding his subsequent payments, so that his actual balance was not reduced; but of that the trustees had not necessarily the means of information. The balance to the 31st of December 1829, was £1634, which was more than covered by subsequent payments by the 7th of April 1830. It appears, however, that the trustees, and particularly Mr Pringle, were aware that Mr Molle retained balances in his hands beyond what they thought necessary or proper, and that his so doing was the subject of remonstrance in 1828, which led to the reduction of what was then due; and in 1830, the correspondence proves that Mr Pringle insisted upon the payment of the balance then in hand, which not being done, led to the recall of the factory granted to Mr Molle, which was followed by an intimation of his bankruptcy on the following day, up to which time it does not appear that there was any ground for suspecting his solvency; and it is proved, that at the time of his appointment he was in high credit. The profit which arises from the use of a balance, is sufficient to account for the attempt to detain it, without attributing it to inability to pay. A passage in Mr Pringle's letter of 22d of September 1830, has been much relied upon, as showing that he had been aware of Mr Molle's bad circumstances in 1828. He says, speaking of a payment of £1500 received in 1828,—“I own I am a good deal pleased that this was done, from whatever quarter it was procured.” The meaning of this is very doubtful. It may mean that he doubted Mr Molle's having means of his own to pay that £1500; or it may mean, that it might have been paid out of subsequent receipts, so as not in fact to reduce the amount of balance due on the preceding December. It is much too slight a piece of evidence to support the case of Mr Pringle's having at that time been so cognizant of Mr Molle's difficulties, as to have made it his duty to interpose for the purpose of preventing his receiving any further part of the property, and to institute legal proceedings for the purpose of compelling payment of the existing balance,—the credit and supposed responsibility of Mr Molle having been unsuspected until very shortly before his bankruptcy. I cannot, therefore, find in the evidence given, any such proof of culpable negligence in the mode of dealing with the factor, as would,

according to the decisions in Scotland, render a trustee liable for the losses sustained by his ultimate insolvency. The cases of *Ainslie v. Cheape*, 13 Shaw, 417, and *Cowan v. Crawford*, in 13 Fac. Coll., 628, are strong authorities upon this point. In 1828, the trustees finding their factor retaining balances in hand beyond what they thought proper, press him, by every means short of legal proceedings, to keep down such balances, which course continues till December 1830, when, finding their efforts ineffectual, they recall his appointment—which produces his bankruptcy, without any previous proof of his being insolvent. The result is, that, in my opinion, the judgment below was correct, in holding that Mr Pringle's estate is not liable for the loss sustained by the insolvency of Mr Molle; and if he did not make himself liable for such loss, it is clear that Mr Hunter did not; for every circumstance from which the responsibility of Mr Pringle could arise, exists in a less degree in the case of Mr Hunter. If the case fails so far, there is, I think, no ground for the general account; for if Messrs Pringle and Hunter are not chargeable with Mr Molle's balance, their own accounts have been regularly examined and settled, according to the provisions of the trust-deed, and no case is made for opening them. It is indeed said that Mr Pringle has in those accounts been allowed a salary of £50 per annum, to which, as trustee, he was not entitled; and if that question had arisen for decision in a proper form, and under circumstances calling for a judgment upon the point, whether a trustee could create an office for himself out of his trust, so as to derive profit from his trust, I should have had great difficulty in assenting to what appears to have been assumed, rather than decided, in Scotland. In such a case, there cannot be any good reason for any difference in the rules adopted in the two countries, and there cannot be any doubt as to the inconvenience and danger of such a practice; but in this case, if the £50 per annum were to be disallowed, and struck out of Mr Pringle's accounts, he would be entitled to charge for all actual expenses incurred by the duty he performed as cashier: so that there is no probability that the estate would profit by opening the accounts in that respect; and when it is considered that this allowance arose from an appointment made in the presence of the pursuer, and was to be paid out of rents, the surplus of which was his, and that it has been sanctioned by the accountant, who had authority from the trustees to settle the trustees' accounts, I cannot think that it would be advisable, for such a purpose, to interfere with the judgment below, particularly when it appears that such allowances have been usual in Scotland, and that there is something like judicial authority for them, as in *Montgomerie v. Wauchope*, Fac. Coll., 4th June 1822. I think, also, that the House would be very reluctant, when the principal object of the suit fails, to give any relief upon so small a part of the case,—particularly where the record is loaded with charges and accusations of personal fraud and wilful dereliction of duty against Mr Pringle and Mr Hunter, of which there is not only no proof, but for which there does not appear at any time to have been any reasonable ground for suspicion, and for introducing which into the pleadings I have not seen or heard any justification. And this leads to the only remaining question—that of costs, which is the only one upon which I have entertained any doubt; and if I had been sitting in the Court below—considering the failure of the case made against the trustees, and the unjustifiable charges brought against them,—I should perhaps have thought it just that they should be indemnified in costs, by directing the pursuers to pay them. But in this House the case is different. A court of appeal does not interfere in the question of costs, without reluctance, in any case, and generally, will not entertain an appeal for costs alone; and the question of costs can only arise upon the cross appeal. I am therefore of opinion, that both appeals should be dismissed, with costs.

Appeals dismissed, with costs.

First Division.—Lord Fullerton, *Ordinary*.—Spottiswoode and Robertson, *Appellants' Solicitors*.—George Webster, *Respondents' Solicitor*.—[W.H.D.]

22d June 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 236.—WILLIAM DIXON, *Esq.*, *Appellant*, v. MRS MARGARET DIXON or FISHER, and her HUSBAND for his interest, *Respondents*.

Husband and Wife—Testament—Provisions—Jus Relictæ—Homologation—Reduction—Circumstances in which held (affirming the judgment of the Court of Session), that a widow having, in the first instance, accepted and taken possession of various special subjects of value, to which she had right by the testamentary deeds of her husband; and having thereafter transacted with his disponees and executors, and discharged all her claims against the estate, it was not thereafter competent, either to her or any one in her right, to repudiate or reduce the settlements of her husband on the ground of inadequacy or otherwise.

This was an action of reduction raised by the pursuer in his own name, and in that of his now deceased mother, Mrs Janet Smith or Dixon, in aid of his pleas in a process of multiplepoinding raised by the present defenders in May 1823, and in which the pursuer, William, and his elder brother, John Dixon, as the general representatives of their father, the late William Dixon, are the nominal pursuers.

Mr William Dixon, the pursuer's father, an Englishman by birth, came in early life to Scotland, and was engaged as manager of Blackhouse colliery, near Ayr. While in that situation, about the year 1775, he married Mrs Janet Smith, without any marriage-contract. Mr Dixon afterwards gradually improved his circumstances; and in the latter part of his life they improved so much, that at his death in 1822, he was enabled to leave to his family a most extensive succession, consisting of heritable and moveable property. Antecedent to 1809, having acquired the lands of Palace-Craig, in the parish of Old Monkland, he secured to his wife a reasonable provision in the event of widowhood. On 14th December 1809, he executed the deed now sought to be reduced, which proceeds on the narrative that no antenuptial marriage-contract had been executed by himself and his wife, nor any provision made in her favour in the event of survivorship; and therefore he binds and obliges himself, and his heirs and successors, to pay to her, if she survive him, a life rent annuity of £150 per annum, in security of which he disposed to her the lands of Palace-Craig. He farther granted to her a life rent of the mansion-house, garden and offices, and a park of ground extending to about twenty-two acres. By the same deed there is assigned to her

"in absolute property, in the event of her surviving me, the whole household furniture and plenishing, bed and table linen, and plate that shall be pertaining and belonging to me at the time of my death, likewise three of the best milch-cows which shall belong to me."

In return for these provisions the deed bears:

"And I, the said Janet Smith, do hereby accept of the provisions before mentioned, in full of all I could ask or claim, by or through the decease of the said William Dixon, hereby renouncing the legal provisions I might be entitled to in the event of my surviving him."

On 11th April 1817, Mr Dixon's affairs still prospering, he executed another deed, providing certain sums to his children, and disposing of the *universitas* of his estates in favour of his two surviving sons, John and the present pursuer, William. By this deed an additional sum of £1000 is provided to Mrs Dixon.

On 23d November 1821, Mr Dixon executed a disposition in favour of his wife, by which her provisions were considerably enlarged. It bears to be granted "for the love, favour, and affection I have and bear to Janet Smith, my wife, and for other considerations me hereunto moving," &c. The additional provisions are, 1. The absolute right to two shops in Glassford Street, Glasgow; and, 2. Forty shares of the undertaking called the Monkland Canal Navigation, the value of which was £4400.

Mr Dixon died on 16th October 1822 at Govanhill, and was survived by his wife, and by two sons and four daughters,—viz, John; William; Isabella, widow of Hugh Mann, writer in Glasgow; Margaret, Mrs Fisher; Janet, wife of Mr Joseph Whitehead, tanner in Paisley; and Lillias, unmarried.

In virtue of the deed of settlement of 1817, Mr Dixon's two sons assumed possession, generally, of his whole property, under the exception of the subject specially conveyed to his widow. The pursuer, William Dixon, assumed the sole control and management of the business, estate, and affairs. Soon after Mr Dixon's death, the defenders intimated their dissatisfaction with the provision granted to Mrs Fisher (a liferent of £4000), and requested explanation of the value of Mr Dixon's estate, with the view to claim legitim. This produced a termination of all domestic intercourse between the defender and Mr Dixon's widow and family.

After her husband's death, Mrs Dixon took possession of the furniture, as provided to her by the postnuptial contract. She drew payment of the dividends on her shares of the Monkland Canal Company. She also uplifted the rents of the Glassford Street shops, in which she took infestment, and she gradually drew payment from her sons of sums to account of her money provisions. Mrs Dixon made no claim for terce or *jus relictæ*, nor did she enter appearance in the multipoleinding.

On 28th February 1826, a deed of agreement was executed by Mrs Dixon on the one part, and by her sons, John and William Dixon, on the other part. By this deed the two sons bound themselves to make payment to their mother of £5400 at the term of Whitsunday 1836 (ten years after), with interest from 16th October 1822. They engaged, moreover, to pay her a liferent annuity of £200, and to give her the liferent use of the house and garden at Govanhill. They farther bound themselves to provide and maintain for her three cows, and a carriage and pair of horses, and to make over to her the whole household furniture which had belonged to her husband; and, finally, they agreed that she should have right to the two shops in Glassford Street. On the other hand, as a counterpart (which forms the basis of this reduction, so far as stated in the libel),

"the said Mrs Janet Smith or Dixon not only declares herself satisfied with the provisions before mentioned, in lieu of, and in full of all claims of whatever nature, whether legal or conventional, she is entitled to from the estate of the said deceased William Dixon, her husband, but she hereby gives up, disposes, conveys, and renounces, to and in favour of the said John Dixon and William Dixon, and their heirs and successors, all such claims and rights, in whatever way conceived, and whether legal or conventional, and hereby binds and obliges herself, her heirs, executors and successors, to execute all revo-

cations, conveyances or other deeds that may be necessary for investing them and their foresaids in the full right thereof, with full power to them and their foresaids to follow forth and make the same effectual by all competent and legal ways and means: Farther, the said Janet Smith or Dixon hereby acknowledges that she has, since the death of her said husband, received from the said John Dixon and William Dixon the sum of £1569. 16s. Sterling, to account of the sums provided to her as aforesaid."

Of the same date with this deed of agreement, Mrs Dixon executed, in favour of her two sons, a regular transfer in the usual style, of

"all and whole forty shares of the undertaking of the Monkland Canal Navigation, as the said shares stand divided by an Act of Parliament of the 53d year of the reign of his late Majesty, and which belonged to the said deceased William Dixon, and were conveyed by him in my favour, conform to disposition and assignation, bearing date the 23d day of November 1821, and recorded in the Sheriff-court books of Lanarkshire the 23d day of October 1822, with the dividends due on the said forty shares at and prior to the date hereof, and in all time coming."

John and William Dixon afterwards, in September 1826, found it necessary to execute a trust-deed in favour of Mr Cuthbertson, accountant in Glasgow, in order "to liquidate and pay off our debts, as well as the provisions left by our said father." To this deed Mrs Dixon, and all the other members of the family, excepting the defenders, acceded. In adjusting this matter, no mention was made, nor any conveyance granted to Mr Cuthbertson of the widow's terce and *jus relictæ*, as acquired by Messrs Dixon under the agreement of February 1826.

On 20th May 1827, John and William Dixon entered into an agreement, with consent of their trustee, by which the pursuer, William Dixon, took upon himself their whole joint obligations, and engaged to pay to his brother, John, the sum of £35,000; and, on the other hand, John conveyed to William his share of their father's estate and funds. In that agreement there was no conveyance by John to William of the rights acquired by them in virtue of the mutual deed executed by them and their mother, now libelled on, of 28th February 1826. By the agreement of May 1827, the pursuer, William Dixon, was taken bound to relieve his brother John of all their joint debts and obligations, and of the legacies and annuities left and bequeathed by their father, &c. Instead, however, of paying off those due to his mother and sisters, William Dixon prevailed upon them to grant a deed, on 23d and 25th December 1830, discharging the eldest son, John, of all liability to them under his father's settlements, and accepting of himself as their sole debtor.

The present action was raised on 14th December 1831, in name of the widow, Mrs Dixon, and her son William, concluding for decree of reduction of her postnuptial contract of 14th December 1809, and of all writs importing an acceptance of the provisions settled on her, and stating, that by an assignation embodied in the deed of agreement of 28th February 1826, the widow had conveyed to her two sons, John and William, her rights *jure relictæ*, worth £10,000, to which the pursuer, William, now had right, in virtue of the transaction by which he purchased his elder brother's interest in the whole funds and estate of the family.

Defences were lodged, but no steps were taken by the pursuer while his mother lived. She died in De-

ember 1834, and the action was revived in consequence of a summons of waking raised by the defenders, in order to clear the way for a decision in the separate process of multiplepounding, since which time the pursuer endeavoured to support it by various productions:—1st, By the following mandate:

“GLASGOW, 3d June 1823.—We hereby authorise you to appear for us in the process of multiplepounding raised by Mrs Fisher, in regard to the succession of the late Mr Dixon, against us and others, and to claim our legal shares of said succession. We are, gentlemen, your most obedient servants, (Signed) JANET DIXON, JANET WHITEHEAD, JOSEPH WHITEHEAD, LILLIAS DIXON, ISABELLA MANN, WILLIAM DIXON.” (Addressed) “To Messrs Tod and Romanes, W.S., Edinburgh.”

No use was made of this mandate by lodging claims in the multiplepounding. 2dly, There was put into the process of multiplepounding, on 23d May 1836, a deed of revocation, executed by Mrs Dixon of so early a date as 12th March 1824, by which, on a recital of all the provisions granted by her husband in her favour, she revoked and recalled her acceptance thereof, that she might be restored to her whole legal rights. This deed did not appear to have been delivered, and was not noticed in any of the deeds or transactions subsequently to its date, and was not libelled on in this process. The third document produced was a mandate, dated 11th March 1830, to Messrs Tod and Romanes, authorising them to raise an action of reduction, to the effect of enabling her “to make effectual the legal claims competent to me *jure relictae* or otherwise.”

In support of the action the pursuer *pleaded*—

1. Mrs Dixon's alleged acceptance, *stante matrimonio*, of certain provisions in her husband's settlements in lieu or satisfaction of her legal provisions of *terce* and *jus relictae*, is null and void, in respect that any such acceptance was a *donatio inter virum et uxorem*, and as such was revocable, and was revoked accordingly. 2. Those provisions having been quite inadequate, and far less than the value of her legal provisions, either at the time that these conventional provisions themselves were made, or at the time of Mr Dixon's death, her alleged acceptance thereof was not onerous or irrevocable, nor could her power or right of revoking such acceptance be affected by other provisions, which were not so accepted, having been subsequently granted, or by her acceptance of provisions which were not declared to be in lieu or satisfaction of her legal claims. 3. Mrs Dixon's alleged acceptance of certain conventional provisions in lieu or satisfaction of her legal rights, was moreover void and ineffectual, in respect of her having signed the same at the solicitation of her husband, in ignorance of the nature and extent of her legal rights, and of the disproportion between these and the conventional provisions; and in respect, at all events, of her alleged acceptance having proceeded upon error in *substantialibus*. 4. Mrs Dixon's acceptance was legally and effectually revoked, not only by the deed of revocation and other writs which she granted in her own favour, and which were effectual in law before as well as after delivery, but likewise by her transactions with her sons, and the pursuer individually, and by the institution of the present action of reduction. 5. The alleged proceedings founded upon by Mrs Fisher and her husband, could not prevent Mrs Dixon from effectually repudiating the provisions in Mr Dixon's settlements after his death, and enforcing her legal rights, in respect that she never discharged or renounced her legal rights, otherwise than by conveying the same to Mr Dixon's disponees; that these proceedings did not take place, at all events, until after she had repudiated the settlements, and declared her option to enforce her legal rights, and that the provisions which were implemented or secured to her were not those contained in the settlements, but those afterwards made to her by John and William Dixon, or the latter individually. 6. Although she had received all that was provided to her in the settlements, the same would have been only

imputable to account of what belonged, or was owing to her under her legal provisions; and she or her assignee would still have been entitled to enforce payment of the remainder of these legal provisions. 7. Mrs Fisher and her husband are not entitled to found upon any declarations in Mr Dixon's settlements, as preventing his widow from revoking the same, or from enforcing her legal rights, in respect that they themselves have repudiated and frustrated that settlement to a great extent, and that they are not entitled both to approbate and reprobate the same. 8. Mrs Fisher and her husband are not entitled to found upon the proceedings posterior to Mr Dixon's death, as preventing Mrs Dixon, or her assignee, from repudiating the settlement, and enforcing her legal rights, in respect that the share of Mr Dixon's effects, claimable by Mrs Fisher and her husband, became fixed and determined at the time of his death, and could neither be enlarged nor diminished by subsequent transactions, which were *res inter alios acta*, and were adopted for the very purpose of preventing them from claiming more than their legal share. 9. Moreover, Mrs Fisher and her husband are not entitled to found upon these proceedings to that effect, in respect that the fund to which these proceedings related, had previously been rendered litigious by the multiplepounding, and that the amount of the share of the fund *in medio*, which was claimable by them at the institution of that action, could not be affected by such transactions among third parties *pendente lite*. 10. The pursuer, as the assignee of Mrs Dixon, has right to her share of the goods in communion, and is entitled to have the right there-to declared, and to have the proceedings which are said to affect the same rescinded, all as concluded for in the libel.

The defenders *pleaded*—

1. If the deed of agreement of 1826, between the late Mrs Dixon and her two sons, was intended to convey to them her legal provisions as a widow, they were necessarily transferred by the trust-disposition executed by these parties in favour of Mr Cuthbertson for behoof of their creditors, and are vested in him, so that William Dixon is not a competent party pursuer of this action; and, at all events, Mr Cuthbertson ought to have been a party to it. 2. The provisions in favour of Mrs Dixon, contained in the heritable bond of annuity, or postnuptial contract of 1809, having been reasonable at its date, that deed was irrevocable. 3. In taking into consideration the question concerning Mrs Dixon's power to revoke the deed of 1809, it is necessary to take into view the provisions afterwards granted in her favour, and accepted. Mrs Dixon (the alleged cedent of the pursuer, William Dixon) having assumed possession of these provisions, could not effectually, by herself, or by an assignee, divest herself of these, and claim her legal provisions. The enjoyment and subsequent conveyance by her (in her settlement) of the household furniture, &c., granted to her by the postnuptial contract,—the receipt by her of the dividends on the canal shares, and the conveyance by her of these canal shares,—the receipt by her of the rents of, and the taking infeftment in the shops, &c., in Glassford Street, as well as the payments which she received from the executors of her husband antecedent to February 1826, on account of the provisions made in her favour by her husband, were conclusive acts of homologation of her husband's settlements, and an irrevocable acceptance of her provisions under them. 4. The deed of 1809 did not require to be delivered by the husband to the wife, in order to complete the obligation which it created. The husband was the legal custodian of documents in which the wife had an interest, and the possession by the husband of that mutual deed (if it remained in his possession), must be held to have been the possession both of himself and his wife. 5. The deeds of agreement of 1826 and 1827, before mentioned, and libelled on in this process of reduction, afford no legal foundation for the claims now made by William Dixon, for himself, and as in right of certain of his sisters. If the agreement of 1826 conveyed Mrs Dixon's legal provisions to her two sons, it would have fallen under the trust in favour of Mr Cuthbertson, and is vested in him, and not in William Dixon. 6. The revocation of 12th March 1824, kept latent during Mrs Dixon's lifetime, and so recently, and since her death, produced in this action of multiplepounding, can have no effect, seeing that it was not a delivered document; and the other writings not put in to this process at any time during

Mrs Dixon's life, and only brought to light under a diligence against havers at the instance of the defenders, Mr and Mrs Fisher, after her death, are equally ineffectual to support the claims here made by William Dixon. 7. A document (not testamentary) privately framed and kept latent till after the death of the granter, cannot be successfully founded on, in opposition to the public and open acts of the maker of the document, so as to affect the interest of third parties, or to deprive them of the *jus quesitum* previously established in their favour. 8. A right to terce or *jus relictæ* may be effectually compounded and discharged by the party legally entitled thereto. 9. The widow of Mr Dixon having expressly renounced, or, from her acceptance of the provisions granted in her favour under the settlements, having legally excluded herself from claiming her terce and *jus relictæ*, the present action cannot be maintained, and the defenders will fall to be assozied, with expenses.

The Lord Ordinary pronounced the following interlocutor:

"22d June 1838.—The Lord Ordinary having considered the closed record in this process of reduction, and having heard parties' procurators thereon, and made avizandum, Finds that the question raised by the original summons in the name of the deceased Mrs Dixon, and William Dixon as her assignee, and the supplementary summons in the name of the said William Dixon, the pursuer now insisting, depends mainly on two points,—1st, Whether the contract of marriage entered into by Mrs Dixon and her husband, the late William Dixon, in 1809, and in particular, the clause thereof, whereby Mrs Dixon, in consideration of the provisions settled upon her by the said contract, in the event of her surviving her husband, accepted of the said provisions as in full of all she could ask or claim by or through the decease of the said William Dixon, and renounced the legal provisions she might be entitled to in that event, was, upon the death of the said William Dixon, liable to revocation by Mrs Dixon, on the ground that the provision thereby made in her behalf were so greatly inadequate as to render such her acceptance and renunciation in law *donatio inter virum et uxorem*? And 2d, Whether the said Mrs Janet Smith or Dixon did competently and effectually repudiate the provisions made for her by the said contract and the other deeds of settlement subsequently executed by the said William Dixon, revoke the acceptance and renunciation expressed in the said contract, and prefer her claim to her legal provisions as the widow of the deceased, against the general representatives of her husband? Finds, that the first of these points depends, or may depend on matter of fact, on which the statements of the parties respectively are essentially opposed: Finds that the second question must be determined by a due consideration of the documents in process: Finds it established that the said Mrs Dixon did obtain possession of valuable property, provided to her by her husband, in virtue of the conveyances expressed in his deeds: Finds, that by deed of agreement on the 28th February 1826, between the said Mrs Dixon and her sons, John Dixon and William Dixon, the general disponees and executors of her deceased husband, the said John and William Dixon bound themselves to pay to Mrs Dixon the sum of £5400 at the terms specified, which sum of £5400 is, in the accounts of these parties, and in various other documents, uniformly described as a legacy or provision to which she had right under the settlements of her husband,—to secure her in an annuity of £200, and in the life-rent of a house specified, with certain other benefits,—to deliver to her the whole household furniture, plate, &c., of her husband, which furniture, &c., was also provided to her by the deeds of her husband; and by which agreement they farther stipulated, that she should have right to two shops in Glassford Street, which shops were expressly conveyed to her by her husband's settlement, and in which she obtained infestment in virtue thereof: In consideration of which obligations, the said Mrs Dixon declares herself satisfied therewith, 'in lieu of and in full of all claims of whatever nature, whether legal or conventional, she is entitled to' from the estate of her husband, and gives up, disposes, conveys, and renounces, to and in favour of the said John and William Dixon, &c., all such claims and rights, in whatever way conceived, whether legal or conventional, and binds herself to execute all revocations, conveyances, or other

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deeds necessary for investing them in the full right thereof, with power to follow forth and make the same effectual; and she farther acknowledged, that since her husband's death she had received £1569. 16s. to account of the sums provided to her as aforesaid: Finds, that by a deed of transfer of the same date, the said Mrs Dixon assigned and transferred to the said John and William Dixon forty shares of the Monkland Canal which belonged to the deceased, 'and were conveyed by him in my favour by the disposition and assignation' specified, with the dividends due thereon, to be held subject to the same rules and on the same conditions that the deceased William Dixon or myself held the same immediately before the execution hereof;—which deed of transfer contains a clause, declaring it to be without prejudice to her legal rights, in respect of the property of the deceased: Finds that the said deed of agreement neither proceeds on the narrative that Mrs Dixon had, at any time preceding the date of it, repudiated the settlements of her husband, and revoked her obligation under the marriage-contract, nor does it itself either express or import such a repudiation and revocation: Finds, on the contrary, that it proceeds on the express assumption of specific rights vested in her, in virtue of the said settlements, and that the said deed of transfer is expressly founded on her title and possession, vested in her by the said deeds: Finds that by the force of the said deed of agreement, the said John and William Dixon, as the disponees and executors of the deceased, stood completely discharged of all claims competent to Mrs Dixon, whether under the settlements of her husband, or at common law, and that she had finally accepted of the provisions specified in the said agreement, as in full of all that she could claim: Finds that it was not thereafter competent to the said Mrs Dixon herself to make any claim to her legal provisions, or to repudiate the provisions made for her by the settlements of the deceased, or to revoke the obligations of the marriage-contract; and finds, that it was not competent to the said John and William Dixon, after having finally transacted and settled with the widow on such terms, either in their own names, under any general title as assignees, or in her name, to repudiate for her the settlements of the deceased, or to revoke or reduce the marriage-contract, to the effect of thereby altering or affecting the rights of other parties interested in the succession: Finds it farther established, that thereafter a transaction took place between John and William Dixon, whereby the former, upon certain considerations, renounced his rights as one of the disponees and executors of his father, and agreed that the said William Dixon should have right to the whole property, subject to the conditions therein expressed: and finds, that the said agreement, and the express discharge which was thereafter executed by Mrs Dixon, and the other persons therein interested, in favour of the said John Dixon, proceeded on the assumption that Mrs Dixon had not repudiated the provisions made for her by the deeds of her husband: Finds that, in these circumstances, Mrs Dixon having, in the first instance, accepted and taken possession of various special subjects of great value, to which she had right by the deeds of her husband, and having thereafter transacted with his disponees and executors, and finally discharged all her claims against the estate, it was not thereafter competent, either to her or to any one in her right, to repudiate or reduce the settlements of her husband, or the obligations undertaken by her in the marriage-contract, on the ground of inadequacy, or on any other ground set forth in this record: Therefore, sustains the defences to this effect; but before pronouncing decree of absolvitor, appoints the cause to be enrolled, and in the mean time reserves all questions of expenses.

"Note.—It would require a much longer statement than it would be proper for the Lord Ordinary to annex to the above interlocutor, to explain in detail the grounds on which he has come to the conclusion expressed in it. He will endeavour to state the leading points as shortly as he can.

"But it may first be proper to explain, that before giving out this judgment, he put it in the view of the parties, that as it would necessarily supersede the other question involved in the reduction,—viz., whether, if Mrs Dixon had in any competent form repudiated her husband's settlements, and brought a reduction of the discharge of the marriage-contract, she had sufficient ground in law for doing so?—it was for the consideration

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of the defenders, whether the matter of fact necessarily requiring to be ascertained for solving that question, should or should not be first inquired into. That question comprehends two points: 1st, Whether the provisions made for Mrs Dixon by the marriage-contract were, at the date of that contract, so inadequate, with reference to the state of Mr Dixon's fortune at that time, as to render the discharge given a donation by the wife, liable to revocation and reduction? And, 2d, Whether, in point of law, the date of the contract, or the time of the testator's death, must be taken as the rule for determining the question, whether there was such inadequacy or not; and what effect the additional provisions made for her by the other deeds may have on any such question? If the Lord Ordinary had thought it necessary to enter on this part of the case, he should have been of opinion, that the matter of fact, with relation to the state of Mr Dixon's fortune at the date of the contract, should be first ascertained. But the defenders having expressed their desire to have judgment on the question, whether, in the circumstances, the reduction was at all competent, he has felt it to be his duty to give out the interlocutor, which, after considering a most elaborate debate, and examining all the documents referred to, he had previously prepared.

"The Lord Ordinary is, in the first place, of opinion, that the present reduction cannot be supported on the ground of certain documents executed by Mrs Dixon in 1823 and 1824. The first is a mandate, dated June 3, 1823, (app. p. 23,) granted to Messrs Tod and Romanes to appear in the process of multipointing—which had been raised. It is signed by Mrs Dixon, by Mrs Whitehead, who had expressly discharged the legitim by marriage-contract, by Miss Dixon and Mrs Mann, and by William Dixon himself. It appears to the Lord Ordinary that the authority thereby given to claim 'our legal shares of said succession,' simply meant that they should claim what was due to them respectively by the deeds of settlement. Mrs Whitehead could claim nothing else; and as little could Mrs Dixon, without taking some other proceeding. But the mandate was surely any thing but a universal rejection of the provisions of the settlement, and an assertion of rights at common law as opposed to it.

"The deed of revocation, of 12th March 1824, may seem to deserve more attention. That deed was certainly produced under very extraordinary circumstances. But it may be sufficient for the Lord Ordinary to say, that on full consideration, he thinks that it must be regarded as entirely a latent instrument which was never acted on, but on the contrary, was entirely superseded by the transaction which followed between Mrs Dixon and the general disponees and executors of her husband.

"It is indeed evident, that if the attempt now made to claim *jus relictæ* in the name of Mrs Dixon depended on any simple act of revocation by her, the title to maintain such a claim would not be vested in William Dixon, but in Miss Lillias Dixon, who is the executrix of her mother; and that such a claim could not be maintained against William Dixon is very clear. At any rate, if, in point of fact, Mrs Dixon did subsequently accept of the provisions made for her by the settlements of her husband, and discharged them, the question, what shall be the effect of such acceptance and discharge, cannot be affected by such a latent instrument, inconsistent with what she actually did.

"The material question therefore is, what was the true nature of the transactions between Mrs Dixon and her two sons in 1826 and following years, with reference to the possession which she had previously obtained of property conveyed to her by her husband's deeds? For it is clear that the present action is not an action for the benefit of Mrs Dixon or of her executrix, but simply a proceeding adopted by William Dixon in order to lessen the amount of the fund of legitim claimed by Mrs Fisher against him, as the disponee and executor of their father. If he obtained a title to make such a claim for his own benefit, whether in his own name or in that of Mrs Dixon, by the deeds of 1826, that title could not be altered by the mere bringing of the reduction in Mrs Dixon's name, or by the terms in which the summons may be expressed. And if he did not obtain such a title by the transactions in 1826, beyond all doubt, any right to set aside the marriage-contract, to repudiate the settlement, and to claim

jus relictæ, which Mrs Dixon might previously have had, was completely and effectually discharged by the deeds which then passed between the parties.

"The most material deeds are the deed of agreement, 28th February 1826, and the deed of transfer of the Monkland Canal shares, of the same date. (App. pp. 28 to 31.) It is evident that Mrs Dixon was previously in possession of the forty canal shares, valued at £4000 or £4400. She had right by the settlements to an annuity; to the liferent of a house, with twenty-two acres of ground and other advantages; to the whole household furniture, &c., and to two shops in Glassford Street, conveyed to her by her husband. Now, without going much into details, the Lord Ordinary can find nothing in the deed of agreement that has the least resemblance to a repudiation of the provisions of the settlement. The deed proceeds on no such narrative; and on the contrary, her right in the canal shares is expressly acknowledged, and a transfer of them is executed by herself, as of property conveyed to her by her husband, and held by her 'immediately before the execution hereof.' The two shops in Glassford Street are recognised as belonging to her; and in these she obtained infestment. Her right to the furniture is also acknowledged; and the whole effect of the agreement is, that for the transfer of the canal shares,—for her annuity of £150,—for the liferent of the house and ground,—and for the discharge of all her claims,—John and William Dixon bind themselves to pay to her £5400, at the postponed term of Whitsunday 1836, with interest from the death of her husband,—to pay to her an annuity of £200,—and to convey to her in liferent a different house and garden. In consideration of which she declares herself satisfied with the provisions before mentioned, in lieu of, and in full of all claims of whatever nature, whether legal or conventional, she is entitled to from the estate of her husband. Then she conveys all her rights to John and William Dixon, and binds herself to execute revocations, and all other deeds necessary for making the same effectual. And she acknowledges to have received since her husband's death 'the sum of £1569. 16s. to account of the sums provided to her as aforesaid;' which must mean sums provided to her by the settlements; because, till this deed was executed, nothing else had been provided to her.

"The Lord Ordinary is of opinion that this deed imports an acceptance, and not a repudiation of the provisions of the settlement. No doubt it is an arrangement by which those provisions are discharged on certain considerations. The defenders state, that it arose out of the difficulties in which John and William Dixon were at that time, which led to the trust-deed executed by them (app. p. 33,) in the same year: and the Lord Ordinary thinks that it probably was of that nature. But independent of this, it was manifestly a transaction which proceeded on the basis that Mrs Dixon did assert her claim to all the provisions of the settlement; that she was actually in possession of a part of the property, and exercised the rights of a proprietor in it; that no repudiation had taken place; and that the parties had never entered on any consideration of what her claims might have been if she had rejected the provisions of the settlements, and claimed *terce* and *jus relictæ*.

"After this John and William Dixon conveyed their estates to Mr Cuthbertson as trustee (app. p. 33, &c.); and it is apparent, that in that transaction it was assumed that the settlement was binding on Mrs Dixon, and no supposition was suggested that any other claim could be made in her right (see app. p. 51).

"Mrs Dixon was infest in the Glassford Street shops on the 23d March 1827, expressly on the conveyance by her husband, than which it is not easy to conceive a stronger act of acceptance of the provisions made by his deeds. These houses had from the first been recognised as the property 'of Mrs Dixon' in the books of John and William Dixon. See entry, October 31, 1825 (app. p. 124). Then, with regard to the other provisions, there is the following entry:—'September 30, 1828.—Stock Dr.,—to sundries for the following legacies, in terms of the disposition and settlement of the late Mr Dixon, viz., to Mrs Dixon, Govanhill, her legacy £5400. Do. an equivalent for her annuity of £200, £4000'—(app. p. 120); and throughout the accounts this debt is substantially stated in the same manner.

"In May 1827, an agreement was entered into between John and William Dixon, by which John, for considerations, conveyed to William all his rights and interest as joint donee and executor of their father. In that transaction it is most clear to the Lord Ordinary that Mr John Dixon, at least, had not the slightest conception that the transaction between them and Mrs Dixon had the effect of conveying to them any right or title to repudiate the settlement in her name, or to claim *jus relictae* as her assignees,—and he has accordingly stated the contrary, in the most positive terms, in his defences to this action. But the deeds speak for themselves. When it became necessary that Mrs Dixon should directly discharge Mr John Dixon of all her claims, both the letters which first passed (app. p. 63), and the formal deed of discharge (pp. 65-70), are perfectly distinct and explicit, as discharging the provisions made by the deeds of settlement.

"Without going into farther particulars, or enlarging on the application of these facts, the Lord Ordinary thinks it completely established, that Mrs Dixon had finally and irrevocably recognised and accepted the provisions made for her by the settlements, and that, if there had ever been any serious thought of revoking and reducing the discharge of the marriage-contract, it had been entirely abandoned, and the chequer closed against it by the acts and deeds of Mrs Dixon herself.

"The idea seems to be entertained, that Mrs Dixon could, at one and the same time, accept of the provisions, take what was equivalent to payment of them, and grant a discharge in full of these and all her claims, to the executor, and yet reserve, or rather convey to him a right to reverse the whole proceeding, to repudiate the settlement, and revoke and reduce the marriage-contract in her name; in other words, to make the discharge which she had granted to her husband, and confirmed to his executor in full satisfaction, operate in favour of the husband's representative, against the child or children claiming legitim. The Lord Ordinary is of opinion that this is incompetent. It brings the case exactly to the point which occurred in the case of *Andrews v. Thomson or Sawyer*, March 2, 1836; and therefore, instead of going into any detailed explanation of the principle, the Lord Ordinary will simply refer to the report of that case, and the full note of Lord Corehouse upon it. The facts of the two cases are not exactly the same; and in particular, Mrs Dixon has not in direct terms done what was attempted by Mrs Sawyer in that case. But they are the same in principle; and the Lord Ordinary is of opinion that the judgment must be the same in both. For if Mrs Dixon had effectually accepted the provisions, and discharged them by the deed 1826, the Lord Ordinary thinks it very clear, that nothing which she may have been induced to do afterwards could alter the state of the case."

"26th June 1838.—The Lord Ordinary having called the cause and heard parties' procurators, sustains the defences, repels the reasons of reduction, and assolis the defenders from the conclusions of the action, original and supplementary, and decrees: Finds the defenders entitled to expenses; appoints an account thereof to be lodged, and remits to the auditor to tax the same and report."

The pursuer reclaimed, but the Court (8th February 1839) adhered to the interlocutor of the Lord Ordinary.

William Dixon appealed.

Lord Chancellor.—My Lords, before I examine the grounds upon which the Court of Session have held that the pursuer cannot maintain this suit, I cannot but observe the situation of the parties litigant,—the question being, whether Mrs Janet Dixon, the widow, had by her acts precluded herself from claiming these rights and interests out of her late husband's property, to which she would otherwise have been entitled? She institutes the suit jointly with her son William, which William, as one of the general donees of the husband of Janet, and his father, and as claiming through John, the other general donee, was entitled to the whole of the father's property, subject only to the claims of the younger children, and of the mother; and the object of the suit is, to have it declared that the mother is entitled to her legal claims against the estate, and to repudiate

and set aside all acts and deeds by which she may have accepted the conventional provisions made for her by her husband in lieu of such legal claims. But all those acts and deeds so sought to be set aside were between the widow and her sons, whose right is now vested in the pursuer, William; and both join in this suit. It is true that the younger children are interested in the effect of these acts and deeds, as they may affect the amount of the legitim; and what such effect may be, is in question in another proceeding. The question in the present suit is, whether the widow can, after what has taken place, renounce her conventional provision? and the object is, if necessary, to set aside what has taken place, in order to enable her to claim such legal right. To this suit the younger children are parties, and so far—as the question is, whether, after what has taken place, the widow can renounce her conventional provisions and claim her legal right,—the form of the suit may be very proper; but so far as the object is to set aside these transactions, there appears to be a peculiar impropriety in the formation of the suit. All the parties to a transaction join in praying that it may be set aside, because the result of it may benefit a third party, but such third party was a total stranger to the transactions sought to be set aside; and all the grounds upon which that relief is prayed, exist only as between the widow and the sons, the general donees; but as between them no relief is asked—all the interests of both sons and of the widow being vested in the pursuer, William. How such transactions affect the rights of the younger children may be a fair question; but that such rights are to be investigated without reference to these transactions, or how, as against them, these transactions are to be set aside, appear to me very difficult to comprehend. Certainly, in this country, no such proceeding could be allowed. But I proceed to consider what the facts are upon which this relief is prayed. By the deed of 1809, the husband secured to his then wife £150 per annum, and the house of New Palace-Craig, and twenty-two acres, for life, and the furniture, and three of his best cows,—she consenting to renounce the legal provisions to which she might be entitled. By a deed of 11th April 1817, he gave her £1000, in addition to the former provisions, in full of all she could ask or claim in and through his decease. By a deed of 22d November 1821, he secured to her two shops in Glasgow, and forty canal shares, but the gift was not expressed to be in lieu of her legal right. The husband died in October 1822. These provisions for the widow being all under postnuptial-settlements, it may be assumed that, upon her husband's death, it was competent to her to repudiate them, and to claim her terce and *jus relictae*. But some of these provisions were given, upon express condition of her renouncing all such rights; and it is clear, that she could not approbate and reprobate such gifts; or, in the terms of the English law, she was bound to elect between them and the legal rights they were intended to supersede. What ought to be evidence of such approbation or election, is a question of fact, and may be proved either by the general conduct of the party in her dealings with the property, or by express declaration. In considering the evidence upon these points, it is expedient to keep in mind, that very soon after the death of the husband, the daughter, Mrs Fisher, had intimated an intention of repudiating the provision intended for her by her father, and of claiming her legitim, which led to the suit of multiplepoinding in 1823. The extent of this claim, which was earnestly resisted by the mother, might much depend upon whether the mother accepted or repudiated her *jus relictae*, and to this may be attributed much of that which has been relied upon as evidence of her not having so repudiated it. But still the fact remains to be examined, did she, or did she not, accept the provisions intended for her by her husband? If she had not intended to accept those provisions, her title to terce and *jus relictae* accrued upon her husband's death in 1822. But there is no trace of any steps being taken to act upon or enforce any such rights, but there is proof, that to a certain extent, at least, she dealt with the subject of her husband's provisions; and such proof as there is of the dealings of the mother and her sons with the property, is referrible only to her title under her husband's provision, and not to her title to terce and *jus relictae*. The deed of the 28th of February 1826, admits that she had received from them "£1569. 16s. to account of the sums provided for her as aforesaid." That deed—though for the purpose of defeating

the claims of the daughter, Mrs Fisher, ambiguous terms were introduced into it,—was clearly a settlement between the mother and the sons upon the footing of the husband's provisions. It could not, indeed, be otherwise, it being a fact admitted on both sides that she was offended at her daughter's attempt to disturb the provisions made by her husband. That such was the principle upon which this settlement proceeded is apparent, when it is considered, that what she would claim under her husband's provisions, was, *first*, an annuity of £150; *2d*, the liferent of the house and grounds at Palace-Craig; *3d*, the furniture; *4th*, the £1000; *5th*, two shops in Glasgow; *6th*, forty canal shares; *7th*, three cows;—and what she took under the agreement of 1826, was, *first*, an annuity of £200; *second*, the liferent of the house and garden at Govanhill; *third*, the furniture, &c.; *fourth*, £5400, she giving up to her sons the forty canal shares; *fifth*, the two shops in Glasgow; *sixth*, the keep of three cows; *seventh*, the use of a carriage and horses. It is impossible to refer this arrangement to her title to *terce* and *jus relictæ*. It is an acceptance of, and dealing with, the conventional provisions of her husband, as between herself and her sons; and if so, there is no ground for relieving her from her own act, upon any ground of ignorance or surprise. If she accepted these provisions in lieu of her legal claims as between herself and her sons, it was not competent for her, as against her daughter, to keep alive those claims, but to the attempt to do so must be attributed the mandate of the 3d of June 1823, and the deed of revocation of the 12th of March 1824, of which there is no proof of its having ever been delivered or used; and the whole conduct of the parties proves that it was not intended that it should have any operation as between the mother and her sons. It appears to me, for these reasons, clear, that it is now too late for the widow to repudiate the settlement of her husband, and that the pursuer has no right to impeach the transactions which he seeks to set aside, and that the judgment of the Court below was right, as pronounced in the three interlocutors of the 22d and 26th of June 1838, and 8th of February 1839. As to the interlocutor of the 11th of March 1837, it appears to me to be unimpeachable here upon the merits, as well as upon form. I move your Lordships, therefore, that the interlocutors be affirmed, with costs.

Interlocutors affirmed, with costs.

Second Division.—Lord Moncreiff, *Ordinary*.—Archibald Grahame, *Appellant's Solicitor*.—Spottiswoode and Robertson, *Respondents' Solicitors*.—[W.H.D.]

1st July 1842.

FIRST DIVISION.—(H. B.)

No. 237.—JAMES STUART, *Petitioner and Advocate*, v. JOHN SPOTTISWOODE and GEORGE SPOTTISWOODE, *Respondents*.

Burgh—Road—Police Act, 7 Will. IV. c. 32—*Held*, that under the Edinburgh Police Act, the Sheriff or Dean of Guild has a judicial power to determine the situations in which foot-pavements are required.

By the Edinburgh Police Act (7 Will. IV. c. 32,) it is enacted (§ 18), that

“Whereas it would be greatly for the convenience and benefit of the inhabitants residing within the limits aforesaid, that proper foot-pavements were made in situations requiring the same, be it therefore enacted, that the owners or proprietors of all houses and other buildings, or of gardens and grounds, whether buildings are erected on the same or not, which are adjoining to or fronting any road, street, square, passage, or other public or principal place within the bounds before described (excepting always the gardens and grounds opposite to Princes Street, and the gardens and grounds opposite to Queen Street, which shall be paid and upheld as at present), shall at their expense cause the ground before their property respectively on the sides of the said roads, streets, squares, or passages, to be well and sufficiently paved with flat, hewn, or other stones, or in such other manner and form as the Dean of

Guild of the city of Edinburgh, or the Sheriff of the county of Edinburgh, or his substitutes, according as the said street, square, or place shall be situated within their respective jurisdictions, shall, by decrees to be pronounced by them respectively in their proper courts, from time to time, on the application of the fiscals of these respective courts, or of any private party having interest, with concurrence of the said fiscals, or on the application of the superintendent of police, direct and appoint: Provided always, that in case such owners or proprietors shall refuse or neglect to cause such pavements to be made in the manner and form so directed, it shall and may be lawful to the said Dean of Guild or Sheriffs respectively, on the complaint of the said Procurator-fiscal, or party, or superintendent, to cause such pavements to be made at the charge and expense of such owners or proprietors respectively; and in case such owners or proprietors shall refuse or neglect to pay such charges when required, it shall and may be lawful to the said Dean of Guild, or Sheriff or Sheriff-substitute respectively, in their proper courts, to decree such charges and expenses to be paid by such owners or proprietors, either to the tradesman or tradesmen by whom the work shall have been done, or to any other person to be named by the said Dean of Guild or Sheriffs, with the additional expense incurred in recovering the same.”

Founding on this Act, James Stuart, superintendent of police, presented a petition to the Sheriff, praying that John and George Spottiswoode, proprietors of certain ground and subjects adjoining and fronting Brandon Street, should be ordained

“to cause proper foot-pavement to be constructed along and upon the side of the said road or street, in front of, and adjoining said ground or subjects, with flat, hewn, or other stones, or in such other manner and form as your Lordship shall direct and appoint; and in the event of their refusing or neglecting to cause such pavement to be made, to remit to proper tradesmen to execute the same, and to report the expense thereof.”

The respondents, besides certain preliminary objections to the petition as inaccurate and informal, *pleaded*—1. That there is already a well-formed gravelled footpath on the side of the road adjoining the said piece of vacant ground; and as neither the public generally, nor the individuals of the district in particular, have ever complained of its insufficiency, it cannot be held to be in a situation requiring to be paved. 2. By the Road Acts, the Cramond Road Trustees are bound to make and maintain proper foot-paths on the said roads for the public convenience: and by parity of reason, they are also bound to pave these foot-paths when the convenience of the public requires it, or, at all events, the one most used by the public. 3. The Police Act did not supersede the provisions in these Road Acts, nor in any way relieve the Road Trustees of their responsibility under the same. 4. The Road Trustees collect annually large sums from the public for the support of roads and foot-paths such as those in question; and it would not be consistent with any principle of justice were proprietors whose property happens to be adjacent thereto compelled, at their own expense, to pave these foot-paths for the public benefit and convenience, while those who are put in possession of the public money, to provide for the public convenience, are exempted from any such burden.

The petitioner *pleaded*—1. As the part of the road or street referred to is admitted to be unpaved, and as the defenders' property adjoins to and fronts it, and is within the bounds of police, they, as the owners or proprietors, are the parties bound by the Act to construct pavement. 2. The road trustees, by the Statutes under which they act, though bound to make foot-paths, are

not obliged to make foot-pavement. If the defenders assert the contrary, they may be allowed to call the trustees, or they may be reserved relief against them. 3. The Act founded on in the petition being posterior to the Road Acts founded on by the defenders, cannot be affected or controlled by them. 4. As the Act founded on imposes the obligation to make foot-pavement absolutely and unqualifiedly on the owners or proprietors of the adjoining properties, no other course than the present was competent to the petitioner.

The following interlocutor was pronounced :

" The Sheriff having visited and inspected the premises, and advised the closed record, repels the preliminary pleas stated by the defenders, and finds upon the merits, that it is not necessary, for the convenience and benefit of the public, that the foot-path in question should be paved at present, but reserving right to the pursuer to make a new application when the circumstances are changed ; finds the defenders entitled to expenses."

The petitioner advocated, and put in the following additional pleas :—1. Under the enacting clause of the Statute libelled, the 7th Will. IV. c. 32, § 18, the Sheriff had no jurisdiction to inquire or determine as to the necessity of paving the foot-path in question, but only as to the manner and form in which it was incumbent on the defenders to cause the pavement to be made. 2. It was imperative on the Sheriff, under the Statute, and upon the application of the pursuer, to decern and ordain the defenders to cause the foot-path in question to be paved at their expense in such manner and form as the Sheriff should direct ; and in the event of their refusing or neglecting to cause the pavement to be made in the manner and form so directed, to cause the same to be made at their expense, and to decern against them for the amount thereof. 3. Supposing the question as to the necessity or propriety of paving the foot-path in question to have been open for adjudication by the Sheriff under the Statute, he has determined this question erroneously, and without due or proper investigation ; and assuming the statement of facts by the pursuer, which he is prepared to instruct, to be correct, it is most necessary, for the convenience and benefit of the public, that the foot-path should be forthwith well and sufficiently paved. 4. In every view, and looking to the expense of discussing the preliminary pleas in which the pursuer was successful, he ought not to have been found liable in full expenses.

Additional pleas by the respondents—1. Under the terms of the Statute 7 William IV. c. 32, § 18, the Sheriff of the county of Edinburgh, and the Dean of Guild of the city, respectively, are vested with discretionary powers, and with private jurisdiction, not only as to the manner and form of making foot-pavements or paths within certain limits, but also as to whether or not, and the time when, such footpaths shall be made. 2. In any view, and in so far as the judgment of the Sheriff, in the present cause, proceeds upon and finds matter of fact as to the sufficiency of the existing foot-path adjoining the respondents' property, it is final and conclusive, and cannot be brought under review of the Supreme Court by advocacy or otherwise. 3. Further, as the judgment complained of is well founded, both in law and in fact, the advocacy ought to be dismissed, and the process remitted *simpliciter* to the Sheriff, with expenses.

The Lord Ordinary pronounced the following interlocutor :

" 2d June 1842.—The Lord Ordinary having heard parties, finds that, by the 18th section of the existing Police Statute for the city of Edinburgh, an obligation is laid upon proprietors to pave the ground on the sides of the roads opposite their properties, in such manner and form as the Dean of Guild or the Sheriff may direct ; and that neither the Dean nor the Sheriff have power to dispense with the fulfilment of this obligation : Finds that the petition to the Sheriff prayed that the respondents should be ordained to fulfil this obligation, by causing a ' proper foot-pavement to be constructed,' ' with flat, hewn, or other stones, or in such other manner and form as your Lordship shall direct : ' Finds that the interlocutor of the Sheriff merely decides ' that it is not necessary, for the convenience and benefit of the public, that the foot-path in question should be paved at present : ' Finds that the parties differ as to the meaning of this finding, and that in one view it does not exhaust the prayer of the petition : Therefore remits to the Sheriff, with instructions to apply these findings, and with power to recal the interlocutor advocated if he shall think proper ; and to do farther in the premises as to him shall seem just ; and finds no expenses due to either party, *hinc inde*, in this Court.

" Note.—If the interlocutor advocated proceeds on the ground that the Sheriff has power to dispense with any sort of foot-pavement, where he thinks that none ' is necessary for the convenience and benefit of the public,' the Lord Ordinary is quite clear that this is a misconstruction of the Statute. The Statute takes all discretion about the necessity of *some kind* of foot-pavement out of the hands of all the local authorities ; because, upon a preamble that foot-pavements are *greatly for the benefit and convenience of the inhabitants*, the 18th section enacts that owners ' shall construct them. All that is left to the Sheriff and the Dean of Guild is, not whether the sides of the roads shall be paved or not, but whether the pavement shall be with flat, hewn, or other stones, or in what other manner or form.

" Now, it is uncertain whether the Sheriff meant to decide that there need be *no pavement at all*, or only no pavement with flat or hewn stones. If the former was intended, then the Lord Ordinary thinks that the Sheriff has exceeded his jurisdiction. If the latter, then the Sheriff ought to have said in what other manner and form the pavement was to be constructed, or he might have found that the existing pavement was already sufficient.

" The Lord Ordinary has inspected the place ; and if he had been the Sheriff he would have felt himself compelled to order this path to be paved with *flag-stones*, so as to have joined the paved end of Brandon Street to the paved end of Huntly Street, instead of leaving a gap of about 130 yards without *any regular foot-path at all* (its present state) between these two points ; and thus obliging foot-passengers going from the one end of these streets to the other only to find a foot-pavement on the opposite side, which implies their crossing the road twice. But the Statute gives the jurisdiction of prescribing the *manner and form* of paving to the Sheriff or Dean of Guild ; and therefore, if the interlocutor had performed this duty, the Lord Ordinary would not have interfered with it. But it has not done so. It has either decided that there need be no pavement, or only that this pavement need not be with *regular flags* ; the first of which is against the Act, and the second does not exhaust the petition."

The respondents reclaimed, and referred to the 19th section of the Act, as connected with, and explanatory of, the 18th.

Lord President.—I must own that I do not think the respondents have been successful in their plea, founded on the 19th section. It appears to me to have a different object altogether from the 18th. This, however, does not remove my difficulty as to the soundness of the interlocutor reclaimed against. I cannot read the introduction of the 18th section (call it preamble or not), bearing that it would be *greatly for the convenience of the inhabitants* that proper foot-pavements were made "in situations requiring the same," and hold that these pavements must be made in every situation. On the contrary, I am clear

that the Sheriff or Dean of Guild are bound to exercise a judicial discretion, and determine whether any particular situation is of the kind requiring a foot-pavement. So far I am under the necessity of differing from the Lord Ordinary, but in substance I agree. The Sheriff, after inspecting the ground, gives his decision that a foot-pavement is not at present necessary. I am always disposed, in such cases, to put great faith in the determination of the Judge Ordinary, and not to alter it except on strong grounds. I see none such here.

Lord Gillies.—I concur very much in what your Lordship has said. The Sheriff finds that it is not for the convenience and benefit of the public that a foot-pavement should be made at present, and I agree with him. As to his right to exercise a judicial discretion in the matter, I do not know what meaning can be given to the commencement of the 18th section if his right is denied.

Lord Mackenzie.—I have some difficulty. I agree that the 19th section cannot be transferred to the 18th; but the 18th seems to enact, that all principal streets or thoroughfares within the bounds of police, with certain specified exceptions (including of course all not specially excepted), must be "sufficiently paved with flat, hewn, or other stones, or in such other manner or form" as the Dean of Guild or Sheriff may direct. Under these terms, it might indeed be made a question what the kind of pavement is to be? Do they mean more than merely that there must be a foot-path? Say it were Macadamized, i. e., made of stones laid one above another, would not that do? I am afraid hardly, as the word used is *paved*.

Lord Fullerton.—The case is not free from difficulty; but I rather agree with the majority. The Statute, though not very clear, seems to give the Judge a discretionary power for determining whether or not the thing ought to be done. As to the 19th section, I am inclined to think that the latter part of it does apply to the present case. It is not necessary, however, to go on that, as I am clear that the Sheriff was entitled to judge if the pavement was necessary, and if not, to refuse.

The Court pronounced the following interlocutor:

"Alter the interlocutor of the Lord Ordinary reclaimed against; repel the reasons of advocacy, and remit *simpliciter* to the Sheriff, and decern: Find the respondents entitled to expenses, and remit the account," &c.

Lord Ordinary, Cockburn.—*Act.* Maitland; Roderick Mackenzie, W.S., *Agent.*—*Alt.* Anderson, Baillie; Warren H. Sands, W.S., *Agent.*—[H.B.]

1st July 1842.

FIRST DIVISION.—(H.B.)

NO. 238.—EARL OF KINNOULL and REV. ROBERT YOUNG, *Pursuers and Suspenders*, v. REV. JOHN FERGUSON and OTHERS, *Defenders and Respondents*.

Process.—Conjunction of Actions.—*A patron and presentee raised, 1st, a declarator directed against the Presbytery of the bounds, concluding to have it found that, on the refusal of the majority, a minority of the Presbytery were entitled to induct the presentee; and, 2d, A suspension and interdict directed both against the Presbytery and a Special Commission of the General Assembly, to prevent the induction of any other party than the presentee.—Circumstances in which held that the processes ought not to be conjoined.*

The pursuers in the Auchterarder case, after raising a declarator concluding to have it found that the minority of the Presbytery (three members or more) are entitled to ordain and admit the presentee, presented a note of suspension and interdict, directed both against the Presbytery of Auchterarder, the defenders in that case, and also against the Special Commission of the General Assembly, praying for suspension of a resolution and remit, by which the General Assembly,

"on the petition of three hundred and ninety-three heritors, elders and others, inhabitants of the parish of Auchterarder, praying for the settlement of a minister in the parish," had agreed "to remit to the Presbytery of Auchterarder to proceed to the settlement of a minister in the pastoral charge of the parish of Auchterarder, on such reasonable provision for stipend as may be secured, instructing them in their proceedings to advise with and conform to the directions of the Special Commission to be hereafter appointed."

No appearance was made for the Special Commission; and the counsel for the Presbytery having moved that the processes should be conjoined, the Lord Ordinary pronounced the following interlocutor:

"15th June 1842.—The Lord Ordinary having heard the counsel for the parties on the motion for joining this declarator with the process of suspension and interdict at the instance of the same parties who are pursuers of the present action, against the same parties as respondents who are defenders in this process; in respect that both questions relate to the same benefice, and depend on the question, whether the pursuer, Mr Young, is the only presentee legally entitled to be admitted and received as incumbent thereof: Conjoins the cases, and renews the order on the parties to lodge cases in the conjoined processes within eight days, in terms of former interlocutors.

"*Note.*—The Lord Ordinary thinks himself bound to conjoin these cases, according to the ordinary course of proceeding adopted in all questions depending *contemporaneously* in the Court between *same parties*, and relative to the *same estate* or office. He is also of opinion, that this mode of preparing both cases, and submitting them for judgment at the same time, will not only be the most convenient form for the parties, but the most satisfactory course both for this Court and the Court of Appeal, if they are ultimately called on to decide the case on the merits.

"In the suspension, the patron and presentee bring under suspension a sentence or order of the General Assembly in May 1841, whereby they, without a vote, 'remitted to the Presbytery of Auchterarder to proceed to the settlement of a minister in the pastoral charge of the parish of Auchterarder, on such reasonable provision for stipend as may be secured,' &c. The suspenders maintain, that that order was at direct variance with the previous judgment of this Court, and of the House of Lords, finding that the Presbytery were bound to take Mr Young on trials; and as they have not done so, but expressly refuse to obey that judgment, the suspenders crave an interdict against the Presbytery giving effect to the said sentence of the General Assembly.

"In the action of declarator at the instance of the suspenders, they conclude to have it found and declared, that the Reverend John Clark, and six other ministers (the minority) of the said Presbytery, who had intimated their readiness to give effect to the right of the pursuers, and to the previous decree obtained by them, or any three or more of them constituting a presbytery, 'shall be competent to constitute and hold meetings of said Presbytery, for the purpose of performing and discharging the duty of the said Presbytery in the matters foresaid, and to take trial of the qualifications of the pursuer; and if, in the judgment of such ministers constituting a meeting of Presbytery as aforesaid, he shall be found qualified, to admit and receive him accordingly as minister of the aforesaid church and parish,' &c. &c. See summons, p. 33.

"The summons contains other conclusions against the majority of the Presbytery unnecessary to be detailed.

"The Lord Ordinary is of opinion that there is a manifest propriety in having the questions raised in these cases discussed at the same time, before whatever Court they may come afterwards to depend. On the one hand, if the reasons of suspension were repelled, that issue would of course be fatal to the progress and success of the declaratory action; while, on the other hand, it is apprehended that the affirmance of the pursuers' pleas in the suspension, might, in some views of the case, afford important support to the conclusions of the pursuers in the declarator.

"In answer to this view of the cases, the contingency of the

two cases was not denied; but it was stated, that there was no plea on the part of the chargers in the suspension which could now be feebly set up, and in fact that the plea for the chargers, on which this branch of the case depends, was solemnly decided against the Presbytery by the First Division of the Court in the case of Lethendy. Now, the Lord Ordinary begs it to be understood, that it is far from his intention to question the decision of the Court in the branch of the case of Lethendy which applies to the present. But, when he recollects that that case may yet be appealed, and would in that event be subject to reversal, he does think, that no course should be taken here to increase unnecessarily the proceedings and expense in the two cases now before the Court, which have an inseparable connection with each other.

"In this Court, the point ruled in the case of Lethendy which is applicable to the present question, need not be re-argued here; a simple reference to that decision will suffice;—but as no appeal may be taken in Lethendy, and as that case, if appealed, may be decided on a *different* ground from that taken in this Court, while it is not impossible that an appeal may be taken in the *present* cases, the Lord Ordinary does think that it would be hard and unreasonable to refuse conjunction here, and thus drive the parties who may be appellants into the expense of two appeals, when one would suffice."

The pursuers reclaimed:

Lord President.—We are always anxious to save unnecessary expense; and when different processes relative to the same matter are in dependence between the same parties, it is usual to conjoin them. Here, however, the parties are not the same. The Special Commission is a new party altogether; and though appearance is not made for them, we cannot help that, but must look to the processes themselves. Not only are the parties not the same. The points raised are also very different. It may be, that ultimately the points of law to be determined will come to be the same, and that it may in consequence become proper to conjoin them; but I am clear that they ought not to be conjoined at this stage.

Lord Gillies.—I take the same view. At first I was inclined to adhere to the interlocutor, but I now think it ought to be altered. The proper object of conjoining processes is to save expense; and in nineteen cases out of twenty both parties concur; but when one objects, it is incumbent on the other to show that the conjunction is expedient for both. That has not been shown here.

Lord Mackenzie.—I am of the same opinion. When a party objects, the processes ought not to be conjoined without strong reasons. Here I see no such reasons. On the contrary, I would say that if they had been conjoined, it would be desirable to separate them. The object of the one process is to declare the right of the minority of the Presbytery to admit the presentee. The object of the other is to declare the right of the patron and presentee to hinder the admission of another by any party. These two objects are by no means necessarily dependent on each other. The one may be competent and just. The other may be incompetent and unjust. Why, then, should two causes so different be conjoined. They can go on separately and with great advantage. There is also the other ground, that the parties are not the same. I am clear that we ought not to force the conjunction.

Lord Fullerton.—I am inclined to the view taken by the Lord Ordinary. I agree with Lord Gillies as to the object of conjoining processes; but I am afraid the concurrence of parties is not so general as his Lordship imagines. My experience has rather been, that when the one party moves for a conjunction, the other opposes it. This, however, is of little consequence. All we have to consider is, whether the processes can be conveniently conjoined. The objectors say that the parties are not the same. This is true if all had appeared; but no appearance is made for the new party; and I know not why the usual form has not been adopted of putting that party out of Court. Were this done, the parties would be the same. Then as to the conclusions of the processes, they are very much akin to each other. Indeed, those of the suspension appear in a great measure involved in those of the other. The question is not of great importance, as it can only affect the expenses.

The Court pronounced the following interlocutor:

"Alter the interlocutor of the Lord Ordinary reclaimed against, and refuse, *hoc statu*, to conjoin the actions, reserving all questions of expenses for subsequent decision: Remit the case back to the Lord Ordinary to proceed in the several processes as shall be just."

Lord Ordinary, Cuninghame.—*Act.* Anderson, Inglis; Storie and Baillie, W.S., *Agents.*—*Alt.* Rutherford, R. Bell, Moncreiff; William Young, W.S., *Agent.*—*B. Clerk.*—[H.B.]

1st July 1842.

SECOND DIVISION.—(G. D. F.)

No. 239.—JOHN MATHESON, *Pursuer*, v. GEORGE MACKENZIE, *Defender*.

Arbitration — Reference — Reduction — Oversman — Circumstances in which, where there was a written reference to two valuers, an award by an oversman appointed by the referees was opened up: the material grounds being, 1st, that the referees, and then the oversman, acted without hearing parties, and, 2d, that there was not legal evidence of the appointment of the oversman, or consent of parties to his nomination.

The pursuer, by letter dated 17th September 1838, agreed to sell to the defender a certain lot of sheep, to be delivered "the day after the next Muir of Ord market," viz., 19th October following, and "the stock to be taken over by valuation by two men mutually chosen, viz., Alexander Mackenzie, Esq., Mossford, and John Cameron, Esq., Corrichoillie." The letter contained no power to the referees to name an oversman in case of differing in opinion. After the date of the letter, but before any valuation, the sheep were keiled (the reason for which was differently stated by the parties), and left on the farm of the defender. The two referees and the defender met on the subject of the valuation at the market in question, but it was admitted on the record that the pursuer was not then present. It appeared from the depositions of the referees, as enacted in the course of the Inferior Court procedure, that neither of them had an opportunity of inspecting the sheep on this occasion; but one of them (Mackenzie) stated that he was well acquainted with them for years previously, and had very recently before seen them, when he acted as judge of the roup at which the pursuer bought them. The other referee, Cameron, was well acquainted with the district in which the sheep were reared, and the stamp and quality of sheep stock there, and he stated, that on the occasion when they met for the valuation, he trusted to the report of Mackenzie, "who gave him distinct and accurate information as to the description of the stock, and he went upon the report of Mr Mackenzie's knowledge of it;" and that "from his knowledge, with the information afforded by Mr Mackenzie, and his confidence in that gentleman, he accepted of the appointment, and proceeded to form his opinion as a valuator."

The referees differed very materially as to the value, and, without consulting with the pursuer, or intimating the fact to him, they named an oversman, Patrick Rose, writer in Dingwall, to decide, who happened to be in the market where the referees had met. The parties were not agreed on the record as to whether both referees consented to name Rose as oversman, or only one of them, but it appeared from the depositions of the referees that Cameron only had consented, at least Mackenzie did not say that he had consented to

the appointment. There was no writing under the hands of the referees which instructed the devolution of the reference on Rose. Rose, however, was not aware that they had not both consented; and, in the belief that they had, he proceeded to act as oversman, by immediately hearing on the spot what the referees had to say on the subject. Rose, in his deposition, stated, that he had "repeatedly bought and sold sheep on his own account, and on account of others;" "that he rents a sheep farm," and "has for some time back been factor on the estate of Strathconon;" "that from the information thus acquired, he conceives that he was qualified to act the part of thirdsman" on the occasion alluded to. He stated that he knew the stock in question previously, but he admitted that he had no opportunity of inspecting them when he undertook to become oversman. Soon after his meeting with the referees he issued his award, by letters sent to the principals, in which, after stating that Messrs Mackenzie and Cameron had referred to him to settle the value, he fixed the same accordingly at a certain sum per score.

The pursuer being dissatisfied, thereafter removed the sheep from the farm of the defender, where they were, in consequence of which the defender presented a summary application to the Sheriff of Ross-shire, complaining that they had been removed from his possession, though sold and delivered to him, and praying for interdict against Matheson, and to prohibit him from interfering or selling the sheep, and to ordain him to restore them, and besides, to find him liable "in exemplary damages for his unwarrantable and illegal conduct," and the loss and damage sustained by the complainer by their removal.

In the proceedings which followed on this application, it was maintained that the procedure by the referees was unwarranted, both as to proceeding to the valuation in the absence of the pursuer, and without hearing both parties; and, besides, that the referees had no power to name an oversman without the consent of both pursuer and defender; and further, that it was illegal, in respect of fixing the valuation without inspecting the stock: consequently, that the pursuer was at liberty to do with the sheep as he chose. The Sheriff-substitute, and afterwards the Sheriff, held that the whole procedure was perfectly regular; that the valuation was binding; and that the pursuer was liable in damages, which were thereafter modified.

The pursuer then raised this action to reduce the award, principally on the grounds above stated.

In defence, it was maintained that the reduction was groundless, in respect the proceedings in the reference, if it were to be dealt with as a reference, were perfectly regular and binding on the pursuer, as being consonant with the every-day practice of the district. In particular, it was maintained, that according to that custom, it was not necessary to inspect such stock before fixing the value, where the referees, as was admitted, were men intimately acquainted with the locality, and the kind and quality of the stock which was there bred. But, besides, it was *pleaded*, that the matter could not be looked on as an arbitration, but a sale, where the price, though not fixed, was contingent on the award of the two gentlemen,—that that was competent, and in consequence, in such a state of circumstances, the custom of the country, as to ascertain-

ing the value, must be looked at, to determine whether the referees had gone beyond what was the undoubted practice or not. It was insisted that the custom had been complied with, and that Mr Rose was to be looked on as assisting the referees in opinion. Now, as to the transaction being a sale, and so understood by the parties, there was the evidence of a completed transaction by the "keiling," which was proof of the transfer of possession; and when that was joined to the fact of the sheep having been left in the possession of the defender, the inference was irresistible of sale. It was explained, however, that the "keil mark" was merely intended to distinguish the sheep from other sheep of the pursuer's in the vicinity.

The pursuer, in raising the process of reduction, presented a note of advocacy, *ob contingentiam* of the reduction, when both processes were conjoined.

The Lord Ordinary pronounced the following interlocutor:

"17th December 1841.—The Lord Ordinary having heard parties, and considered the conjoined processes, recalls the interlocutors complained of in the advocacy: Repels the defences in the reduction; and declares, reduces, and decerns in terms of the libel: Finds the pursuer and advocator entitled to expenses, both in the Inferior Court and in the Court of Session: Appoints accounts thereof to be given in, and when lodged, remits the same to the auditor to tax and to report.

"*Note*.—The grounds of the Lord Ordinary's decision are,—1st, That the conclusion for damages in a summary petition was incompetent.

"2d, That the arbiters had no right to name an oversman.

"3d, That neither the arbiters nor the oversman ought to have formed any opinion without giving the parties an opportunity of being heard.

"4th, That even though it should be held that the sheep were delivered, not for *interim* preservation, but in furtherance of the bargain, this must be presumed to have been done conditionally, and on a reliance that the price was to be fixed *in the way agreed to*; and that the fixing of the price in this way having become impossible, the whole bargain was broken up.

"The attempt to prove, that arbiters deciding matters referred to them, without hearing parties, and naming an oversman, without any power to this effect being conferred on them by the parties, is conformable to the custom of Ross-shire, is ridiculous."

The defender reclaimed. At advising,

Lord Medwyn.—I am not prepared to apply to this case the strict rules of a formal arbitration, as in the case of Telford; for I take this as a common bargain of every-day's occurrence in the district, where the understanding was, that if the valuers differed in opinion, they should resort to an oversman, without immediately consulting with the parties themselves. Accordingly, in a case of this sort, you must look at the custom of the part of the country where the case occurred; and I am quite sure, that not only in Ross-shire, but all the highlands over, referees resort to an oversman when they differ in opinion, without communicating with the principals. I am quite satisfied of the prevalence of the custom; and they do this before they inspect the subjects. In this way, I cannot hold that Rose was improperly appointed, or that the referees or Rose were wrong in determining without, at the moment, seeing the sheep. The kind and value of stock are well known, according to the district, and without inspection; and every one knows, that without seeing the animals, a shilling or more will at once be stated as the value of such and such sheep, according to the district, in consequence of the quality being so well known and understood by dealers. The only point as to which I concur with the Lord Ordinary, is, that there is no proof of the devolution on Rose. That ought to have been properly instructed; and if both referees had concurred in saying that Rose was appointed, I would have been for altering the interlocutor, as I should, in

those circumstances, have been for admitting the custom of the country in regard to such matter. But that is not so instructed as the proof stands, according to my mind; and I am for adhering. I have no doubt Rose believed he was appointed, but his appointment is not proved, which is very material; and it is on this point alone I concur.

Lord Moncreiff.—I concur with the Lord Ordinary, and I certainly differ from the opinion now expressed. If this had been a verbal contract, I might have seen room for the distinctions laid down by Lord Medwyn; but here there was a written contract, and I think, therefore, it is going very far to say that the valuator had power to name an oversman, where no such power is conferred in the letter, which was their warrant. I think that is extremely doubtful, to say the least of it. It was said that this was the custom in Ross-shire. But what of that? I daresay it may have been done a hundred times without complaint, but the question here is,—if, in point of law, the referees had power to name an oversman, and to devolve the matter in dispute on him? I doubt that very greatly indeed; and I do not see what power there was to do this, without the consent of both parties. Now it is very material to observe, that only one of the parties, viz., the defender, was present, and not the other, viz., the pursuer. The pursuer was not bound, in my opinion, to be present, as it was said he was, on the occasion; because, following the reasoning of the reclamer, he would have been bound to be there to fix on an oversman. Now, the letter gives no such power; and when the referees differed in opinion, and came to the resolution of throwing up the matter, they ought at least to have put their resolution in writing, in order to make it conclusive, both against themselves and in the case, that they had done so, and that Rose was appointed.

Lord Medwyn.—Mackenzie says, in his deposition, he went to ask in an oversman.

Lord Moncreiff.—I don't think that material, as I consider that as there was writing constituting them referees, writing was necessary to show the devolution. Only look at the proof and see how material this is. Cameron says there was a devolution on Rose: Mackenzie says no such thing. Rose thought himself appointed, and I daresay he did; but what of that? and what can be made of it, when Mackenzie tells us he did not consent. The referees differ as to this, but it is plain the thing would have been clear had there been writing. I am not prepared to say that, in other circumstances, the devolution might not be good; but here we have no evidence of the fact.

Lord Justice-Clerk.—I concur in the grounds stated by the Lord Ordinary.

Lord Moncreiff.—I forgot to mention about inspecting the sheep. I don't say, absolutely, that it was necessary for the referees to inspect them, when they met to value them, if they knew the particular sheep of their own knowledge previously. I give no opinion on that; but what I would say is, that a mere general knowledge of the quality and kind of sheep in a district would not appear to me to be enough.

Lord Justice-Clerk.—I concur with the Lord Ordinary. If both parties had been present, and there had in these circumstances been irregularity, I would not have been for giving great weight to the doubts which might occur to lawyers in such a transaction. But where one of the parties was absent, I hold that we cannot look at the alleged custom of the country. If it had appeared that the principals had consented to the referees not inspecting the sheep, I could have seen ground for making light of irregularity, and would have consented to let in the alleged custom; but I cannot do so in this case, where one of the parties was absent. It was said he was bound to have been present, but I cannot concur in that, from the terms of the letter. But he was not present, and I think it is high time that the gentlemen who acted as referees here, and who are said to have great experience in such matters, ought to know that the principals, in cases of arbitration, should be present. In these circumstances, therefore, custom is out of the question, and irrelevant. Then, what have we in the case? We have several points admitted—each and all of which are sufficient for me for adhering to the interlocutor. If this had been a sale, the bargain would have been at an end by the referees differing in opinion as to the price; but it is a case of arbitration, else why talk of an oversman. It is only by arbitration you bring in the

oversman. Now, the first thing admitted is, that there was no consent of both parties to the devolution, and no intimation of the devolution to the pursuer. That is of itself enough to upset the case. (2.) It is admitted that the reclamer was present, and not the pursuer. That is also fatal, as both ought to have been present. (3.) Then there is no written appointment of the oversman, as there ought to have been—the appointment of the referees having been in writing. That is also fatal. And (4.) Moreover, the parties, that is, both of them, were not heard. The pursuer was not present, and he ought to have had an opportunity of being heard as to what he could say; and he ought to have had an opportunity of saying whether he concurred or not in what was done,—whether or not wishing an inspection of the sheep or otherwise. That is also an insuperable objection, and fatal to the case. I concur with Lord Moncreiff, and therefore move that the interlocutor should be adhered to.—As to whether referees ought to inspect sheep, when they have a competent knowledge of the district, without seeing them at the moment, I must be understood as offering no opinion.

Lord Meadowbank absent.

The Court accordingly *adhered*.

Authorities for Pursuer.—Telford and Co., 2 S. and D., p. 167. Brown on Sale, p. 33, § 40, p. 148, § 201. Sugden on Vendors, l. p. 465, and cases cited. Langmuir v. Sloan, 21st May 1840; 2 S. and D., p. 877. Lord Dunmore v. M'Inturner, 28th January 1835; 13 S. and D. 356. Bell's Prin. § 92. Ersk. III. 3, 4; IV. 3, 32; and Parker on Arb. p. 120.

Authorities for Defender.—Stair, I. 14, l. 1. Ersk. III. 3, 4. E. of Montrose, 1639; M. 15, 145. Brown on Sale, p. 120.

Lord Ordinary, Cockburn, for Jeffrey.—Act. Rutherford, A. McNeill; L. Mackintosh, S.S.C., Agent.—Alt. Pyper; J. Richardson, W.S., Agent.—[G.D.F.]

1st July 1842.

SECOND DIVISION.—(G.D.F.)

No. 240.—THOMAS MANSFIELD (*Burnett's Trustee*),
Raiser, v. MRS VIOLET YOUNG and OTHERS,
Claimants.

Proof.—Evidence.—Heritable and Personal Creditors.—*Question of evidence, whether particular portions of land were comprehended under the securities of heritable creditors, and a conveyance to a trustee for payment of debt, or whether they belonged to personal creditors as a fund of payment?*

The late James Burnett was proprietor of the lands of Barns, Haswellsykes, two third parts of Over Glack, and sundry other subjects, with pertinents, lying within the barony of Traquair, and county of Peebles. Sir James Nasmyth of Posso was the contiguous proprietor, and part of his estate, which was entailed, and that of Barns, &c., appeared to have been considerably interspersed, or lay runrig and rundale, and were possessed *pro indiviso* in certain portions by the respective tenants of the two estates. In 1781, after an application to the Sheriff of the county, a contract of excambion was executed by Mr Burnett and Sir James Nasmyth, by which the latter conveyed to the former "all and whole the foresaid lands of Haswellsykes, Caverhill, with these parts of the Over and Nether Glacks, amounting to 626 acres 1 rood and 13 falls, with a small fraction lying north of the line of march therein described, and particularly bounded and described in the foresaid report and plan relative thereto, here held as repeated *brevitatis causa*."

Mr Burnett, on the other hand, conveyed to Sir James Nasmyth,

"all and whole the said lands of Woodhouse and Templehaugh, with these parts of the lands of Over and Nether Glacks, amounting in all, as aforesaid, to 572 acres 2 roods 9 falls, and a small fraction lying on the south of said line of division, and

bounded and described in the manner mentioned in the foresaid report, and plan relative thereto."

In regard to this excambion it was explained by the raiser, that although it bore that 626 acres were given by Sir James Nasmyth to Mr Burnett, and 572 acres by Mr Burnett to Sir James in return, it far exceeded the amount of lands actually excambed. These amounts included large portions of ground, which previously had respectively belonged to each of them, and the measurements were only introduced for the purpose of pointing out the extent of the whole lands which had been made the subject of division, whether belonging to Sir James Nasmyth or Mr Burnett, that had been allocated to each. Thus the contract bore that Sir James conveyed to Mr Burnett the lands of Haswell-sykes, although they never belonged to Sir James, but were exclusively the property of Mr Burnett; and, on the other hand, the disposition by Mr Burnett disposed to Sir James parts of the lands of Nether Glack, which are not contained in his titles, but were the property of Sir James; and so also he disposed to him the whole lands of Woodhouse, although, as appeared from his titles, he had only right to one-fourth part of them, the remainder belonging to Sir James.

These parties were infest under the excambion, and possessed under it. Thereafter, Mr Burnett, in 1816, conveyed his whole heritable property to his son James, the description of the lands in that conveyance being the same, with a slight exception, as that contained in his own original infestment; "together with all right, title and interest, claim of right, property and possession, which I and my predecessors and authors had, have, or can any way claim or pretend thereto in all time coming."

In this deed, however, there was no *per expressum* conveyance to his son of the lands of Caverhill, which Burnett, senior, had received under the contract of excambion; and the son, while he possessed these subjects, never made up any titles in special to them, nor till after insolvency.

Burnett, junior, contracted considerable debt; and in conveying his lands in heritable security, there was no *per expressum* conveyance to the creditors in their securities of the lands of Caverhill,—the lands assigned in security being described in the same way as in the conveyance by Burnett senior to Burnett junior. The latter executed a trust-deed in favour of the pursuer of his heritable property, for payment of his creditors, but the description of the lands conveyed to the trustee was precisely in the same situation as in the previous conveyances.

The trustee accepted the office and sold the estate, including the lands of Caverhill, which were advertised to consist of 110 acres, and it was only then, in consequence of it having been discovered that there was no title to Caverhill in the person of Burnett, junior, that he, on insolvency, made up a supplementary title to the lands, and conveyed them to the purchaser.

In this state of matters, certain of the personal creditors required the trustee to set apart for them, as a fund of payment, the price or value of the lands of Caverhill, from which, it was contended, the heritable creditors were excluded, as their securities did not, *per expressum*, extend over these subjects. This was resisted by the trustee for the heritable creditors, who,

at a meeting of the creditors, received instructions to pay off the heritable creditors in full; but as certain creditors were absent (*inter alios* the claimants, who were personal creditors,) who did not appear to have acceded to the trust, a notification was sent to them, to the effect that the trustee was to act on the resolution of the meeting, unless instructed to the contrary within eight days, and that if further opposition was intended, it would be necessary to put the trustee in funds to litigate the question with the heritable creditors. The claimants still however objected to the resolution of the creditors, and intimated to the trustee, while the fund was still in his hands, that they would hold him liable if he parted with the fund in the way which had been resolved on.

The present multiplepinding was then raised, in which the trustee maintained, that though it had been found necessary, as a matter of form, to complete a title to Caverhill separately, yet, as the lands could not now, from lapse of time, and the impossibility of distinguishing the boundaries, or the parcels of land of which it consisted, from the circumstance of the properties of Sir James Nasmyth and of Mr Burnett lying so interspersed together, it must be held that they fell under the conveyances to the heritable creditors, as part and pertinent of the rest of the estate, and so were covered by their securities, preferably to mere personal creditors. It was also maintained, that the claimants were barred from objecting to the payment of the heritable creditors in full, as they had failed to put the trustee in funds to litigate, or to come under any obligation for the results that might arise from the opposition. The trustee, besides, *pleaded*—that the opposition of the claimants was nimious and oppressive, as the course followed by the trustee was the best, in the circumstances, for the interests of all concerned; for, as the heritable creditors had it in their power to pursue measures under their real rights, which would have entailed a ruinous expense on the personal creditors, no other course was so beneficial as the one adopted.

The Lord Ordinary pronounced the following interlocutor:

"19th December 1840.—The Lord Ordinary having heard the counsel for the parties on the closed record, productions, and whole process, and made *avizandum*—Finds, 1mo, That Mrs Young and the trustees of her late husband (the real raisers and objectors to the condensation of the fund *in medio*) are to be considered as non-acceding creditors to the trust constituted by Mr Burnett of Barns in the person of Mr Mansfield, the nominal raiser, and could not, as such creditors, be barred from pursuing separate measures, and attaching the estate of their debtor, or any part thereof, by any act of resolution of the trustee or acceding creditors: Finds, 2do, That as it is admitted that the said objectors did intimate and give notice to the trustee (both privately and by protest) that they meant to challenge the legality of his making payments to the heritable creditors, which they now seek to have disallowed, while the funds were still in his hands, and before these payments were actually made, it is not necessary for them to bring a reduction either of these payments, or of the trust generally; and that by raising the present process of multiplepinding in name of the trustee immediately after the said intimation and protest, and insisting that the amount of the said payments shall be included in, or added to the condensation of the said fund, they are not to be considered as having acceded to the trust, but only to have exercised their right to pursue separate measures, and attach the estate of their debtor, as now actually or constructively

in the hands of the nominal raiser: Finds, 3^{to}, That the transaction between the late Sir James Nasmyth and the deceased Burnett of Barns in 1781, was far more of the nature of a division of properties formerly possessed by them *pro indiviso*, or in runrig or rundale, than a proper excambion or mutual conveyance of separate tenements which had previously belonged exclusively to one or other of the disposing parties; and that the burden of proving that any of the properties then disposed to Burnett were truly of the latter description, and also of proving the extent, boundaries, and present value of such properties, is wholly on the objectors: Finds, 4^{to}, That the said objectors cannot now succeed in getting any addition made to the fund *in medio*, unless they can prove that the arrangement made by the trustee (with the consent of all the other personal creditors), under which the payments now objected to were made to the heritable creditors, was in itself an injudicious arrangement, and has actually occasioned greater loss to the personal creditors than they would have sustained through loss of interest, pointing of the ground, expenses of litigation, and otherwise, if that arrangement had not been gone into; and before farther answer, appoints the cause to be enrolled, that the objectors may explain in what way they mean to proceed with the proof now proposed to be allowed them.

"Note.—The Lord Ordinary has no favourable impression as to the objectors' ultimate success; but he sees no reason to doubt that they are entitled to try the question, and in this shape. In substance and fact they are now doing for themselves, and against him and his whole constituents, what he invited or challenged them to do (rather more awkwardly) in his name, and against a part only of these constituents, or the heritable creditors alone—that is, *they are litigating, at their own expense*, for access to the disputed fund. There seems no room either to doubt that a non-acceding creditor, who is trying to take a fund out of the hands of a trustee, backed by all who have acceded, by raising a multiplepointing in the name of such trustee, is very emphatically pursuing separate measures.

"The ground of the third finding cannot be well explained, without going into more detail than would be convenient in this place. But it is evident that 626 and 572 acres of arable ground could not have been properly excambied under the 10th Geo. III., which only allows thirty acres of that description to be so disposed of, and indeed little more than one-fourth even of Caverhill (extending to 109 acres) could have been acquired *de novo* by a conveyance of that description. There is room probably for a distinction between the lands which were disposed in 1781, under a denomination which does not at all occur in the previous titles of the donee (as seems to be the case as to Caverhill alone), and these where the name does not stand in his original titles. But even as to the former, the objectors will have great difficulties, both from the effect of probable possession as *part and pertinent* of other lands, and from the probable change in the boundaries and extent of lands passing under the same denomination, in the course of the sixty years which have elapsed since 1781.

"The fourth finding imports no more than that the objectors cannot succeed, unless they show that more would not have been *taken away* from the fund for general distribution than would have been added to it, by the trustee acting as they now say he ought to have done."

On a reclaiming note, the Court, 10th March 1841, recalled the last two findings in the Lord Ordinary's interlocutor, and before answer, allowed a proof to both parties of their disputed averments, *i. e.*, in reference to the situation of the lands of Caverhill; and remitted to the Lord Ordinary to proceed accordingly. His Lordship, on the remit, allowed the proof, and thereafter pronounced the following interlocutor:

"9th March 1842.—The Lord Ordinary having heard parties under the remit of 10th March 1841, from the Court, and considered the process, Finds that the security held by Mr Mansfield, the trustee, for behoof of the real creditors, does not comprehend the lands of Caverhill: Finds that these lands must be held to consist of the 108 acres sold by the trustee as Caverhill: Finds (subject however to the condition immediately here-

after mentioned,) that the price of this Caverhill must be added to the fund *in medio* in this process, to the effect the claimants may draw their due share thereof; but that it is competent for the trustee to extinguish the interest of the claimants as such, by showing that the arrangement by which the price of Caverhill was paid to the real creditors, was beneficial for the claimants, or not injurious to them; and before further answer, appoints the cause to be enrolled, in order that it may be settled how the matter is to be proceeded with in reference to this last view, and reserves all questions of expenses.

"Note.—The Lord Ordinary thinks that the transaction between Sir James Nasmyth and Mr Burnett was not a mere division of land formerly held *pro indiviso*, or lying runrig or rundale, but was an excambion of separate properties, and that hence, as the securities apply only to the previous titles, they do not include Caverhill, part of the excambied ground acquired by Barns for the first time by this contract of excambion.

"If the claimants had insisted upon it, it is not improbable that they might have succeeded in showing that Caverhill was larger, but they stated that they were willing to hold it to be as the trustee himself had represented and sold it.

"Having paid the price of this estate to the heritable creditors, in the face of objections by the claimants, they have a clear title to vindicate their interest; but the possibility of the trustee extinguishing this interest is kept open."

Mrs Young reclaimed, praying the Court

"so far to recal, vary, or alter the said interlocutor, as to find it proven, from the writings produced in process, that the march of the lands acquired by Mr Burnett of Barns from Sir James Nasmyth of Posso, under the contract of excambion, 1781, and not comprehended in the securities granted to the heritable creditors, as sworn to by Thomas Gibson, a witness for Mr Mansfield, began at Barnhouse, or near it, and ran straight up to the top of the Hunt Hill, and then went along the top of the ridge for about a mile in length to the Dawick march, and then came down the Hope by the burn, and from that along the new line of division, all as laid down on the plan by William Oman, 6th September 1781, and to remit to a competent person or persons to measure and value the said lands, and to report; and to find that the said Thomas Mansfield is bound to add the amount of the price or value of the said lands to the fund *in medio*, in the present process, to the effect the claimants, as personal creditors, may draw their just share thereof; and to find the said Thomas Mansfield personally liable to the claimants in the whole expenses hitherto incurred by the claimants."

Mansfield also reclaimed, praying the Court to find that the price of Caverhill did not fall to be added to the fund *in medio*, and to find Mrs Young liable in expenses.

The Court

"Alter the interlocutor, in so far as to find that the lands of Caverhill consist of 110 acres, as advertised by Mr Mansfield, as Caverhill; and in regard to the last finding, of consent alter the said interlocutor, in so far as to reserve the point of competency, referred to in the said interlocutor, to be discussed before the Lord Ordinary under the last direction in the said interlocutor: *quoad ultra*, adhere to the said interlocutor, and remit to his Lordship to proceed further in the cause: Find the reclaimers, the said Mrs Violet Young and the trustees of the said Thomas Young, entitled to their expenses since the date of the interlocutor reclaimed against; appoint an account," &c.

Lord Ordinary, Cockburn.—Act. A. Anderson; W. and J. Cook, W.S., Agents.—Alt. Penney; A. Hutchison, Agent.—F. Clerk.—[G.D.F.]

2d July 1842.

FIRST DIVISION.—(H. B.)

No. 241.—REV. JAMES DOUNE SMITH, *Suspender*, v. PRESBYTERY of ABERTARFF and OTHERS, *Respondents*.

Process.—Suspension.—Interdict.—Where a presbytery was proceeding with a libel against a minister, interdict granted before answer, on the ground that the minister of a parliamentary church and his elder had seats in the presbytery, and were taking part in the proceedings.

The note of suspension in this case stated, that a libel had been served on the complainer by persons "alleging themselves to constitute" the Presbytery of Abertarff, "falsely accusing him of certain acts of fornication and adultery,"—that of the pretended members, one was the minister of one of the Parliamentary Churches, and another his elder,—that an appeal had been taken to the General Assembly, who had sustained the relevancy of the libel, and appointed four ministers taken from other Presbyteries to proceed with the Presbytery of Abertarff in preparing the case for final judgment,—and that accordingly witnesses had been summoned, and the proof was appointed to be taken on the 5th current. The suspender therefore prayed

"to suspend the proceedings complained of, and to interdict, prohibit and discharge the said Presbytery of Abertarff, and the" (individual members), "from jointly or severally proceeding to take proof upon the libel against the complainer, dated 2d March 1842, depending, or alleged to be depending at present before the said Presbytery, and from further taking cognisance of, or following out any proceedings under the said libel, or to any effect proceeding with the same, and from pronouncing any judgment under the said libel, or carrying into effect any judgments pronounced, or to be pronounced under the same; also to interdict, prohibit and discharge the said Charles Stewart from taking any proceedings either under name of agent, assessor or otherwise, under the said libel; also to interdict, prohibit and discharge the said Mary Macphee, and other persons before named, cited, or proposed to be cited as witnesses under the said libel, from appearing before the Presbytery, in order to give evidence under the same, and from giving evidence in the matters of the said libel, or taking any part in the proceedings under the same."

The Lord Ordinary pronounced the following interlocutor:

"1st July 1842.—To see and answer within fourteen days, and to be intimated, reserving consideration of the question of interdict, and likewise as to caution."

The suspender reclaimed:

Lord President.—I pay no regard to any of the statements but this, that persons alleged not legal members of the Presbytery are taking part in the proceedings; and on this ground, the sufficiency of which we have repeatedly recognised, I am clear that the interdict should be granted. Were we to do otherwise, we should absolutely stultify ourselves.

Lord Fullerton.—I took a different view in the other cases, and do here also of course, though the granting of the interdict seems to follow from these cases.

Lord Mackenzie.—I have some doubts. Formerly we had only to consider whether we ought to recall an interdict where the respondents had made no appearance. Here I don't know whether they are to appear or not.

Lord Gillies.—If we only order them to answer, without granting the interdict, they will gain their cause. They will proceed with the proof of their allegations, and so do an irreparable injury to the suspender.

Lord Mackenzie.—I don't wish to hold, that in all cases where an allegation of this kind is made, interdict is to be at once granted. I am not prepared to adopt this as a general principle; but in the special circumstances—considering that

the proceedings, if allowed to take place, will be irreparable,—I think we must grant the interdict.

The Court remitted to the Lord Ordinary, with instructions to grant the interdict.

Lord Ordinary, Ivory.—*Act*. Robertson, Penney; Hugh Fraser, W.S., *Agent*.—[H.B.]

2d July 1842.

SECOND DIVISION.—(G. D. F.)

No. 242.—MRS ISABELLA COLINA ROY or MACKENZIE, *Claimant*, v. CURATOR for ROSS'S CHILDREN, *Respondent*.

Husband and Wife.—Marriage-Contract.—Annuity.—Competition.—Trust-Deed.—A wife, who was secured in an annuity of £500 by antenuptial contract, followed by infestment in her husband's lands, which were sold by his trustee, held entitled to have her annuity fully secured to her out of the balance of the price of the estate upon which her annuity was secured, after payment of the preferable securities, and such balance directed to be laid out in purchasing or securing the same accordingly.

By antenuptial contract, dated 25th August 1817, Kenneth Mackenzie of Dundonnell provided the claimant, Mrs Isabella Colina Roy or Mackenzie, in a jointure of £500 per annum, restrictable to £400 in the event of there being issue of the marriage. The contract bound Mr Mackenzie, and his heirs and successors, personally for this jointure, and also contained a conveyance of his estate of Dundonnell in security of the provision, with precept of sasine, upon which Mrs Mackenzie was duly infeft in October 1817. Mr Mackenzie died in April 1826, without issue of the marriage, having previously executed a trust-deed for behoof of his creditors, in favour of certain trustees in succession, containing a conveyance of the estate of Dundonnell, with a power of sale, and a deed of settlement, dated 11th July 1817, regulating the succession to the estate. Under this latter deed, Thomas Mackenzie, the testator's only surviving brother, became entitled to succeed to the estate, under the express condition of his making payment of a sum of £5000 to be settled on his sister, Mrs Dr Ross, in liferent, and her children in fee.

After Kenneth Mackenzie's death the estate was sold by the trustee, the late Mr Girvan, accountant, under the powers in the trust-disposition of 1824, who thereupon brought an action of multiplepinding, calling all parties interested into Court. With the view of throwing open a capital sum for division upon the postponed claimants on the fund, and saving the loss of interest from the fund *in medio* being deposited in bank, a proposal was made to Mrs Mackenzie to allow her annuity to be redeemed by payment of a slump sum as its converted value. To this proposal Mrs Mackenzie agreed; and it having been ascertained that the medium value of the annuity, according to the tables other than those of Government, was £7500, Mrs Mackenzie declared her willingness to accept of this sum, and the arrangement received the sanction of Dundonnell's creditors at a general meeting held on 20th May 1834.

A difficulty, however, arose, in consequence of Dr Ross's family being minors, and therefore, it was thought incompetent for them, or by their father, to give a binding consent to the proposed arrangement. To

obviate this difficulty the summons of multiplepounding, by which the fund *in medio* was thrown into Court, contained amongst others a conclusion,

"that it ought and should be found and declared, by decree of our said Lords, that the purchase of the said annuity of £800 per annum to the said Mrs Isabella Colina Mackenzie for the said price of £7500, was a proper and beneficial act of administration on the part of the pursuer, as trustee foresaid. And our said Lords ought and should interpose their authority thereto."

The heritable creditors prior in right to the claimant, Mrs Mackenzie, were paid out of the price, and she also consented to payment of a variety of other claims not preferably secured, by which the balance of the fund *in medio* became greatly reduced. The only claimants in the multiplepounding were,—1st, Mrs Mackenzie for her annuity; 2^d, Mrs Ross and her children for the provision of £5000; and, 3^d, The trustee upon the sequestered estate of Thomas Mackenzie for the residue, if any should arise. The last of these claims was ultimately withdrawn, in consequence of its being discovered that there would not be enough even to satisfy the claim of Mrs Ross and her children. The only parties that remained were therefore Mrs Mackenzie, the preferable creditor, and Mrs Ross and her children, the postponed claimants; and the question between these two regarded the mode in which Mrs Mackenzie's claim for annuity was to be settled and given effect to.

In her claim, as lodged in process, Mrs Mackenzie stated the following pleas:—"1. The claimant is entitled to be preferred on the fund *in medio* for the sum of £7500, as the converted value of the annuity secured to her by her marriage-contract over the lands of Dundonnell, and interest thereon since Whitsunday 1834." This plea refers to the contract which had been made with the creditors, before explained. "2. If this claim is not given effect to, the claimant is entitled to have secured and set apart such a capital sum as will provide her in the annuity of £500 per annum, secured by her marriage-contract. 3. In the event of the estate not yielding a capital sum, which, invested at the ordinary rate of interest, will yield a yearly return equivalent to the claimant's annuity, she is entitled to demand that the balance of the funds, or so much as is necessary, should be employed to purchase an annuity for her from Government or otherwise, so as to make good her primary right as creditor on the estate."

In the course of the discussion which ensued, Mrs Mackenzie contended, that if the contract as to the conversion was not fulfilled, she was entitled to insist, either that her annuity should be made good to her by a sum being invested sufficient to produce it at simple interest; or, if the fund *in medio* was not sufficient for that purpose, that such annuity should be purchased, either from Government or some other quarter, by the employment of so much of the fund as should be necessary for that purpose.

Upon advising the pleas of parties, the Lord Ordinary (Lord Moncreiff) pronounced the following interlocutor:

"12th May 1838.—The Lord Ordinary having considered the closed record, and heard parties' procurators on the claim of Mrs Mackenzie, in regard to the annuity provided to her, as explained alternatively in the three first pleas in law for the said

claimant, and on the claim for expenses incurred by the claimants in making up the record against Mr Girvan, the trustee and raiser of the multiplepounding, and having made avizandum, Finds that the claimant, Mrs Mackenzie, is an onerous creditor on the whole fund *in medio* for her annuity of £500, originally secured by infestment over the estate of Dundonnell, the price of which, after being sold by Mr Girvan, the trustee, forms the fund *in medio* in this multiplepounding: Finds that the only other claimants, Mrs Ross and her children, are merely gratuitous legatees for their respective interests of liferent and fee, in the sum of £5000, payable out of any reversion of the funds which may remain after satisfying the proper debts of the deceased Kenneth Mackenzie: Finds that the precise right of the claimant, Mrs Mackenzie, is, in terms of her second plea in law, to have such a sum of capital from the price of the estate laid out and secured, as may be sufficient, at the rate of interest which may be obtained by contract, to secure the payment of her said annuity during her life; and that, till her death, the other claimants, Mrs Ross and her children, could have no claim over that capital money: Finds, that if such a sufficient fund were found to exist, Mrs Mackenzie could not insist for more than that it should be so secured, and in particular, would not be entitled to demand that an estimate of the present value of her annuity should be made by calculation, and the amount thereof in a capital sum should be paid over to her: But finds, that in the event that, upon a full adjustment of the state of the funds, it shall appear that there is not a sufficient sum of capital to secure the said annuity by simple investment, the said Mrs Mackenzie must be entitled to insist, either that her annuity shall be valued, and the value thereof paid to her as the amount of her claim in the multiplepounding; or otherwise, that the full payment of her annuity, during all the days of her life, shall be effectually secured to her by some other form of investment, of the whole or a part of the sum which may remain *in medio*; and finds that the other claimants, as the gratuitous donees of the deceased Kenneth Mackenzie, have no legal title or interest to resist such her claim to one or other of the said alternatives, as set forth in her first and third pleas in law, but in the option of the said other claimants, under the control of the Court. But in respect that it does not appear that the precise amount of the fund *in medio* has yet been ascertained, supersedes farther judgment *in hoc statu*, in regard to the application of the principles thus laid down; but allows the cause to be enrolled by either party: Finds that Mrs Mackenzie has a just claim against the fund *in medio* for the arrears of the annuity already due, and also for the value of one-half of the household furniture of the deceased, according to the terms of her marriage-contract; and that, in the event of its being found that there is not a sufficient fund both to pay the sums so due, and to secure the annuity *de futuro*, it will be in her option either to take payment thereof, or to allow the whole sum to be laid out for providing the annuity: Finds that it is not expedient to give any judgment on the claim for expenses in making up the record and otherwise, now made against Mr Girvan, until Mr Girvan's own accounts, and all objections which may be made against them, shall be before the Lord Ordinary: Therefore, in the meantime, reserves also all such questions, and reserves also all other questions of expenses."

To this interlocutor his Lordship added the following note:

"The first question disposed of by the interlocutor is somewhat curious, and not quite simple. But it must be kept in view that Mrs Mackenzie had not merely the personal obligation of the deceased for her annuity, but also the security of the whole estate of Dundonnell by infestment. As long, therefore, as any part of that estate, or what is the same thing, the price of it, remains, she is entitled, not merely to have her annuities paid as they fall due, but to have her right to them in some manner made secure by the substitution of some other security in place of that which is taken away. If there was a capital sufficient to secure it, she could ask no more; but if there is not such a capital, she is bound, after the whole funds is in the hands of the Court for division, to accept of successive annuities out of that limited capital, under the hazard that it may entirely fail long before the expiry of her lifetime? Or are the gratuitous donees of her husband entitled to say that she shall be put to

that hazard in order to give them a chance of reversion if she should die before the fund is exhausted; or to state such an interest as an objection to any mode of application of the existing fund, by which full implement of the onerous debt may be given or secured? After full consideration, the Lord Ordinary is of opinion that, though metaphysical subtleties may be suggested on such a question, the plain sense of it is, that the onerous creditor must, if possible, be made entirely secure by means of that which is the *surrogatum* of her previous security, and that no gratuitous legatee can oppose her in that demand.

"It would indeed be most unreasonable to listen to such a plea, unless the other parties were to produce some other sufficient security that the annuity should not fail, and this would really come to the same thing. But if it were even supposeable that the annuitant should be content with such a diminished annuity as the existing capital simply invested would secure, certainly when she died, her representatives would have a good claim for payment of all the sums of annuity unpaid from the capital so preserved, before the legatees could draw anything. The Lord Ordinary is, however, of opinion that the legal right of the annuitant is according to the findings in the interlocutor."

This interlocutor having been brought under review of their Lordships of the Second Division by a reclaiming note for Dr and Mrs Ross and their children, and the curator *ad litem* for their children, the note was refused, and the interlocutor affirmed by the unanimous judgment of the Court.

On the case returning to the Lord Ordinary, the first point to be ascertained was the actual amount of the fund *in medio*, and the following interlocutor was pronounced:

"23d February 1839.—The Lord Ordinary appoints Mrs Mackenzie to put in a minute as to the amount of the fund *in medio*, with reference to the payment or securing of her annuity, and that in eight days; and appoints the other parties to answer the same, and also to state in their answers which of the alternatives of the interlocutor, of date 12th May 1839, they propose to adopt."

The claimant accordingly lodged a minute, giving the estimate of the fund *in medio*, the amount of which depended on contingencies, and which, in one view taken by her, would not exceed £6600; and she added, that in any view, "the fund *in medio* was not a sufficient fund to secure to Mrs Mackenzie, by simple investment, payment of her annuity during her life."

In answering this minute, the curator *ad litem*, though not admitting the arithmetical details of Mrs Mackenzie's estimate, admitted that the fund *in medio* was not sufficient to secure the annuity by simple investment; and with regard to the call made upon him to state which of the alternatives of Lord Moncreiff's interlocutor, with reference to the adjustment of the annuity, he was inclined to adopt, the curator said:

"On the whole, he rather inclines to think that, in a practical point of view, the interests of the minors would be best secured by adopting, as far as is necessary, the latter alternative, viz., that the full payment of her annuity, during all the days of her life, shall be effectually secured to her by some other form of investment of the whole or a part of the sum which may remain *in medio*."

"As to the particular mode of arrangement, it occurs to him that a mixed plan would be preferable, viz., that part of the fund should be employed in purchasing for Mrs Mackenzie, or in redeeming from her, such an amount of annuity as would, together with the interest to be obtained for the remainder of the fund laid out at simple interest, make up the full annuity of £500.

"The mode is suggested by the curator for the sanction of the Court. He does not consider himself at liberty to make choice of either alternative, absolutely, without their sanction."

Subsequently, the following interlocutor was pronounced:

"28th May 1839.—The Lord Ordinary having heard parties' procurators, before answer remits to Mr John Mackenzie, manager of the Scottish Widows' Fund, to report in what manner the full payment, during all the days of Mrs Mackenzie's life, could be effectually secured to her by the payment or investment of the whole or any part of the fund *in medio*; and what sum will be required for this purpose. And also to report whether any other plan occurs to him calculated to purchase or secure the said annuity, with the probability of a reversion to the other claimants, and to offer any other suggestions calculated to carry into effect the views of the parties."

An interim report was returned by Mr Mackenzie, in which he pointed out the impracticability of what had been called the mixed mode of adjustment. He farther reported, that upon an investment at simple interest, with such drafts made upon the capital as might be necessary to make up the deficiency of the annuity, the whole fund would, according to the best estimate that could be formed of its amount, be exhausted in seventeen or nineteen years, leaving the annuitant without any thing, in the one case, at the age of sixty-four, and in the other, at that of sixty-six. He farther reported,

"that the value of her annuity, according to the Northampton tables of mortality, interest at four per cent., was £5945; whilst the lowest sum which he could ascertain would be taken by a respectable and safe office to secure her in an annuity of £500, would not be less than £7500."

In the course of the proceedings before the accountant, he suggested that some arrangement might best be made by a concession, to some extent, on the part of Mrs Mackenzie, of her legal rights. Mrs Mackenzie, whilst not waiving any of these rights, expressed herself willing to make such concession, and proposed "to give up one-half of the arrears of annuity claimed by her." (which amounted to a very large sum) "and to accept of £6730 as the valuation of her annuity, being the mean sum between the calculated value, according to the Northampton tables, and that which was shown to be the lowest amount that would be charged by a safe and respectable office."

This offer was not accepted; and upon the case returning to the Lord Ordinary, with Mr Mackenzie's report, his Lordship allowed Mrs Mackenzie to give in a minute, stating "what she proposes to accept in this case, having in view the interim report by Mr John Mackenzie." By a minute, Mrs Mackenzie accordingly stated, that what she, on her side, chose was, not that any value of her annuity should be made, but that the sum of £7500, reported on by Mr Mackenzie, or such other sum as the fund *in medio* could afford, should be employed in purchasing or procuring her annuity, or so much of it as could be purchased or procured.

Parties were then appointed to debate, when the following interlocutor was pronounced by Lord Ivory, before whom the case had come to depend (18th July 1840):

"Finds that there is nothing in the interlocutor of 17th January and 19th February last, or in any of the previous interlocutors *in causa*, to tie down Mrs Mackenzie to the statement of any particular sum as the amount which she is willing to accept in satisfaction of her legal claims, but that the course there pointed at was merely tentative, and had in view only to give the parties an opportunity of coming to a settlement in this way, had they both been at one in the matter: Therefore, and in respect that all attempts to adjust the matters in dispute by mutual arrangement have fallen to the ground, and that Mrs

Mackenzie, with reference to the findings in Lord Moncreiff's interlocutor of 12th May 1838 (adhered to by the Court on 11th November thereafter), has now intimated her election in favour of the purchase of an annuity—Appoints cases on the whole remaining points of the cause, and more especially as to the construction and effect of the said interlocutor of 12th May 1838, and the application of the principles therein laid down."

In compliance with this order, cases were lodged for the parties, in which—it being admitted that the balance of the fund *in medio* was insufficient, if laid out upon simple investment, to secure Mrs Mackenzie in payment of her annuity—it was contended, on the part of Mrs Mackenzie, that, in terms of the final interlocutor of 12th May 1838, she was entitled either to have the value of her annuity paid over to her,—that value being the sum for which the annuity could be purchased from a respectable insurance office,—or to have the full payment of her annuity secured to her by some other form of investment, out of part or the whole of the fund *in medio*; while, on the other hand, it was contended—(1.) that Mrs Mackenzie was not entitled to have the fund *in medio* applied in such a way, in security of her annuity, as to deprive the family of the Rosses of all chance of succeeding to any part of it, as would be the case, were the value of her annuity to be paid over to her, or a corresponding annuity purchased from an insurance office, but that she was entitled to no more than the security which the fund, *tantum et tale*, as it was, afforded; and, (2.) That if she were to be found entitled to receive payment of the present value of her annuity, that value was to be estimated, not by what an insurance office would sell the annuity for, but according to the value of the annuity by the Northampton tables.

The Lord Ordinary, in making avizandum to the Court with the revised cases for the parties, pronounced the following interlocutor and note:

"16th June 1842.—The Lord Ordinary having considered the cases given in by Mrs Mackenzie, and the children of Dr Ross, in regard to the mode of dealing with Mrs Mackenzie's claim as a creditor for her annuity of £500, with reference to the *species facti* now admitted on all hands, viz., that 'the fund *in medio* is not a sufficient fund to secure to Mrs Mackenzie, by simple investment,' the payment of her annuity during her life: Inasmuch as this question may in a great measure depend upon the reading and construction of Lord Moncreiff's interlocutor of 12th May 1838, adhered to by the Court on 11th June of the same year—finds that the more expedient course for all concerned will be to obtain the judgment of the Court thereon: Therefore, makes avizandum with this branch of the cause (its other branches having of this date been disposed of by separate interlocutors of the Lord Ordinary,) to their Lordships of the Second Division; ordains the cases (already printed) to be boxed, and grants warrant to enrol.

"Note.—Of the various matters with which the Lord Ordinary has had occasion to deal in his several interlocutors of this date, the leading and most important is certainly that which is involved in the question wherewith avizandum has here been made to the Court. For if Mrs Mackenzie's claim under this head shall eventually be sustained, in the shape and to the full extent which she insists for, the entire fund *in medio* will be exhausted by this single claim, and there will remain nothing whatever to fight about between her and her only competitors, Dr Ross's children. Indeed, many of the findings in the separate interlocutors, which derive their importance only from the chance of an opposite result, will fall to the ground and become practically inoperative.

"This branch of the cause comes, therefore, to be of the very last moment for all concerned. And though the judgment of the Court formerly pronounced in regard to it must now neces-

sarily be taken as the rule of the case, the Lord Ordinary is not sure but that, in construing and extricating that judgment, the Court may still find some measure of difficulty which they did not anticipate when it was pronounced.

"The principle of the judgment seems to be, that in one shape or another, Mrs Mackenzie—as in a question with Mrs Ross and her children, viewed as gratuitous legatees—is either to be secured if possible, during her whole lifetime, in payment of her annuity,—or if that cannot be, then that her claim must be satisfied by a *present payment* as an equivalent. That is to say—(1.) If there had been a sufficient capital (which there is not) to yield an amount of interest equal to the annuity payable, the judgment finds her entitled to insist that the necessary investment of such capital should be made for that end. Failing this, the judgment finds her entitled to insist, 'either (2.) that her annuity shall be valued, and the *value thereof paid to her* as the amount of her claim in the multiplepounding;—or otherwise, (3.) that the full payment of her annuity, during all the days of her life, shall be effectually secured to her by some other form of investment, of the whole or a part of the sum which may remain *in medio*.'

"The interlocutor goes on to say, that 'the other claimants (the Rosses) have no legal title or interest to resist such her claim to one or other of the said alternatives, as set forth in her first and third pleas in law, but in the *option of the said other claimants*, under the control of the Court.'

"Now, here arises one important question between the parties,—Is it Mrs Mackenzie, or is it the Rosses who are to have the right of *electing* between the two alternatives, 1st, of discharging the annuity at once by payment of its *present value*; or 2d, of purchasing—from an insurance office or otherwise—an annuity to be paid *de anno in annum* so long as Mrs Mackenzie lives?

"But another, and not less important question lies behind,—supposing Mrs Mackenzie bound to accept of the first alternative,—what is to be understood, and what shall she be bound to accept, as the *present value* of her annuity?

"On the first of these questions, it does humbly appear to the Lord Ordinary that the plain reading of the interlocutor is to give the election to the Rosses; and that the control therein referred to as to be exercised by the Court, is a control for the benefit of the pupils, in whose behalf the election is to be made, and whose interests had been placed by the Court under the charge of a curator,—who could not, by the very nature of his office, make the election otherwise than under the control and by the authority of the Court.

"Mrs Mackenzie, however, contends, that it was she, and not the Rosses and their curator, to whom the right of election was given; and that any option that was conferred upon the latter was, as she terms it, a mere *option of resistance*,—or, in other words, an option of calling on the Court to decide between the parties, if they could not agree among themselves. The Lord Ordinary cannot help thinking this a most strained construction, and one contrary not less to the spirit than to the letter of the interlocutor. The Court, however, by whom the interlocutor was affirmed,—more especially as they have now the aid of the learned Judge by whom that interlocutor was originally pronounced,—can have no difficulty in dealing with this matter.

"As regards the second question,—what, supposing Mrs Mackenzie bound to consent to the *conversion* of her annuity, is, under the construction of the interlocutor, to be understood as answering the description of its *present value*?—the Lord Ordinary may perhaps, before entering on that point, be permitted, with very great deference, to intimate a doubt, how far, as a *strict question of law*, and apart from supposed *equitable considerations*,—an annuity-creditor is at all entitled to the benefit of such a conversion. He has always understood, that, under any circumstances, an annuity-creditor, secured in *no more than an annuity* out of a particular estate, is not entitled, so far as regards future, and therefore merely contingent annuities, either to appropriate the estate over which the annuity is secured, as in present payment once for all of that annuity (and no matter whether, in point of fact, its future terms shall ever come to be exigible or not), or to compel the proprietor to sell the estate, in order that, by sinking the price in the purchase of an annuity,

a different form and extent of security altogether should be substituted in room and place of that which had been originally contracted for. Yet, what is a *conversion* of the annuity in substance but this in another shape? The annuitant may *adjudge* in payment and satisfaction of *past arrears*, and in security also, it may be, of *future annuities*—the term of such future annuities, however, being in the latter case first come and bygone, before any security of this kind can be made substantively available. But even in the *lifetime of the debtor* in the annuity, it is not thought that the annuitant could, by *any form of diligence*, have a *larger remedy*. And surely there is no difference, in point of principle, where the question arises with the original debtor's *representative*; and just as little where the *estate*, which was the original subject of security, has been sold, and the question arises in reference to the disposal of its *price*—the price in such case being just a *surrogatum* for the estate.

"The Lord Ordinary is the more struck with this as the strictly legal view of the matter, that he observes the principle of *conversion*,—that is to say, of substituting *payment at a present value*, as in satisfaction and discharge of a *continuing annuity*, or even of at all *touching the original security* for that annuity, *without the creditors' express consent*,—is in the strongest terms repudiated, not only by Mrs Mackenzie herself, but by the accountant to whom it was remitted to consider and report upon this question. For, surely, if the one party be thus entitled to stand upon the original contract, the other, with great submission, must be not less so. If Mrs Mackenzie cannot be compelled to *take payment once for all* of her annuity by acceptance of its present value,—so neither can the other party be compelled to *make such payment*, and for that purpose, it may be, to part with the entire estate, or, what comes to the same thing, with the price, which is a *surrogatum* for the estate, in order either to buy off the debt from Mrs Mackenzie herself, or to purchase therewith the additional security of an insurance company, with a view to render Mrs Mackenzie's eventual safety more assured. If Mrs Mackenzie be entitled to say, as she repeatedly does throughout her pleading, that she will have *her annuity, and nothing either more or less*, so, on the other hand, the Rosses or other representatives of Dundonnell, as the debtors in that annuity, seem entitled to answer, that in such case she can enforce payment *only in terms of the original contract*, or in other words, that she must take her annuity *precisely as it is there stipulated to be given*,—that is to say, she can only enforce it, and therefore must be content to take it, *de anno in annum*, as each successive term falls due,—and out of the Dundonnell estate over which it stands secured,—or out of the price of that estate which has come in its place as *surrogatum*,—and this without either the addition or substitution of any new or different form of security whatever.

"Holding this then to be the strict legal result of the case, it humbly appears to the Lord Ordinary, that however much the Court have held themselves entitled to control or qualify such a result, in the exercise of an *equity jurisdiction*—the above considerations strongly illustrate and affect the case, even in construing and following out the *equitable principle* which has been introduced into the question by the former judgment. There is nothing in that judgment, however, which expressly entitles Mrs Mackenzie to *appropriate* to herself the price of Dundonnell. Neither is there any thing therein which entitles her to demand that that price shall be *laid out*, in order to purchase for her a *different security* from that which the said residue, as a *surrogatum* for the estate itself, at present affords. No doubt her security, such as it is at this moment, is not to be *lessened*; but, on the other hand, neither is it to be *enlarged*, nor without the mutual consent of parties, in any respect *altered*. Now, suppose the *estate* had been still extant *in forma specifica*, what would have been the position or legal rights of Mrs Mackenzie? Must she not have rested content with the *security of that estate*, such as it was originally given to her? Could she have demanded *any other or different security*—whether it was *more or less*—simply because the annual returns of the estate were insufficient to meet her annuity? She might have used the *diligence* of the law to enforce her legal rights. But *personal diligence* could at best have recovered her nothing, beyond payment of each term's annuity as it fell due, while *real diligence* could never have enabled her to convert herself from a mere

creditor over the estate into its absolute *proprietor*. Anything, in short, other than simple *security* over the estate, could in such a case have been reached only through the medium of some *voluntary and mutual arrangement*. It is precisely the same, in regard to the *price* of the estate, or any other *surrogatum*. In short, if Dundonnell's representatives, as debtors in the annuity, *choose* to purchase an annuity from any third party, such as an insurance office, and if Mrs Mackenzie *choose* to accept of the annuity so purchased as in lieu of her original security, that is one way of settling the matter; but it is a *speculation of hazard*, and neither party can be compulsorily driven into it. On the other hand, the very uncertainty of life attaches to the annuity itself, as it stands at present constituted, the character of an obligation of *hazard and contingency*; and though there are elements of calculation by which this hazard and contingency may on both sides be converted into certainty, by reducing the whole to a *present value*, yet this, as before, can be effected only as matter of mutual arrangement; and there *must be giving and taking on both sides*, otherwise the contract or arrangement would be purely *leonine*.

"When the Court, therefore, formerly pointed, in one of the alternatives of their judgment, at the *conversion* of the annuity into its *present value*, there was perhaps nothing objectionable, as regards the mere *equity* of the proposal; because, on the one hand, it assumed that Mrs Mackenzie was to accept a present sum *less than the accumulated amount of her annuity*, supposing her to live to the *MAXIMUM TERM of human life*, just as, on the other, it assumed that the annuity-debtor, was to pay a sum *greater than the accumulated amount of annuity* would eventually come to, supposing her to be *PREMATURELY cut off at a term as far BELOW THE AVERAGE ENDURANCE of life*. In short, a fair medium was intended to be struck between the parties, whereby both should share in the benefit and disadvantage of the transaction, and the whole loss or the whole gain not be exclusively attached to one of them only.

"But this is the very reverse of what Mrs Mackenzie is here claiming. For she insists that she must be made secure *at all hazards*, while she throws the whole burden of *contingent and possible loss* attaching to the proposed transaction upon the other party. Thus, she will not accept what the other party offers her—a *fair conversion of her annuity at its present value*—estimating that value according to the approved methods of calculation in such matters. She insists that her annuity be made effectual and secure to the very latest hour of her life,—and that, whether the purchase-money of such an annuity exceed the *present value* of her life interest or not, it must all be paid for by the other party out of the very first head of the estate. With submission, there is neither equity nor equality in such a transaction. For, inasmuch as the annuity-debtor is made to pay beyond the present value of the tables, just in so much as he made to pay more than the real worth of the annuity, looking to the contingencies which affect it.

"The Lord Ordinary cannot conceive that such a result as this was within the most remote contemplation of the Court, when they proposed, by their judgment now under consideration, that Mrs Mackenzie's annuity shall be valued, and the *value thereof paid to her* as the amount of her claim. The value of an annuity, in this sense, is not the *price* at which an *unquestionably assured* annuity of corresponding amount can be purchased in the market. Least of all, is the value of an annuity *defectively secured*—as Mrs Mackenzie's here is said to be, looking merely to the estate of Dundonnell, or its price, as the means of payment,—to be so dealt with. The value of an annuity, in the sense of the judgment, is its estimated worth,—all contingencies considered,—when converted, according to the ordinary elements of calculation, into a *present payment*. But this is an operation of *arithmetic*, and not the arbitrary result of a *mercantile transaction*. It is neither more nor less in principle than what every day takes place in ranking a bill, the term of which has not yet arrived,—and where, therefore, there must be a certain *discount* allowed, in order to fix the present value. In other words, the annuity-creditor, who prefers *present* to *future payment*, may, equitably enough, perhaps be allowed to make the *election*. But if he seek equity, he must give it. He cannot secure for himself *all the benefit of certainty* implied in the present payment of a large sum, no part, or only a very

small part of which is yet due,—and the greater part of which may, in the contingencies of life, never come to be due or exigible at all,—and on the other hand, repudiate the relative hazard, that what he thus presently receives may, on a different turn up of the same contingencies of life, fall ultimately short of what he might eventually have got, had the annuity been allowed to run on, in the natural and ordinary course, to its extreme term.

“In the present case, the difference between the arithmetical present value of the annuity, and the purchase money for which such an annuity could be purchased from an insurance office, is just the difference between £5945 and £7500—a most important consideration in a mere pecuniary point of view. Mrs Mackenzie, it is true, was at one time willing to have compromised the matter by accepting a medium sum of £6730 as the valuation of her annuity, thus becoming herself the purchaser. But even on this footing, the difference would have been more than it is thought she was in justice entitled to insist for. As the parties, however, did not come to any settlement upon these terms, and both now stand upon their legal rights, the difference really at issue between them in this discussion ranges, as at first, between £5945 and £7500. In other words, it comes to not less than £1550; an amount which, it is thought, will induce the Court to pause before they give effect to the argument which has so strenuously been maintained on the part of Mrs Mackenzie.

“Upon the whole, it humbly occurs to the Lord Ordinary, that Mrs Mackenzie will receive all that, upon any reasonable construction of the former judgment, she is entitled to, if she receive the converted value of her annuity as the same shall be calculated according to the received tables. Even in this way, should she die early, the representatives of Dundonnell will sustain a loss, which the law, strictly considered, could never have imposed upon them. But, on the other hand, this possible loss may perhaps, in a certain point of view, be held to be counterbalanced by the possible gain which would accrue in case of her life being prolonged beyond the usual term. And between the two, equity (as the court, it is presumed, intended,) may so far be substantially restored upon the whole matter.”

At advising,

Rutherford thought the case was decided substantially by the Court on 12th May 1838, and therefore he was not aware that it was necessary again to trouble the Court with any observations, further than to say that it appeared that Mrs Mackenzie was, on every principle, entitled now to make her election.

Lord Justice-Clerk and *Lord Medwyn*.—Most certainly she is.

Rutherford.—Then, if that be the opinion of the Court, the matter is at an end.

Lord Justice-Clerk.—Mrs Mackenzie consented to the sale, which it was not incumbent on her to do. But is she to be the worse for that? In my opinion that cannot be.

Lord Moncreiff wished to ask, if, after the sale, there were funds sufficient to pay the heritable creditors?

Rutherford.—I understand that, after the sale, there was enough to pay the heritable creditors, and also the annuity to Mrs Mackenzie; and it was only in consequence of her allowing the unsecured creditors to be paid out of the price of the estate, that the funds to answer the annuity are now deficient.

Lord Medwyn.—There is here no question between her and the heritable creditors—only between Mrs Ross and the legatees, who are, *quoad* her, gratuitous donees; and so far as the latter are concerned, they cannot, in my opinion compete with her. All that we can do here, and we are bound to do it, is to secure to Mrs Mackenzie whatever remains of the price for her benefit. She asks to get £6000 meantime invested for her annuity, and that ought to be done; for she has no one validly to compete with her.

Lord Justice-Clerk.—I think she is entitled to have the whole remaining sum invested. However, she asks less than that to be meantime invested, and I think that ought to be granted. I can see no one here who is entitled to compete with her. She has acted throughout in a most liberal and handsome manner.

Lord Moncreiff concurred.

Lord Meadowbank absent.

SCOTTISH JURIST.

The Court

“Find that Mrs Mackenzie is entitled to have her annuity fully and effectually secured to her, so far as may be accomplished, by investment of the free balance of the trust-funds; and that for this the said free balance must be employed in purchasing or securing to her the said annuity, and in the meanwhile, authorise £6000 of the said funds to be uplifted and employed towards the said purpose; and remit to the Lord Ordinary to carry this interlocutor into effect, and to proceed otherwise with the cause as shall be just, reserving all questions of expenses.”

Lord Ordinary, Ivory.—For Mrs Mackenzie, Rutherford, Penney; Roy and Wood, W.S., Agents.—*Alt.* H. J. Robertson; Hope and Oliphant, W.S., Agents.—*T. Clerk*.—[G.D.F.]

2d July 1842.

SECOND DIVISION.—(G. D. F.)

No. 243.—ALICE KILGOUR, Pursuer, v. ANDREW NICOL and (his Trustee) RICHARD HENDERSON, Defendants.

Process—Reduction—Review—*Lis Pendens*.—An action of reduction dismissed as incompetent, in respect of being an attempt to review an Inferior Court process still depending, unexhausted, and unextracted.

About 1785, Robert Kilgour and Peter Nicol commenced business as wrights in Kirkaldy, under the firm of Kilgour and Nicol. They were brothers-in-law—Kilgour having married the sister of Nicol. In November 1798, Kilgour died, leaving a deed of settlement executed in that year. Soon after his decease, his eldest son and heir, David Kilgour, was assumed as a partner by Peter Nicol, and by them the business was carried on under the same firm of Kilgour and Nicol until June 1836, when Peter Nicol died. David Kilgour then conducted the business alone for nearly two years, and died in March 1838.

The affairs of neither of the two companies had been wound up. The family left by Peter Nicol consisted of two sons and five daughters. One of the former survived the father but a short time, which event left surviving—Andrew Nicol, the eldest son and heir, and the five daughters, who did not make up any title or incur any representation, and the interest in his estate devolved solely on Andrew Nicol. On the other hand, David Kilgour, who represented his father Robert, was himself represented by Peter Kilgour, wright in Kirkaldy, his only brother and heir-at-law. He also left five sisters,—one of them, the present pursuer, being unmarried, three married, and one a widow, besides the widower and daughter of a deceased sister.

After his father's death in 1836, Andrew Nicol made several attempts to get the affairs of the two companies wound up; and in October 1838, he presented a petition to the Sheriff of Fife, praying for a warrant of service on the whole representatives both of Robert Kilgour and David Kilgour, including the present pursuer and her sisters, and the widower and child of the deceased sister,—and upon Andrew Nicol's sisters, as next of kin of their deceased father, Peter Nicol; and for the appointment of a competent person or persons, with power to apply for, and obtain possession of, the books, accounts, and other papers belonging to, and connected with, the affairs of the said companies,—to collect the debts, and to pay the debts due by them, and thereafter to make up a state of the affairs; also praying the Sheriff to approve of the report to be ob-

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tained, divide the residue, if any, between the representatives of the respective parties, and to decern against either set of representatives for any balance found due to the other, &c.

The defenders alleged that this petition was duly served upon the present pursuer; and answers were given in for the whole representatives of Robert and David Kilgour by name, expressly including the present pursuer, in which they stated, that they most cordially agreed to the appointment suggested, for the purpose, and with the powers craved in the petition.

The persons mutually agreed on were thereupon appointed by the Sheriff, with the powers craved; and one of them having thereafter resigned, his place was supplied by the appointment of another. A variety of procedure took place; and the persons appointed by the Sheriff having made an interim report as to the accounting betwixt the partners of the companies *inter se*,—the import of which was, that the partners should be held to have drawn equal amounts from the concerns,—objections were, in September 1840, lodged for the representatives of the Kilgours, expressly including the present pursuer. Answers were lodged thereto for the present defender, and the objections were repelled in 1841; and an appointment was made on the reporters to proceed with the remit by collecting the outstanding debts. This order was renewed on 5th March 1842, and the process is of course still depending, unexhausted and unextracted.

The pursuer, who was one of the daughters of Robert Kilgour, and alleging that she possessed the character of executrix-dative of her brother David, brought this action, calling for reduction of the petition in the Inferior Court,—the letters of supplement for citing certain of the defenders,—the answers lodged for the defenders, herself included,—the interlocutor containing the first appointment of two persons as prayed for,—a minute for the present defender, craving a new appointment in room of the one who resigned, and the interlocutor pronounced thereon,—the interim report, dated 6th July 1840,—the interlocutors of 15th and 19th September 1840, 28th January and 9th March 1841, and “all other references, minutes of consent, reports, interlocutors of Court, or other writings arising out of the said pretended application or petition.”

The following were the reasons of reduction:—The first was the usual reason of style.

“*Secundo*, The foresaid petition to the Sheriff of Fife was altogether null and void. It was at the instance of a party who had no title to ask the investigation, or demand the inquiry which he craved. The said Andrew Nicol, the petitioner, succeeded to the heritage belonging to his father, whereas the right to the executry devolved upon his sisters, who only could call for investigation of the state of the copartnery affairs, or demand a count and reckoning; yet these sisters, as executors, so far from concurring in the application, were called by the said Andrew Nicol as defenders to the pretended petition. *Tertio*, The said petition was incompetent, and its incompetency appeared in the very face of it; for an allegation that a party's father had overdrawn his share in a company firm did confer no title to pursue a count and reckoning at the instance of one who was heir in the heritage, and not executor in the moveable succession. *Quarto*, The form of the proceedings was altogether out of shape, a summary application of this nature being inept and contrary to law,—a petition to force parties to a reference being quite unprecedented in the practice of Scottish

Courts. *Quinto*, The reference was altogether irregular and improper—was never consented to by the pursuer, nor was she aware that it ever had been agreed to. She never gave any authority or mandate to any one to appear for her; and her name, if it appeared at all, has been irregularly introduced in the pleadings. *Sexto*, The pretended consent, said to be by William Mitchell, was no warrant, *per se*, for the interlocutor appointing the reference—no authority or mandate being produced by the pursuer, or by any of the other parties, so far as she understands; moreover, such a consent, if worth any thing, could not confer upon the parties named the ordinary powers of arbiters, but merely empower them to act as reporters, whose opinions could be controverted, and whose reports could be opened up in the usual manner. To have given the parties named the absolute powers of arbiters, there ought to have been a minute, regularly subscribed by all the parties concurring in the appointment, and binding themselves, respectively, to abide by whatever award might be pronounced.”

The defender, who was trustee on the sequestered estate of Andrew Nicol, maintained, as a first preliminary objection—“That the present reduction is incompetent, as being an attempt to set aside or review the proceedings in an Inferior Court process still depending, unexhausted and unextracted, which cannot be done in the form of a reduction.”

The Lord Ordinary pronounced the following interlocutor:

“1st June 1842.—Having heard parties' procurators, sustains the first preliminary defence, dismisses the action, and decerns: Finds the pursuer liable in expenses, and remits the account thereof, when lodged, to the auditor to tax and to report.”

The pursuer reclaimed; and, not denying the general rule, which prevented the review of an Inferior Court process while unexhausted, he *pleaded*, that the statements in the reasons of reduction effectually excepted the present case, to which the rule was inapplicable. The Court, however, did not call on the counsel for the defenders for any reply.

Lord Justice-Clerk.—Your course is plain. If your statement in the summons is correct, you have only to appear in the Inferior Court process, and show that it is so.

Maidment.—We cannot appear.

Lord Justice-Clerk.—You certainly may; for if your statement be correct, that there was never any proper appearance for you, you surely are entitled to appear, and show that if there was any nominal appearance for you, it was without any mandate or proper authority. All the grounds that you have explained just now are just so many reasons for your appearing in the Inferior Court.

Lord Medwyn.—There is nothing plainer. And it will be easily seen whether appearance was properly made for you. There will either be or not a mandate, or, what is the same thing, the copy of the application which was served on your client.

Lord Moncreiff.—We must sustain the preliminary defence. You are not without a remedy, for your client can appear in the Inferior Court; and by allowing decree to go out against her, the remedy which she has is then plain. She may then advocate, reduce, &c.

Lord Medwyn.—It is just an attempt to obtain a review without finding caution in an advocacy.

Lord Meadowbank absent.

The Court unanimously *adhered* to the Lord Ordinary's interlocutor, inserting the reservation, but without prejudice to any steps the reclamer may think it advisable to take in the Inferior Court.

Lord Ordinary, Cockburn.—*Act*. Maidment; Alex. Miller, Agent.—Alt. Monro; T. and R. Landale, Agents.—T. Clerk.—[G.D.F.]

2d July 1842.

SECOND DIVISION.—(G.D.F.)

No. 244.—JOHN SCOTT, *Pursuer*, v. JANE STEVENSON or RONALD, *Defender*.

Property, Declarator of—Title and Interest—Servitude—Road—Process—Circumstances in which held, that one of two proprietors of houses adjoining a close which was used as a common passage by both, was not entitled—having no *per expressum* right of property in the close—to substitute another passage, alleged to be equally convenient, for the existing one; and observed, that the other proprietor had a clear title to object to the substitution, even though he did not pretend a right of property in the close, but merely an interest to keep the passage open.

Special case of title and possession. Prior to 1797, Robert McNair or Robert McNair and Company were proprietors of a lot of ground and houses comprehended on, and between the Gallowgate of Glasgow and the recent line of street called London Street, on the north and south parts, and two parallel closes, called the West and East Sugarhouse Closes, on the west and east parts. The west close alone communicated directly with the Gallowgate—not the east close; but there was a narrow passage near the south boundary of the west close, which communicated between the two closes, and by means of the passage, the inhabitants in the east close had access to the Gallowgate by going along the west close. The McNairs sold the whole of their property in different lots, without retaining right to any portion of the subjects, so far as known. But the articles of roup under which they sold could not be found. In the titles of the purchasers of the east close, the McNairs conferred on them the right of egress and ingress through the west close and passage above alluded to, and the lots, both in the east and west close, were all described as bounded by the closes respectively. The pursuer came into possession of the whole houses on both sides of the west close, with the exception of a tenement north of the narrow connecting passage which belonged to the defender, and he was also proprietor of the houses on both sides of the narrow passage. The defender, on the other hand, was proprietor, besides, of a tenement in the east close, near the Gallowgate, and north of the connecting passage, which, in the pursuer's titles, was called the "Common Close." In the titles of all the lots in the two closes there was the following clause:—"With the privilege always of a passage of twelve feet wide, and which shall be kept open in all time coming, at the head of said close, for a passage for carriages from the said west close to the east."

The pursuer proposed to make certain erections, or new dwelling-houses, on his property, so far as it was south of the defender's lots in both closes, and of the connecting passage—the intention being to erect houses with a frontage to London Street. But in these operations it was necessary to interfere with the narrow communicating passage, and partly absorb it in the new buildings. But in order to keep up the access to the east close, he proposed to give the inhabitants in it access by a passage a little farther north than the existing one, and to make it considerably wider and more convenient. This was resisted by the defender, on the ground that the pursuer had no right of property in the *solum* of the passage or closes, and accordingly,

that he had no title to interfere with any of them, and thereby to prejudice the right of access to the east close. Further, that the defender's title to object was sufficient, from her interest in keeping the passage open.

The pursuer's property was described as bounded by the closes and passage, and he was unable to show by his progress that he had any *per expressum* conveyance to the *solum* of the closes or passage. He however contended, that in a question with the defender, who pretended no right whatever to the *solum* of the west close and passage, his (the pursuer's) right of property in them must be inferred, in respect he possessed the property on both sides of the west close and also of the passage. If the defender had no property in the *solum*, then it was maintained, she had a mere servitude of way over the west close in favour of the east close, but that right of servitude did not give her a title to prevent the improvements in question, but merely an interest to see that the servitude, if altered in situation, should be so regulated as to be not less useful than previously. In the present situation, the defender had to pass along the whole of the west close to obtain access to her tenement in the east close, near the Gallowgate, while, in terms of his (the pursuer's) offer, the servitude of way would be rendered more available and beneficial, by shortening the distance from the Gallowgate to the east close, besides the benefit arising from the increase in the size of the proposed new communicating passage. It was also contended, that the proprietors of a dominant tenement had no legal interest to prevent the substitution of the one passage for the other, where he did not aver, and certainly could not qualify, damage by the change.

The question between the parties was tried by the present action, which the pursuer brought to have it found and declared, (1.) That he had right to the *solum* of the west close, south of the defender's tenement therein, and also to the *solum* of the connecting passage, burdened with the servitude of access in favour of the east close: (2.) That he was entitled to substitute for the present narrow connecting passage, another one farther to the north, which would be more convenient and beneficial to the dominant tenements than the present access; and (3.) That he should be found entitled thereafter to erect the proposed new buildings on the existing passage.

The Lord Ordinary pronounced the following interlocutor:

"8th February 1842.—The Lord Ordinary having heard parties in this declarator, and considered the process, Repels the defences, and decerns in terms of the conclusions of the summons: Finds the defenders liable in expenses, appoints an account thereof to be given in, and, when lodged, remits to the auditor to tax the same and to report.

"Note.—The Lord Ordinary is clear that the defenders have no interest to maintain their defences, for the object of a dominant in tormenting a servient, by obstructing measures which are very important to the latter, and not at all injurious to the former, forms no legal interest. The defender, Ronald, has plainly a mere servitude of passage, and this servitude seems to be rather improved than hurt by the change sued for. Accordingly she has not been able even to pretend any fair interest. She cannot get by the west close into London Street, and although she could, she would have no right to enlarge her servitude, which was only given for access to her premises in the

east close, so to connect the west close into a thoroughfare to London Street.

"But the pursuer's conclusions, in so far as they proceed on the idea that he is now the proprietor of the west close, and of the passage, are by no means so clear. Because he has not only no express disposition to the close or passage, but on the contrary, is declared to be bounded by them, with only the privilege of a passage through them. And therefore, if the original owner were to appear and to claim the property of these, as never having been conveyed away by him, the pursuer would have no easy defence to maintain, though the Lord Ordinary does not mean to indicate that he thinks that this defence would be hopeless. But at present the pursuer has only to overcome a party who pretends no right of property in the close or passage himself; and who, as the mere holder of a servitude, has no fair ground for objecting to what the servient tenement desires. As against such an opponent it rather seems to the Lord Ordinary that the acquisition of the ground on both sides of the close and passage makes these fall into the property which thus contains them, under the burden only of existing servitudes.

"And whatever difficulty there may be in applying this principle to the first conclusion, which is grounded on the pursuer having acquired the property, this difficulty is very greatly diminished, if not altogether removed in reference to the second, which the Lord Ordinary thinks would be well founded even though the first could not be maintained. The question raised under this second conclusion is, whether the dominant can object to have the servitude regulated. Considering the position of the parties, and the total absence of all interest in the defender to object, the Lord Ordinary does not think that the regulation proposed can be obstructed."

The defender reclaimed. At advising,

Lord Justice-Clerk.—I am not able to concur with the Lord Ordinary. By the titles of the whole of the feuars in the east and west closes, the tenements are described as bounded by the west and east closes respectively, and passage, and part of the defender's property is described as bounded on the north by the passage; and this passage is called in the titles the "Common Close," i. e., for behoof of those in the east close; and there is a clause by the M'Nairs, saying that this passage was to be kept open in all time coming. Now, this clause is in the whole of the titles. Look now at the summons for the conclusions (reads them). This would, if granted, be to exclude the right of the east close over the passage. Now, I think the pursuer has entirely failed in showing that he has any right of property in the passage; and besides, his property is described as bounded by the passage. It was said he acquired right to all that the M'Nairs had that was sold in lots; and now he says, having got the whole property of the M'Nairs, he has right to the close and passage. As to that, I think his claim is, in the circumstances, untenable in point of law. M'Nair conveyed the property severally to the different feuars, describing their feus as bounded by the closes and passage. Probably he did not think of the *solum*, but meant it to be conveyed; but then the pursuer cannot show that he has a conveyance to it. No doubt, in a question with M'Nair's representatives, there may be sufficient ground for excluding any claim of theirs, where the feuars generally are called; but in a question between the pursuer and the defender, the point is far otherwise, where his tenement is described as bounded by the passage or closes. It was a common passage to those in the east close. But, besides, the defender has property in the west close, and how can the pursuer maintain that he is entitled to shut up the west close, which he proposes in that case? I think there is no foundation whatever for the pursuer's claim, and that the facts are not sufficient to show or raise a question of servitude. Even if it were a question of dominant and servient tenements, I cannot concur in the views expressed by the Lord Ordinary; for I think that, in the circumstances, the defender has a clear title and interest to object to the passage being shut up; and no matter whether the passage the pursuer now proposes for the defender is better or worse than the existing one.

Lord Meadowbank.—I do entirely concur in what has now been stated, that I need not read over the opinion I had written out. On looking to the titles, it is impossible to sustain the sum-

mons. The close is described as the west close, and the other as the common passage between the east and west closes; and then the properties are described as bounded by them. I therefore cannot entertain the pleas of the pursuer, for they would exclude the defender from the common passage, even so far as she has property in the west close. The interest here of the defender is to me complete and legitimate, and sufficient to entitle her to resist the pursuer, where the latter is unable to instruct any right of property in the *solum*.

Lord Moncreiff.—I am of the same opinion. The titles here of all parties are the same, *mutatis mutandis*, and all are described as bounded by the closes or passage; and that passage is designated in the pursuer's own titles as a common passage or close. There are no grounds, as it appears to me, to raise a question of servitude. The facts of the case do not warrant it; and therefore, I conceive it clear the pursuer has no right to interfere with the existing state of matters. He says, "I'll give you a passage as good as the one you have got." But we do not know any thing about that, and are not bound to consider the interest of the pursuer to make this offer till he first make out his right of property. The defender appears to me to have a perfectly fair and legitimate interest to object to the pursuer's proposal, and to object to the closing up of the present passage. Her interest is to see it kept open for herself and others; and that is enough. If the proposed passage be better than the existing one, that is out of the question till the pursuer show his right of property; and it is for the defender to judge what her own interest is. But here the question is one of title; and the pursuer has failed in establishing his right of property. I therefore concur with your Lordships that the interlocutor should be altered.

Lord Meadowbank absent.

The Court

"Alter the interlocutor reclaimed against: Sustain the defence, and assolvie the defender from the whole conclusions of the libel, and decern: Find the defenders entitled to the expenses incurred by them; appoint an account," &c.

Lord Ordinary, Cockburn.—*Act.* Rutherford, T. Maitland, J. S. More; J. O. Mack, W.S., *Agent.*—*Alt.* Dean of Faculty (Wood), Penney; J. and W. Jollie, W.S., *Agents.*—*F. Clerk.*—[G.D.F.]

5th July 1842.

FIRST DIVISION.—(H.R.)

No. 245.—DAVID CORMACK, *Charger*, v. MRS JEMIMA ERSKINE or HENDERSON, *Suspender*.

Diligence—Charge—Caution—Relief—Cash—Credit—A cash-credit bond was signed by three co-obligants, to be operated upon by two of them as a company. Under a previous arrangement, the first sums drawn under the bond were employed in paying a private debt due by one of the partners to his father, the third co-obligant—In these circumstances, held that the third co-obligant, who had paid up the bond and obtained an assignment to it, was not entitled to give a charge upon it to the other partner.

Adolphus Meiklejohn Sceales, after carrying on the business of a wine-merchant, under the firm of "A. M. Sceales and Company," entered in 1836 into partnership with Edward Henderson, and continued the business under the firm of "Sceales, Henderson and Company." In the contract of copartnership it was arranged that the capital stock should be £2000, and that for that purpose, each of the said copartners should advance, or make available to the company, the sum of £1000. Henderson paid this sum in cash; but it was agreed, that

"in lieu of the said A. M. Sceales's £1000, the whole stock of the said A. M. Sceales and Company, conform to inventory and valuation thereof, as at the said 1st day of March last, sub-

scribed by the parties as relative hereto, and as much of the debts of the said A. M. Sceales and Company as are also therein contained, which, when collected, with interest from the said 1st day of March last" (the proposed day of commencement), "to the dates of such collection, will make up the said sum of £1000, as at the said 1st day of March last, the said valued stock and debts to the above extent, with interest as aforesaid, constitute the said A. M. Sceales's half of the stock of the said Sceales, Henderson and Company. But under the following conditions, viz.—If, after collecting the foresaid debts, and applying them as aforesaid, there shall, when taken with said stock, be more than make up the said A. M. Sceales's share of the said stock, as at the said 1st day of March last, he shall be entitled to draw the excess or balance in his favour which shall be over and above the said sum of £1000. But if, on the other hand, there shall happen to be a deficiency for the above purposes, he shall be bound to make up the same to the said Sceales, Henderson and Company, with interest at the rate of four per cent., so as to make up the whole sum paid by him as at the said 1st day of March last (including the above valued stock), to amount to the said sum of £1000."

A. M. Sceales, while in business by himself, had a cash-account for £800 with the Royal Bank, and for which his father, Mr Andrew Sceales, was security. When the copartnership was formed, only £214 of the cash-account remained undrawn, and this sum was added to A. M. Sceales's stock, in order to make up his advance of £1000, and entered to his credit as "cash in Royal Bank." A new cash-account for £1000 having been obtained from the Royal Bank, to be kept in name of Sceales, Henderson and Company, and in which A. M. Sceales, Edward Henderson, and Andrew Sceales were the co-obligants, the former cash-account for £800 was paid up,—the first money drawn under the new account being a sum of £603. 9. 3., appropriated to this purpose. Shortly after, another sum of £190 was drawn to pay a private debt due by A. M. Sceales to his father. The copartnership having proved unsuccessful, was dissolved in 1839. At this time the whole amount of the cash-account was drawn, and with reference to it, Henderson addressed his partner, A. M. Sceales, stating—

"I have not the slightest wish to press an immediate settlement with the bank; but at the same time, I trust no unnecessary delay will take place;—however, I think, in the mean time, you ought to procure for me a letter from your father, stating, that although the cash-credit account at the Royal Bank bears to be for behoof of Sceales, Henderson and Company, yet, at the same time, it is a debt for which you and your father are alone responsible. As I wish this affair to be settled without farther delay, I trust you will either write or mention my proposal to your father, so that the matter may be arranged this week."

A. M. Sceales accordingly wrote his father:

"I am grieved to say that, in consequence of a train of misfortunes, I am compelled to ask the favour of you to pay up my cash-account to the Royal Bank. It is impossible for me to express the pain and vexation this has given me, as no man can be more sensible than I am of the extreme liberality and kindness with which you have treated me all along."

Mr Henderson having afterwards applied to Mr Andrew Sceales on the subject, received the following answer:

"In reply to your favour of the 13th instant, I expect you will pay up your cash-account with the Royal Bank, as a standing house, and at your earliest convenience."

Mr Henderson again wrote as follows:

"I have yours of the 14th; but what I wish to know, and what my letter of 5th to Adolphus was written to ascertain is, whether you, as arranged at the time, are to relieve me of the sums due by the bank bond? The first sums paid out of it were

to yourself, or to relieve your former obligation, to the extent of upwards of £790."

The following answer was sent by Mr A. Sceales to his son:

"SIR,—As I wrote your partner on the 14th current—'I expect you will pay up your cash-account with the Royal Bank, as a standing house, and at your earliest convenience;' and I have only to add, that no earthly consideration will induce me to pay one penny of it, unless under sequestration,—then I will know how to conduct myself."

Payment having been demanded by the bank, the sum due under the cash-credit was paid by Mr Andrew Sceales, on an assignation to the bond to Mr Cormack, who, holding it in trust for Mr Sceales, gave a charge upon it to Mr Henderson as one of the individual partners of the firm of "Sceales, Henderson and Company." Mr Henderson suspended, but having died during the dependence, appearance was made for his widow as his executrix-dative, who *pleaded*—1. The charge is disconform to the obligation, in virtue of which it is professedly given. 2. The present charge being given by the private agent of Mr Andrew Sceales, and the title of the charger being an assignation in trust for him, the charger must stand in the situation of the party for whom he so holds in trust, and is liable to all the exceptions and defences which would have been pleadable against Mr Sceales himself, especially seeing that he acquired the right after intimation of the suspender's objection. 3. Mr Sceales, senior, being a joint and several obligant without relief, *ex facie* of the bond, payment made by him to the creditors in it, operated an extinction of that obligation, which cannot now be used to compel implement of his right of relief, whatever that may be, against his co-obligants, and such relief can be competently constituted and enforced only by means of an ordinary action. 4. Were it competent at all for one of the co-obligants making payment to charge the others on the bond, the charge could only be given for the share for which each was, *ex facie* of the bond, liable to him in relief, and the present charge for the whole amount of the bond is, on this footing, incompetent. 5. The cash-credit bond having been truly subscribed by Mr Andrew Sceales, not as cautioner for, or for behoof of, the company, or the suspender, but for behoof of his son, and in virtue of an arrangement for supplying him with funds, neither Mr Sceales, nor any party in his name and for his behoof, can warrantably charge the suspender on account of drafts upon that bond. The allegation cannot be disregarded as contrary to the terms of the bond, which, so far from making Mr Sceales a mere cautioner for the company, makes him a co-obligant without any clause of relief. 6. In any view, neither Mr Sceales nor any party in his right, can recover from the suspender the amount of the sums drawn from the cash-credit and applied with his knowledge, but without the privity of the suspender, in extinction of his private obligations, with which neither the copartnership nor the suspender had any thing to do, and the *onus* of proving that the sums were so applied by the authority of the company and Mr Henderson, lies on the charger.

Mr Cormack—whose statements of fact (V. and VI.) are as follows: "At the time this bond was granted, it was expressly arranged that a bond for £800, previously granted in favour of Mr Adolphus Sceales, and in

which Mr Andrew Sceales was cautioner for his son, should be discharged." "Accordingly, at the time Mr Sceales signed the new bond for £1000 at the Royal Bank, the previous bond for £800 was delivered up to him to be cancelled. This was done in presence of Mr Sym Wilson, secretary of the bank. No objection was stated by any of the parties to this arrangement; and unless this had been done, Mr Andrew Sceales would not have set his name to the new and extended bond of credit."—*pleaded*, 1. The charge upon the bond and assignment, and relative account, which form a liquid ground of debt, cannot be suspended on any of the extrinsic and irrelevant averments set forth in this suspension. 2. The allegations as to Mr Sceales not having signed the bond for behoof of the company, and as to the draft having been passed upon any understanding to which the suspender was not a party, being contradicted by the terms of the bond of caution itself, and by the manner in which it was alone competent to operate on that bond, these allegations can form no ground for suspension. 3. The allegations in this suspension being entirely unfounded and irrelevant, there is no ground for staying the regular course of diligence. *Lastly*, Even if there had been a relevant ground of suspension, it is incompetent under the bond to offer any such suspension, without consignment.

The Lord Ordinary pronounced the following interlocutor:

"12th March 1842.—The Lord Ordinary having heard parties, and considered the process, Repels the reasons of suspension: Finds the letters orderly proceeded, and decerns: Finds the suspender liable in expenses; appoints an account thereof to be given in, and when lodged, remits to the auditor of Court to tax the same and report.

"*Note*.—*Quoad* the other obligants on the bond to the bank, the charger's cedent, Mr Andrew Sceales, was plainly a mere cautioner, and his privileges as such were not destroyed, because the money drawn upon that bond by the real obligants happened to be employed by them in paying a debt due upon another account to him. The Lord Ordinary, therefore, conceives that the objections taken to the charge, both in its competency and its merits, are groundless."

The suspender reclaimed. At advising,

Lord President.—My opinion on the merits is clear. On looking at the nature of the transaction, I am convinced that Mr Sceales, senior, who is the real charger (Mr Cormack being only his trustee), has no case on this bond. *Ex facie* he is not a mere cautioner. It is true that he was not the party to operate on the cash-account; but then the fact is not disputed, that the first operation on it was made for the purpose of paying off the balance of the old account, and it is expressly said that this payment was stipulated for by Sceales, senior, as a condition, without which he would not have given his name to the new account. Then he receives another payment of £190, but both that and the first payment were for debts with which the company of Sceales, Henderson and Company, had nothing to do. But the matter does not rest here. A correspondence takes place, which goes far to prove that there has been a full understanding from the very first, that the company were not to be liable for the new account. Henderson writes requesting Sceales, junior, to get a letter from his father, explaining that the cash-account was not to be paid by the company; and Sceales, junior, accordingly writes his father, begging him to pay up—what? Not the company's, but "my cash-account." This correspondence speaks volumes, and makes it perfectly clear to my mind, that the understanding was as Henderson has represented it. On the whole, I don't think that this charge is justly given. It is merely an attempt by the father to get quit of an obligation which he had undertaken for his son.

Lord Gillies.—I concur entirely, and need not make many

additional observations. The bond is no doubt a good ground of summary diligence, but under qualification. If three parties sign a bond containing a declaration that it is for the behoof of two of them only, the third, on paying it, has a good ground of diligence against them. But in this case two things must concur: 1st, The sums drawn must be actually drawn by the two; and, 2d, they must be drawn for their behoof, and not for the behoof of the third party. That was not the case here. The money, though drawn in name of the company, was applied for the benefit of Sceales, senior. I do not, however, go so much on this as on the merits. Taking the statement of the charger, and the confirmation given by the letters, I cannot help thinking that an attempt is here made to take advantage of Henderson. When Sceales, senior, agreed to sign the new account, he stipulated that the debt under the former one should be discharged. This is his own statement. He says he need not have agreed. True, but then he must have remained bound for the old money. His object in signing was not to support the company, but to be relieved of an obligation which he had undertaken for his son. He says Henderson consented to take his signature on these terms. On what terms? Not surely on the terms of relieving Mr Sceales, senior, of his son's debt. He never could have agreed to such terms. It is plain he did not.

Lord Mackenzie.—I am of the same opinion. As to the formal objection to the charge, founded on the nature of the obligation contained in the bond, I have considerable doubts. The money was to be drawn out by the company; and supposing that it had been so drawn and paid to the company, and that the third obligant, after paying it up and obtaining a total assignment, had given a charge upon it for the purpose of operating his relief, I don't see any thing on the face of the bond which would have made the charge incompetent. But the case does not rest there. If competent to the third obligant to give a charge, on the ground that he had paid the money and was only a cautioner—it was equally competent for the other parties to show that he was not a cautioner in the sense represented; that the bond was for the behoof not merely of the company, but also of the co-obligant, or that, if formally for the behoof of the company, still the sums drawn under it were paid to the co-obligant. The last of these things has been made out here. Either the money in dispute, though drawn in name of the company, was actually drawn for the behoof of the father and the son, or was unduly, without proper authority, paid to the father;—in short, was improperly appropriated by one of the partners for the cautioner's behoof. Either supposition is sufficient to repel the charge, which, in so far as these payments are concerned, cannot be sustained.

Lord Fullerton.—The only question is, whether the charge can be sustained in the circumstances. I think it cannot. It is not necessary to decide as to the competency or incompetency of one co-obligant, who has paid, doing summary diligence on the obligation against his co-obligants. In point of principle, it might be thought that when the debt is paid, the obligation is extinguished, and consequently, that the only mode in which the party who has paid could proceed, would be by an action of relief. In practice, however, the co-obligant is permitted to do diligence, and I am not sure that in bonds like the present, where, *ex facie*, the money was to be drawn for behoof of two of the co-obligants, the third, considered as a cautioner holding an assignment to the bond, might not be entitled to do diligence upon it. It is impossible, however, to call Mr Sceales, senior, merely a cautioner. His own statement proves that he was not. In consequence of signing the new bond, he was relieved to the extent of his obligation under the old one. He was thus not merely a cautioner but a co-obligant, who had a great personal interest; and it is impossible to sustain a charge given by him for sums, the greater part of which were actually paid to himself. What he may be able to make of an ordinary action, I don't know, but the present diligence cannot proceed.

The Court pronounced the following interlocutor:

"Alter the interlocutor of the Lord Ordinary, and suspend the letters *simpliciter*, and decern: Find the charger liable in expenses to the suspender, and remit to the auditor," &c.

Lord Ordinary, Cockburn.—*For Charger*, Dean of Faculty (Wood), Robertson; Gibson-Craigs, Dalziel and Brodie, W.S.

Agents.—*For Suspenders*, Solicitor-General (M'Neill), Pyper, Logan; Henry Tod, W.S., *Agent.*—*B. Clerk.*—[H.B.]

5th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 246.—JANET GARDNER, &c., *Pursuers*, v. JAMES ALEXANDER HALDANE, *Defender*.

Personal Exception—Acquiescence—Reduction.

Special case. The pursuers—who were interested in the succession of a brother, the late Captain Gardner, in reference to which a process of multiplepounding, wherein the pursuers were parties, had been brought into Court, in which the executors had been previously exonerated to the extent of funds intromitted by them—brought this action of reduction, &c., to reduce and set aside certain orders, interlocutors, and procedure had therein, generally on the ground that they were irregular, and without authority, and that they had been obtained in absence of the pursuers. The Lord Ordinary found that the pursuers were barred by their appearance in the multiplepounding, in which they drew certain portions of the fund *in medio*, from now objecting; and at all events, that as they were entitled to obtain such redress as they now claimed in the multiplepounding, sustained the defences and assolizied. The pursuers reclaimed, but the Court, without hearing counsel for the defender, *adhered*.

Lord Ordinary, Cockburn.—*Act.* J. S. More, Patterson; James Adam, W. S., *Agent.*—*Alt.* Whigham; Robert Haldane, W.S., *Agent.*—*F. Clerk.*—[G.D.F.]

6th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 247.—MARY ANN M'FARQUHAR or BURROWES, *Pursuer*, v. MARY CORNWALL and OTHERS, *Defenders*.

Husband and Wife—Fee and Liferent—Provision—*A husband having purchased certain heritable subjects exclusively with his own funds, took the conveyance to and in favour of himself and spouse "in conjunct fee and liferent, and to the survivor, and their heirs, assignees, or disponees whomsoever, heritably and irredeemably"—Held, after the death of the husband, that the widow, as survivor, was the unlimited jar of the property thereby conveyed.*

The late John M'Farquhar, the husband of the pursuer, purchased, in June 1838, certain heritable subjects near Greenock, under articles of roup, from the bankrupt estate of Maitland Young, merchant there. After narrating receipt of the price, the disposition executed by the bankrupt and trustee proceeded:

"Therefore I, the said Maitland Young, as principal, and I, the said James Turner, as trustee foresaid, have sold, alienated and disposed, as we do hereby for our several rights and interests, and with consent of Alexander Thomson, manager and partner of the Greenock Bank Company, Thomas Hart, draper, and John Fyffe, ironmonger, both in Greenock, commissioners on the said sequestrated estate, or at least a quorum of their number; and also with consent of the said Henry Tower Paten, sell, alienate, dispoone, assign, convey and make over from us and our heirs or successors respectively, to and in favour of the said John M'Farquhar and Mrs Mary Ann Cornwall or M'Farquhar, his spouse, in conjunct fee and liferent, and to the survivor and their heirs, assignees or disponees whomsoever, heritably and irredeemably, all and whole," &c. [here follows the description of the subjects];—"together with the whole houses and others erected thereon, and all right, title and interest which I, the said Maitland Young, as principal, or I, the

said James Turner, as trustee foresaid, our predecessors and authors, or heirs and successors had, have, may, or anyways might have claim, or pretend thereto in all time coming. In which subjects and others, with the teinds above disposed, we, the said Maitland Young and James Turner, with consent foresaid, bind and oblige us and our foresaids to infest and seise the said John M'Farquhar and Mrs Mary Ann Cornwall or M'Farquhar in conjunct fee and liferent, and the survivor and their foresaids, upon their own proper charges and expenses, and that by two several infestments and manners of holding."

Infestment followed on this deed, and bore that heritable state and sasine were given and granted "to the said John M'Farquhar and Mrs Mary Ann Cornwall or M'Farquhar, in conjunct fee and liferent, and to the survivor, of all and whole" the subjects in dispute.

Previous to the date of this deed (in 1836), M'Farquhar, when resident in Demerara, had executed a settlement, by which he bequeathed to his widow "£300 Sterling a-year for her use and the use of her children," while she remained single; and in the event of her demise before her mother, the annuity of £300 was bequeathed to the mother, "for her use, and the use of my children;" and it was also declared, that in the event of his wife (the pursuer's) demise the mother should "come in as executrix and guardian over my children, in the place of her daughter, Mrs Mary Ann M'Farquhar," the pursuer.

After effecting the purchase of the Greenock subjects, M'Farquhar executed a trust-disposition and deed of settlement in the Scots form in favour of the defender, of the pursuer, and certain others, by which he conveyed to them his whole real and personal property, whatsoever and wheresoever, to be held by them for payment of his debts, &c.; and, *inter alia*, they were directed

"to make payment to the said Mary Ann Cornwall or M'Farquhar, my spouse, for the use of herself and the children of our marriage, and failing her by death, either before or after me, to the said Mrs Mary Cornwall, my mother-in-law, for the like purpose of a free annuity of £500 Sterling during all the days and years of her life, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment thereof at the first of these terms which shall happen after my death, and so forth during the life of the said Mary Ann Cornwall or M'Farquhar."

This proviso was immediately followed up by the declaration,—

"And I do hereby declare that the provisions hereby given to the said Mary Ann Cornwall or M'Farquhar, with the right acquired by her in my foresaid dwelling-house, agreeably to the disposition thereof in our favour, shall be accepted of by her in full satisfaction to her of all terce of lands, third or half of moveables, and every other claim competent to her by and through my decease in any manner of way, excepting only her claims for mournings and aliment to the first term of Whitsunday or Martinmas after my decease,—both of which are hereby reserved to her."

The deed also conferred on the pursuer, and her mother in succession, a liferent of the household furniture and plenishing of every description, and the residue stood destined, under burden of the foresaid annuity of £500, to the pursuer,

"in case she shall be alive at the time; whom failing, as aforesaid, to and in favour of John M'Farquhar, Colin M'Farquhar, William M'Farquhar, and Isabella M'Farquhar, my children, born of my said marriage, and any other lawful child or children that may hereafter be born to me who shall be alive, when the youngest of them or of the survivors of them shall attain the age of twenty-one years complete, and that equally between or

among them or the survivors of them, share and share alike, if more than one, and if there shall be but one, the whole to be paid, assigned and disposed to one such child exclusively so attaining said age; and I do hereby declare, that in case any one or more of my said children shall die before the said residue shall become payable and transferable as aforesaid, leaving lawful issue, then such issue shall be entitled to the share or respective shares which his, her, or their parent or parents would have been entitled to if alive."

By a codicil, an additional annuity of £500 was conferred on the pursuer, besides a lump sum of £500.

The defenders, as M'Farquhar's trustees, having on his death claimed the right to the subjects contained in the disposition executed by Young and his trustee, proceeded to adjudge, when the pursuer brought this action to have it declared,

"that in virtue of the foresaid disposition, executed by the said Maitland Young and others, and the infestment following thereon, and otherwise as libelled, and in consequence of the death of the said John M'Farquhar," she had "an unlimited fee in, and otherwise a good and undoubted right and valid title to the subjects embraced in the said writs, with the whole writs and evidents, vouchers and instructions thereof: And the said defenders and all others ought and should be interdicted, prohibited and discharged from troubling and molesting the pursuer in such right, and from following out the foresaid proceedings, or adopting others by which the said subjects may be adjudged or evicted from the pursuer, or her right thereto destroyed or injured in any manner of way whatever."

The defenders stated, that the property was purchased by Mr M'Farquhar himself, with his own funds exclusively. His wife was not a party to the transaction at all; and no equivalent, in any shape, or to any extent, was ever given by her, either in form or substance, for the right conferred on her by the disposition. She never had any funds of her own, and so could not, directly or indirectly, aid in the purchase. Neither did she ever, in consideration of the right conferred on her, renounce, wholly or partially, any of her interests as the spouse of Mr M'Farquhar. Again, it must be recollected that the pursuer had been previously provided for by her husband's West India settlement, and the provisions thereby constituted in her favour were increased by the subsequent trust-disposition and settlement; which, in its terms and whole tenor and clauses, clearly demonstrates that Mr M'Farquhar, at least, had never intended to confer on his spouse any thing more than a *lifereit* of Bellevue, and did not suppose that any thing else had been done. But, were the conclusions of the present action sustained, Mr M'Farquhar's sons and daughter, for whom he was so careful and anxious to provide, would be left almost, if not entirely, destitute and dependent on the bounty of their mother, who has now attached herself to a second husband;—and they *pleaded*, that, according to the sound construction of the disposition, and the true meaning and intention of the parties connected with it, the pursuer's right to the property in question is not a right of absolute or unlimited fee, but only a *lifereit*; and she has no right, title, or interest to maintain the conclusions of the present action.

The Lord Ordinary pronounced the following interlocutor:

"15th March 1842.—The Lord Ordinary having heard counsel on the record, as closed upon summons and defences, and having thereafter considered the deeds libelled on and whole process, finds that, according to the legal construction of the dispositive clause in the disposition libelled on, the pursuer, as

the survivor of the spouses, is now the unlimited *fiar* of the property thereby conveyed: Therefore repels the defences, and decerns in terms of the libel: Finds no expenses due to either party.

"*Note*.—The present case is distinguished from the late case of Madden and Currie by that difference in the destination, which is held to import a transmission of the entire fee to the surviving wife, which was not maintainable in Madden's case. In that instance, the disposition was taken to the spouses 'in conjunct fee, and to the heirs of the marriage' of the said Edward Kerr and Elizabeth Madden, whom failing, to his and her own nearest and lawful heirs, heritably and irredeemably."

"Here the disposition is in favour of the spouses 'in conjunct fee and *lifereit*, and to the survivor, and their heirs (not of the marriage), assignees or disponees whomsoever, heritably and irredeemably."

"When the destination is in the preceding terms, without any substitution of the heirs of a subsisting marriage, the Lord Ordinary holds himself bound, by a series of authorities which he cannot now question, to construe the right as vesting a fee in the survivor. See Erskine, B. III., t. 8, § 36, and Mr Bell's Commentaries, Vol. I. p. 56, and the authorities therein referred to.

"The defenders allege that the cases quoted, related to the construction of *bonds*, and not to conveyances of land; but the Lord Ordinary is not aware that any distinction can be taken between the cases. It is quite clear that our institutional writers view the legal interpretation given to this destination in the reported cases, as regulating it in all rights in which it is adopted by the parties.

"Further, the legal interpretation due to this destination was fully considered, and the fee found to belong to the surviving wife, in a case where the words were less favourable to support the claim of fee than those which are used in the present case. The case referred to is that of M'Gregor against Forrester (Shaw's Rep., 3d June 1841), which was raised on a disposition granted by a husband 'to himself and his promised spouse in *conjunct lifereit*, during all the days of their lifetime, and to the longest liver of them, and their heirs and assignees in fee.' In that case the fee was adjudged to the surviving wife, both in this Court and in the House of Lords. The question was considered in this Court as clear and settled; but Lord Brougham entered fully into its merits in the House of Lords, and adverted to all the authorities. (See 1 Shaw and M'Lean's Appeal Cases, p. 441.) But as the previous conveyance there was in *conjunct lifereit* only, while the disposition here is both in *lifereit* and fee, it follows, *a fortiori*, that the destination in the present instance ought to carry the fee to the wife.

"It was remarked that the question in Forrester's case occurred on a provision in an antenuptial contract of marriage, while the claim here is founded on a conveyance by the husband to the wife long after the marriage. But if a party conveys any property or right under a substitution of definite technical import in law and practice, it must receive effect, whatever may be the form or occasion of the deed in which it is inserted.

"The defenders made reference to a *trust-deed* executed by the pursuer's husband subsequent to the disposition of the house, to show that the granter must have understood that he only gave his wife a *lifereit* of the house, as he only gives her and her mother a *lifereit* of the furniture; from which it is inferred that he never would have restricted her to a *lifereit* as to the *moveable* property, if he had believed her to have a right of fee in the house which contained it. But this is an inference too remote and uncertain to shake the fixed technical construction of a formal feudal conveyance previously executed by the husband; more especially as, in that very trust-disposition, he confirmed the right to the house which he had before given to the pursuer. Besides, it cannot be inferred, even from his settlement, that he meant to place the house and furniture exactly on the same footing, as he gave a reversionary right to his mother-in-law, Mrs Cornwall, to use the furniture in case of his wife's predecease, while he did not give to the old lady any interest in any event in the house.

"As this is a question brought to establish the pursuer's title, and has been most reasonably conducted on the part of

the defenders, the Lord Ordinary has given no expenses to either party."

Both parties reclaimed—the pursuer as to expenses, the defenders generally. At advising,

Marshall, for defenders, admitted, that if the destination in question had occurred in a marriage-contract, the judgment of the Lord Ordinary was correct, but argued, that as the disposition was a gratuitous one by the husband in favour of the wife, from whom the subjects did not flow, and, indeed, nothing came by her, it was different,—that the expression "liferent" must receive some meaning that it meant a mere liferent to her,—and that it was not competent to throw that expression out of view altogether, as the Lord Ordinary had done. No cases were to be found of a similar kind; and accordingly, it was necessary to look at the intention of the granter, which, it was argued, was to confer nothing but a liferent.

The Court advised the case without hearing the pursuer's counsel.

Lord Justice-Clerk.—The use of the word liferent appears to me to strengthen the case for the pursuer. The destination meant that the liferent was not to be altered during the lives of any of the parties, but that when the death of any of them occurred, the survivor was to have the fee. I cannot think now of disturbing the distinct law and understanding of such cases by looking at intention.

Lord Medwyn.—There can be no doubt what the intention of M'Farquhar was, and that he meant a liferent; but he ought so to have expressed it correctly in legal phraseology; and the deed does not carry it into effect. I agree with the Lord Ordinary.

Lord Moncreiff.—I am of the same opinion; but I really do not see what M'Farquhar's intention is, and do not know what it was; and I cannot help thinking that his intention is just what the law says is the legal meaning of the conveyance, and nothing else. He may have been indiscreet in giving too much to this party, and forgotten others; but still the question is, what did he mean by this deed? And after the expressions of Mr Erskine, and the case of Forrester and others, I cannot doubt but that meaning is correctly found by the Lord Ordinary.

Lord Justice-Clerk.—I am clearly of opinion the interlocutor is right from the decisions. The destination is in favour of the spouses "in conjunct fee and liferent, and to the survivor and their heirs." The expression "conjunct fee and liferent" is a very anomalous one, and one which has never yet been cleared up. It seems to have been to prevent the liferent being defeated in the lifetime of parties; but here, on the death of one of them, it must, on the cases, be taken as operating a fee to the survivor; and there is nothing, besides, in the deed to show that, on survivorship, the right of the wife was limited to a liferent. I agree with the note of the Lord Ordinary and interlocutor, and am very clear that we cannot now disturb the decisions.

Neaves moved that the pursuer should be found entitled to expenses. She had been compelled to bring the action to defend her right to the subjects, which the defenders were proceeding to adjudge.

Lord Moncreiff.—I do not think she is entitled to expenses. It was a fair case for the defenders to try.

The other Judges concurred, and the Court *adhered*.

Lord Ordinary, Cuninghame.—*Act. Neaves*; J. Stuart, S.S.C., *Agent*.—*Adv. Marshall, Macfarlane*; J. Patten, W.S., *Agent*.—*F. Clerk*.—[G.D.F.]

7th July 1842.

FIRST DIVISION.—(H. B.)

No. 248.—DAVID FYFFE and OTHERS, *Pursuers*, v. JOHN HUTCHINSON FERGUSSON, *Defender*.

Testament.—*Process*.—*Title*.—*Foreign*.—*A Scotman who died domiciled in India, bequeathed "to D. F. and his family," by a will executed there, a sum lodged in the hands of his bankers at Calcutta. The executors under the will having died or declined to act, the children of D. F., under a decree-dative from the Commissary of Edinburgh as executors qua legatees, brought an action in the Court of Session for payment of the legacy, against one of the partners of the bank who was residing in Scotland, and obtained decree, subject to the condition of "producing a sufficient title in their persons before extract"—Held that that title must be a confirmation of the decree-dative which they had previously obtained.*

Dr Charles Fyffe, who was domiciled at Calcutta, died there in 1810, leaving a will, in which he appointed Messrs Fergusson, Fairlie and Company his executors, and bequeathed whatever might be realised from the sale of his effects, and from the debts due to him in India, "to David Fyffe, Esq. of Drumgeith, and his family." A considerable sum was due to Dr Fyffe at the time of his death by the house of Fairlie, Fergusson and Company, and decree has been pronounced against the defender, John Hutchinson Fergusson, who had been a partner of that company, finding him liable to David Fyffe and Mrs Elizabeth Kerr or Fyffe, surviving children and representatives of David Fyffe of Drumgeith, and as such having right to the sum bequeathed by Dr Fyffe. An objection to the pursuers' title had not been disposed of; and accordingly, when the interlocutor containing the above decree was pronounced, the following reservation was inserted in it: "The pursuers always producing a sufficient title in their persons before extract."

The defender is possessed of an heritable estate in Sootland, and, several years before the action was raised, had finally left Calcutta and returned to this country.

The firm of Fairlie, Fergusson and Company had also been dissolved, and the executors appointed by Dr Fyffe's will had either died or declined to act. The pursuers accordingly set forth this last fact in their summons, and also, that as the only surviving members of David Fyffe's family, they were "entitled in their own right, and as representing their said deceased father, to payment" of the sum due by Fairlie, Fergusson and Company to Dr Fyffe. The pursuers afterwards, in the course of preparing the record, produced a decree-dative by the Commissary of Edinburgh, decerning them executors *qua* legatees to Dr Fyffe. The question to be determined now was, what was "the sufficient title in their persons" which the pursuers were bound to produce?—the defender contending that it could only be a confirmation by the Commissary of Edinburgh of the decree-dative, which in fact constituted their only title to pursue,—and the pursuers, again, contending that, instead of taking out a confirmation, which would of course make them liable for the legacy duty, it would be sufficient for them to prove the will in India, where, at the time of the testator's death, both he and his debtor resided.

The Lord Ordinary ordered minutes of debate, and made *avizandum* to the Lords of the First Division. At advising,

Lord President.—It appears to me that this defender is entitled to demand that the pursuers shall confirm before extract. The shape of the proceedings leads to this conclusion. If the pursuers had raised the action in another character, the case might have been different. But they have pursued as executors *qua* legatees. That is a solution of the difficulty. The defender is entitled to insist that they shall complete their title by a confirmation. It is said that, because the deceased died in India, the defender is to be satisfied with some proceeding there which is not explained. But what has he to do with these proceedings? He must pay in safety; and that can only be by the pursuers obtaining their title completed by the well-known form of confirmation. Reference has been made by the pursuers to some English cases; but I do not think that they at all apply. They seem to have related to the question whether duty was payable or not? But with that we have no concern here. The present is entirely a question of title. I dare say the defender would be well enough pleased that the pursuers should not be obliged to pay duty; but he has a right to insist that they have a good title.

Lord Gillies concurred.

Lord Mackenzie.—I am much of the same opinion, though the matter is not very clear. One thing, however, is clear, that the defender must have a certain title made up in the party to whom he is to pay. Is such a title now offered? If confirmation in Scotland were offered, I should have no difficulty, because the defender himself consents to take that. But the question is, whether what is now offered is sufficient?—What is offered? It would be difficult to answer that. Some not very specific authority to be obtained in India; and it is said that the English decisions show this to be sufficient. But I am not sure of that. It is clear to me, under those decisions, that if a party die in India leaving debtors there liable to him, and if authority be obtained by his executors from the proper authority in India to uplift the funds, but these debtors subsequently leave India, then they may be sued in England without the necessity of obtaining administration or probate over again. That seems the result of the English decisions; and I own I see no reason why the same rule should not prevail in Scotland. But the present case is different. Although the testator died in India, and although he had debtors liable to him there, no authority was obtained in India to levy the debts. In the mean time the debtor has left India and come to Scotland. Now, I do not think that the cases quoted show it to be clear that, in such a situation of matters, either an authority can be obtained in India to recover the debts; or that, though obtained, the authority would be good in England. If, under that law, it were quite clear that the authority to be obtained in India would be good in England, I might be inclined to think that it afforded strong authority for adopting the same rule in Scotland, seeing no grounds for a different practice in the two countries. But I am not satisfied there is such practice in England, and *a fortiori* think we cannot hold it as a clear and safe point in the law of Scotland.

Lord Fullerton concurred.

The Court pronounced the following interlocutor:

"Find that the pursuers, before extract, must produce, as a title to the debt decerned for, a confirmation in their favour by the Commissary of Edinburgh, as executors *qua* legatees to the deceased Dr Fyffe: Find the defender entitled to the expense of this part of the discussion, and remit the account," &c.

Lord Ordinary, Murray.—*Act.* H. Robertson; Pearson and Robertson, W.S., *Agents.*—*Alt.* Marshall; Hunter, Campbell and Co., *Agents.*—*B. Clerk.*—[H.B.]

7th July 1842.

FIRST DIVISION.—(H. B.)

No. 249.—ROBERT AULD, *Pursuer*, v. ARCHIBALD AIKMAN and OTHERS, (*Aikman's Trustees*), *Defenders*.

Prescription, Triennial.—*Circumstances in which the triennial prescription held not to apply.*

Robert Auld, writer in Edinburgh, brought an ac-

tion against Archibald Aikman and others, trustees of his father-in-law, the late James Aikman, who died in January 1837, concluding for payment of the following accounts, or their taxed amount,—1st, £13. 15. 7., a business account from 31st December 1832–15th January 1834; 2d, £54. 15. 3., a business account from 6th August 1832–4th July 1836; 3d, £86. 16. 4½., a business account from 19th December 1833–24th November 1835.

The defenders admitted that the accounts had not been paid by them, but denied resting-owing, and pleaded *inter alia*, that the accounts were prescribed.

The Lord Ordinary pronounced the following interlocutor:

"19th February 1842.—The Lord Ordinary having heard parties, and considered the process—Sustains the plea of prescription, but allows the pursuer to prove the debt by the writ or oath of the defenders.

"*Note.*—After the three years are out, the burden of proving the debt by the writ or oath of the debtor is laid by the express words of the Act on the pursuer. The proof of the debt necessarily implies the proof both of its constitution and of its subsistence. But where judicial admissions are made that are decisive, it has been held that the oath, being in such a case, where perjury is not permitted, a mere ceremony, may be dispensed with as superfluous.

"The three years were not out here when the original alleged debtor died, so there is no presumption of payment by him, and there is a mutual admission in the defences that payment has not been made by the *defenders*. So far the case is clear.

"But there is nothing that the Lord Ordinary can recognise as an admission by them of the constitution. All that they say of it is, that *they have no personal knowledge of it*. Now suppose that they had sworn this. An *original party's* professing ignorance may be often unavailing, because it may be incredible. But *representatives* stand in a quite different situation; and the point is, whether *their* swearing that they know nothing about the constitution is, in law, a sufficient admission of the constitution to entitle a pursuer to say that he has proved this part of the case by the oath of his adversary?

"The pursuer refers to a great many cases, in which he says that admissions or depositions the same in substance as what occur have been held sufficient by the Court. The Lord Ordinary, after a careful examination of the reports, cannot concede that this is the fact. They were all necessarily circumstantial cases. And the pursuer, before he can prevail here, must distinctly face and maintain the general proposition that a *credible declaration of ignorance of the constitution* is, under the Statute, proof of the constitution by the debtor's oath, even where the debtor is but a representative.

"If it be, the law is in an odd state. An heir is an infant when his father dies. Thirty years afterwards an action is brought against him for payment of a debt said to be due by his ancestor, and reference is made to his oath. He swears, truly, that if the debt ever existed, it still subsists, because he never paid it; but that its ever having existed he knows nothing about. According to the pursuer, this ignorance not being a *denial* of the debt, proves its original constitution; and in this way any pursuer may establish any debt which he is pleased to claim, provided he selects for his defender a necessarily ignorant representative. Or he has only to rear up a claim so entirely *fictitious* that an heir cannot possibly have paid it, or have even heard of it; and the combination of the two facts, viz., of non-payment and of ignorance, establish the pursuer's case under the statutory reference.

"The Lord Ordinary can discover no authority for such a principle."

The pursuer reclaimed, and the Court pronounced the following interlocutor:

"Recal the interlocutor reclaimed against, and find that, in the circumstances of the case, the plea of prescription pleaded

does not apply; *quoad ultra*, remit the cause back to the Lord Ordinary to proceed as to him shall seem just; farther, find neither party is entitled to expenses up to this date."

Lord Ordinary, Cockburn.—*Act.* Crawford; John Cullen, W.S., *Agent.*—*Alt.* Inglis; A. and C. Douglas, W.S., *Agents.*—N. Clerk.—[H.B.]

8th July 1842.

FIRST DIVISION.—(H. B.)

No. 250.—ALEXANDER and WILLIAM GOLDIE, (*Mrs Hoggan or Smith's Trustees*), Pursuers, v. Miss JEAN GOLDIE and OTHERS, (*Representatives of Messrs Goldie and Threshie*), Defenders.

Agent and Client—Responsibility—Reparation—Consequential Damage—Terce—A widow, who had repudiated a postnuptial contract which she had accepted in lieu of her legal claims, and been served to her terce, having brought an action of damages against agents whom her husband had employed, several years before his marriage, to infest him in certain lands, because an erasure in the instrument of sasine had proved fatal to the infestment, and so excluded the terce, the agents were assoltied.

Mr Smith of Land, employed Messrs Goldie and Threshie (not his ordinary agents), to pass infestment for him in the lands of Monygryle, Pointfoot and others, which he had previously purchased. The date of the sasine is 1803. In 1807, Mr Smith married Miss Elizabeth Hoggan. There was no antenuptial contract, but in 1813, a postnuptial contract was executed, by which Mrs Smith accepted of £200 of principal, and an annuity of £25 in lieu of terce. Mr Smith died in 1827, in embarrassed circumstances; and Mrs Smith having repudiated the contract, and recurred to her legal claims, was served to her terce. A ranking and sale had previously been brought of Mr Smith's estate; and the common agent objected to the claim of terce, as regards the lands of Monygryle, Pointfoot and others, on the ground that Mr Smith was not validly seised in them, in consequence of the word "three" in the date of the Christian era (1803) being written in the instrument of sasine on an erasure. The objection having been sustained, both by the Court of Session and House of Lords, Mrs Smith brought an action, insisted in after her death by her trustees, in which, on the narrative, that in

"consequence of this decision, the pursuer's said husband had never been validly infest and seised in the said lands, as he ought to have been, by the said Thomas Goldie and Robert Threshie; and thereby the pursuer has lost her claim to a terce of the rents of the said lands of Monygryle and Pointfoot, and has incurred further loss and expenses in trying the validity of the said instrument of sasine, and in endeavouring to make effectual her said claim as aforesaid: That the said instrument of sasine, founded on by the pursuer in her claim above mentioned, having been prepared, in manner above mentioned, by the said Thomas Goldie and Robert Threshie, as the law-agents or conveyancers of the pursuer's said husband, under his employment, of which employment they accepted, and for which they were paid their full professional charges and expenses, as above mentioned, they were legally responsible for the exercise of due professional skill and care in taking the said infestment, and in expediting and recording the said instrument of sasine, and were bound to have duly and validly infest and seised the said deceased Alexander Smith in the said lands of Monygryle and Pointfoot: That the said Thomas Goldie and Robert Threshie, however, culpably failed or neglected so to do, inasmuch as the said instrument of sasine, as prepared by them, was vitiated and erased in *substantialibus* in that part thereof which expressed its date;"

she concluded against the representatives of Messrs

Goldie and Threshie for payment of the sum of £2000 Sterling, or such other sum, less or more, as shall be ascertained to be the amount of the loss, injury and damage sustained by the pursuer in the premises, including the expenses incurred by her in endeavouring to establish her said claim of terce, and in resisting the objections stated to the validity of the foresaid instrument of sasine.

Pleaded for the pursuers—1. As it was in consequence of culpable neglect, or want of professional skill or diligence and attention on the part of Messrs Goldie and Threshie, as Mr Smith's agents, that the instrument of sasine was adjudged to be null and void, and the widow deprived of her terce of the lands of Monygryle and Pointfoot, the defenders, as the representatives of Messrs Goldie and Threshie, are liable in reparation of the loss and damages sustained by the widow, in terms of the conclusions of the summons. 2. Mr Smith's widow had a sufficient title and interest to institute and follow out the present action; and her title and interest have been validly assigned to the pursuers by her trust-settlement. 3. The grounds of action set forth, are both relevant and sufficient to support the conclusions of the summons. 4. The defenders are not entitled, either as matter of fact, or in point of law, to plead *communis error* in justification of the neglect, or want of professional skill or attention on the part of Messrs Goldie and Threshie, to the effect of eluding liability for the present claim. 5. As Mrs Smith did not validly renounce, and did not receive any consideration or equivalent for her right of terce, she is in no respect precluded from seeking reparation from the defenders of the loss sustained by her as libelled. 6. It is *res judicata* by the judgment of the Court, pronounced on 18th January 1834, in the process of ranking and sale, that Mrs Smith was not barred from claiming terce out of the estate of her late husband by the postnuptial contract between them, which is now founded on by the defenders, and as that process and the steps in it, were regularly intimated to the defenders' agent, this plea is competent and available to the pursuers in this process.

Pleaded for the defenders—1. A claim for reparation against a professional man for negligence or want of skill, is competent only to his employer, who alleges that he is directly injured thereby;—the liability on which such claims are founded arising solely from the implied terms of the contract between the employer and the person employed. The pursuers' constituent, therefore, not being the employer of Messrs Goldie and Threshie, they have no title to insist in the conclusions of this action. 2. The pursuers have not libelled any relevant or sufficient grounds of action, in respect that the parties represented by the defenders were responsible to no one but their employer for their professional diligence and skill, and are not liable to third parties for the consequences of the blunder or neglect alleged. 3. In the circumstances of the case, and in respect of the *communis error* prevalent among the conveyancers of Scotland, the omission or neglect alleged was excusable, and affords no sufficient ground to any party for a claim of reparation. 4. The late Mrs Smith having, for a valuable consideration, validly and effectually renounced and surrendered her legal rights as widow, and particularly her right of terce, could suffer

no damage from any alleged professional negligence through which the subject of the *terce* was diminished, or the grounds of this claim of *terce* otherwise competent to her being destroyed.

The Lord Ordinary pronounced the following interlocutor:

"*8th March 1842.*—The Lord Ordinary having resumed consideration of the record in this case, with the revised cases and writs produced, and whole process, Sustains the first, second, and fourth defences urged for the defenders, and assolvizes them from the whole conclusions of the action: Finds them entitled to expenses, as the same may be taxed by the auditor, and decerns.

"*Note.*—This is an action brought by the assignees of Mrs Smith, widow of Mr Smith of Land, against the representatives of Messrs Goldie and Threshie, writers in Dumfries, who were employed by her husband to pass infestment for him in certain lands which he had previously purchased. The summons concludes for damage said to have been sustained by Mrs Smith, from a mistake committed in extending the instrument of *sasine* on that occasion, which, in consequence of an *erasure* of the date, was found, both by this Court and the House of Lords, to vitiate the instrument.—See Shaw, 13, p. 461, and 1 Robinson's Appeal Cases, p. 173.

"The pursuers' plea is, that their predecessor's husband was thereby found to be uninfest in the lands, whereby his widow was deprived of her *terce* over them, and to that extent they seek reparation from the law-agents who expedite the *sasine*. This question is argued in papers of great ability on both sides; but the Lord Ordinary is of opinion, that it would be going immeasurably farther than the law has ever yet gone, to hold the agents liable, under the circumstances of the present case, to the party now suing them.

"It is assumed in the argument of the pursuers, that when a law-agent is employed to prepare a settlement, which is rendered inoperative from a professional blunder, he is liable to the dispoonee or legatees for every loss which they sustain by the nullity of the deed. Taking that for granted, the pursuers allege, that the widow's claim here was analogous; that she was entitled to rely on the validity of her husband's infestments as the measure of her *terce*; and has right to reparation for any error in his *sasines* by which her right was diminished.

"Now, with regard to the general doctrine relied on by the pursuers, if it had appeared at all sufficient to rule the present case, the Lord Ordinary would have felt it his duty to examine the authority on which it rests (if it be generally recognised), and the limitations under which it must be received in practice. But the specialties of the present case, it is thought, present insuperable difficulties against the claim of the widow, which distinguish her claim, both in its circumstances and in the principle by which the decision must be governed, from any other to which it has been assimilated.

"1st, This is a case of *intestacy*, and the error in the *sasine* created no damage whatever to the agent's employer. No loss accrued to Mr Smith, to whom the *sasine* was to be given. The nullity of the *sasine* did not deprive him of the lands, the value of which were made available for his debts at his death. Even if Mr Smith himself, therefore, had sued the agents in his life for reparation of the error, he could have obtained nothing but a new and more correct *sasine*, which he never asked.

"But when professional errors or omissions occur, from which the employer sustains no loss, and claims none during his life, there is no example of an heir or executor, as the case may be, in an intestate succession, being allowed to prosecute a claim for their indirect or consequential damage in respect of their disappointment or loss in the transmission of the succession. Take the case of an agent desired to purchase an estate, and omitting to do so, or to attach another estate by diligence, and convert the security into money, the agent's omissions very plainly affect the succession between heir and executor, but it is thought that an action of damages by either against the law agent would not be maintainable. In fact, if claims for consequential damage were sustained in these and similar cases against law-agents, their responsibility would be at once incalculable and interminable.

"2d, It is admitted that the agents, whose representatives are now sued, stood in no relation of responsibility to Mrs Smith, either at the date of the *sasine* or at any subsequent period. The *sasine* was passed in 1803; but Mrs Smith was not married to her husband till 1807. And on that occasion she neither employed nor got any advice from Goldie and Threshie. She was married without any provision by antenuptial contract; and though it is insinuated that she relied on enjoying her legal rights, she cannot be allowed to plead that she trusted to her husband's infestments without employing an agent to inspect them. If she had done so, and if he did not detect the error, her claim, upon the principle assumed in this action, would have lain against him and not against the agents who expedite the *sasine* for her husband, years before the marriage, and without any reference thereto. The claim would be far less plausible than that of a purchaser claiming damages from the seller's agent for a blunder in the title, which it has been repeatedly found does not lie against the latter, at the instance of a purchaser who never employed him. On the other hand, if Mrs Smith employed no agent to ascertain the state of her future husband's property and titles, then she cannot plead, that, on entering into the marriage, she trusted to an infestment of her husband's of which she was ignorant. But,

"3d, The claim of Mrs Smith is still more excluded in the present instance by the consideration, that the husband, long after the marriage, indicated a clear intention that neither this nor any other infestment was meant or desired by him to subsist in his person, in security of his widow's right of *terce*. The widow's prospect of *terce* is notoriously defeasible in many ways. The husband may sell the lands, or remain uninfest if he chooses, or convert his property into heritable bonds, or he and his wife may enter into a conventional agreement to discharge the *terce* in respect of another provision. It is admitted that Mr and Mrs Smith took the latter course here. In 1813 they entered into a postnuptial contract, whereby she accepted of £25 per annum, and £200 Sterling of principal in lieu of *terce*. It appears, however, that she repudiated that contract after his death, and claimed and got a *terce* from lands to which her husband's title was unchallengeable; and it is not alleged that she did not thereby get more than £25 per annum, even exclusive of the lands comprehended in the erroneous *sasine*. Be that as it may, the argument deducible from that postnuptial contract in the present question is obvious. Had any party pointed out the error of the *sasine* now libelled on to the husband during his life, and suggested its rectification in relation to his widow's legal claims, it is necessarily presumable that he would have declined, as the passing of a more correct *sasine*, in the case supposed, would have held out an encouragement and inducement to his wife to revoke the contract, and thus to seek an enlargement of her provisions, which they had mutually fixed, and which he never indicated any intention to increase. The present, then, is a claim by a widow, founded on an error in a *sasine* of her husband's, which he not only never objected to, but which it is clear, from a deed under his hand, that it would have been contrary to his interest and presumed wish to rectify, had it been founded on or brought into view during his life with reference to his widow's claims. On this ground alone, it is apprehended that the present action is quite untenable. And in every view it is thought that the claim now urged in right of the widow is not maintainable on any legal or equitable principles applicable to the case."

Mrs Smith's trustees reclaimed. At advising,

Lord President.—On consideration, I have come to the conclusion, that the claim now insisted on in name of the original pursuer, Mrs Smith, cannot be sustained; and I concur with the Lord Ordinary in the views he has expressed.

Keeping in view the various decisions that have been pronounced as to the nature and extent of the liability of agents and other professional men, and attending to the whole circumstances of the case, I agree with the Lord Ordinary in thinking, that to sustain the claim would be to carry the responsibility of the defenders, now represented before us, to a far greater length than has been done in any other case of which I am aware.

1. It is impossible to deny that the claim is rested on the

consequential damages that are said to have arisen to Mrs Smith, from the defect that was discovered in her late husband's sasine in the lands in question; and it cannot be disputed, that consequential or remote damages, as arising out of any act complained of, are no favourites of the law, and are not to be sustained.

2. Admitting the correctness of the judgment as to the defect of the sasine of 1803, it is manifest that the agents in question, who were employed by the late Mr Smith to complete his purchase to the lands in question, never were, directly or indirectly, employed by Mrs Smith, who was not in fact married for four years afterwards, and may never have been seen by her future husband before the purchase. At any rate, a wife, whatever her legal claims on his estate and effects may be, cannot be viewed as the heir or successor of her husband, though, in the event of his death, she has legally secured to her a right of terce in the third of the estate in which he stood infeft at his death. Over that estate the husband retained full power, and continued entitled to sell and dispose of it down till the hour of his death, and no process of inhibition or otherwise could be adopted against him by his wife, with the view of securing the right of terce. An obligation by a father in his son's marriage-contract, gives a claim to his widow directly, *ex contractu*, and is not parallel to the present case. Mrs Smith's situation was totally different, therefore, from that of an heir, who may have right to vindicate a claim of damages that existed in the person of his predecessor, in consequence of the negligence or unskilfulness of his professional agents.

3. Mrs Smith, in regard to her claim, in consequence of the defect in the sasine in question, was in no respect the assignee of her husband, so as to be able in that capacity to follow up his claim against his agents. This is the circumstance on which the case of Goldie, so much relied on by the pursuer as one directly in their favour, had evidently turned, as the wife's claim of damage for the loss of her *jus relicte* was expressly made, under a direct assignation by her husband in her favour, of the very right which an agent employed to make it effectual had utterly neglected. How very different the present case is from that one, it is unnecessary to point out. And when we again look to the particular circumstances that took place under the postnuptial contract between Mr and Mrs Smith, clearly indicating that he never intended, or even contemplated, that she was to be benefited by, or was likely to have any interest in any sasine as creating a right of terce,—we have, in fact, nothing to create the belief that even, if aware of the defect in the sasine in question, Mr Smith could ever have intended that his wife should avail herself of it. Had there been any thing like a deed or writing bearing that Mr Smith had abstained from making any postnuptial provisions for his wife in the event of her surviving him, as he relied on her being sufficiently provided by her legal right of terce, it might have been maintained that this amounted to an assignation of all claims that he might himself possess against his agents for the due completion of his sasine. The very contrary of this is, however, manifested by the postnuptial contract which Mr Smith actually executed.

I cannot, therefore, find grounds for sustaining the present claim. Mr Smith himself could only have called on his agents to give him a new and valid sasine had he discovered the defect; but, in fact, he himself suffered no injury whatever, as he held his estate till his death, and it was then divided among his creditors.

In regard to a claim of *jus relicte*, a widow surely could not raise an action against her deceased husband's manager or factor, for his having neglected to collect or accumulate his moveable estate, in consequence of which her claim of *jus relicte* was so far manifestly diminished.

Lord Gillies concurred.

Lord Mackenzie.—I am of the same opinion. Any right to sue for damage occasioned by the defect in the sasine, vested in the husband long before the marriage took place. Then the marriage took place, and after that the death of the husband. The legal right of terce arose to the wife, but it was by its nature not applicable either to the lands in which the husband was not seized, nor to the claim of damage which was in the husband. In this the wife suffered no wrong. She had no right, either as against her husband or his conveyancer, to have his sasine in the land made perfect, or to damages for the de-

fect. She has no right by terce, as if she had been actually infeft in one-third of the lands at the date of the marriage. Perhaps, in ancient times, it may have been so, but now the right of terce exists only by the operation of the law, as applicable to the rights standing in the husband at the time of his death. In these views, it is impossible that the present claim can be sustained. It is just a right arising from the law. But, even suppose the husband had, by the contract of marriage, expressly bound himself that the wife should get one-third of these lands, would the effect be, that if the husband had an ill made-up right, the conveyancer would be liable to fulfil the obligation to the widow? The heir, and not the conveyancer, would be liable for the lands, though the conveyancer might have to pay for mending the defective titles. But what is proposed here is, that the heir should take the whole estate unburdened by terce, and that the widow should get the value of one-third of the lands from the agent; in other words, that the joint estate of widow and heir should be increased to the extent of a third, at the expense of the agent. That could never be equitable. I therefore concur with the Lord Ordinary.

Lord Fullerton concurred, but chiefly on the specialty of the husband having evidently intended to exclude the terce.

The Court *adhered*.

Lord Ordinary, Cuninghame.—*Act*. Whigham, Young; Alexander Goldie, W.S., *Agent*.—*Alt*. Inglis; Walter Dickson, W.S., *Agent*.—*B. Clerk*.—[H.B.]

8th July 1842.

SECOND DIVISION.—(G. D. F.)

No. 251.—ALEXANDER M'DOUGALL RALSTON, Claimant, v. JAMES and JOHN RALSTON, Claimants.

Testament—Legacy—Vesting—Condition—*A* testator bequeathed to *A*, "and in the event of his death to" his two sisters, "equally between them, or in the case of the death of either of them, to the survivor, the sum of £500, with the interest thereof from six months after my death, payable the said interest to their legal guardians for their behoof, and the principal sum payable to the said *A*, "on his arriving at majority; or, in the event of his decease, to" his two sisters, "on the youngest or survivor of them arriving at majority." *A* survived the testator, but died in pupillarity, predeceasing his sisters, who also died in pupillarity. In a competition for the legacy between the testator's residuary legatee, who claimed the legacy as lapsed by *A* not attaining majority, and the next of kin of *A*, who claimed it as having vested by *A* surviving the testator, the Court preferred the next of kin.

The late William Henry Ralston conveyed his estate, heritable and moveable, to trustees, for the purpose of paying debt, legacies, &c.; *inter alia*,

"Thirdly, I appoint my said trustees to make payment of the gifts and legacies following, namely,—1st, To John Ralston, captain in the 64th regiment of foot, and to his heirs, the sum of £500 Sterling, payable six months after my death: 2d, To William Ralston, son of James Ralston of Towerhill, and in the event of his death, to Elizabeth Ralston and Mary Ralston, daughters of the said James Ralston, equally between them, or in case of the death of either of them, to the survivor, the sum of £500 Sterling, with the interest thereof from six months after my death, payable the said interest to their legal guardians, for their behoof; and the principal sum payable to the said William Ralston on his arriving at majority, or in the event of his decease, to the said Elizabeth and Mary Ralstons, on the youngest or the survivor of them arriving at majority."

By this deed the claimant, M'Dougall Ralston, had conveyed to him the estate of Warwickhill under certain burdens, and he was besides constituted residuary legatee by the last purpose of the trust, which was thus conceived:

"And lastly, after payment of my debts, sickbed and funeral charges, and the expenses attending the execution of this trust,

and the legacies foresaid, and any other legacies which I may think fit at any time hereafter to make, I appoint and direct my said trustees to convey and make over the whole residue and remainder of my estate and effects, to and in favour of the said Alexander M'Dougall, my nephew," (the competing claimant) "for his use and behoof, and to his heirs."

The children of James Ralston named in the bequest, survived the testator, but they all died in pupillarity—William in 1838, Elizabeth in 1840, and Mary in January 1841; but all survived their father, who died in 1836, and he of course survived the testator.

James Ralston was a relative of the testator, and his children, who are those mentioned in the bequest, were the only issue of his then subsisting marriage, but he had a daughter by a prior marriage, who still survives. Subsequent to the death of the testator, the claimants, James and John Ralston, were born, and are now the only surviving issue of their father's second marriage.

In a competition for the legacy, M'Dougall Ralston claimed it as residuary legatee, as not having vested, in consequence of William Ralston having died before reaching majority. The plea was:—The legacy did not vest in any of the legatees, in respect it was contingent and conditional, and none of the contingencies or conditions took effect, or were purified.

James and John Ralston, who were the next of kin of William Ralston, claimed the legacy on the following plea:—That, according to a sound construction of the testator's settlement, the legacy vested in William Ralston, or at all events in his sisters Elizabeth and Mary, or the survivor of them, and did not lapse by his and their predeceasing majority; and the claimants, as nearest of kin both of their deceased brother, and of their deceased sisters, have now right to the sum claimed.

The Lord Ordinary pronounced the following interlocutor:

"1st March 1842.—The Lord Ordinary having heard parties, and considered the process, repels the claim of Alexander M'Dougall Ralston; sustains the claim of James and of John Ralston, and decerns against the raisers for payment to them in terms of their claim accordingly: Finds neither party entitled to expenses.

"Note.—The general rule used to be, and still is, *dies incertus pro conditione habetur*; and if this rule had been firmly adhered to, it would have solved this (and many another) case by deciding, that as the legatee died before the arrival of the period at which the legacy was payable, it had never vested. But though this principle has never been absolutely put down, it has in modern practice been so feebly applied, as to be held to be superseded by the slenderest possible indications of an opposite intention on the part of the grantor; and the rule now is, that his intention, as deducible from the words of the deed, is the sole criterion of construction. 'I have found difficulty (says the Lord President in the case of *Provam*, 14th January 1840,) in thinking that there is any principle established by any decision or series of decisions on the subject. We are bound to give effect to the will of the testator, whatever it is.' And as every case is thus made a special case, it is nearly idle to quote precedents, or to attempt to reconcile innumerable seemingly contradictory decisions.

"The terms and circumstances of the present deed are by no means so clear as to warrant its being said that this question is free from doubt. But on the whole, the Lord Ordinary considers the first part of the clause as the constitution of an absolute and immediately vesting legacy: and the second part as only regulating the application of the interest, and fixing the period at which the legatee, in whom the right is vested, could

demand payment of the principal. This appears to be the true meaning of the words. And this construction is confirmed by the two important circumstances: 1st, That the interest undoubtedly vests at once; 2dly, That there is no special destination after the failure of the legatees, but only the nomination of a residuary heir.

"Each party refers to other parts of the deed as corroborative of his view; but no other part creates any difference on the interpretation of this leading clause.

"Each party also refers confidently to cases; and the confidence of each is fully justified by what they respectively found upon. The case of *Omev*, 19th November 1788, is irreconcilable (at least it cannot be reconciled by the Lord Ordinary) to the judgment he has now pronounced. But on the other hand, the cases of *Wood*, 2d July 1813, (Baron Hume's Reports, p. 271), and of *Kennedy*, 20th July 1841, could be as little reconciled to an opposite judgment. In this situation, the Lord Ordinary prefers the more modern authorities, and yields to what he conceives to be the tendency of modern construction."

The residuary legatee reclaimed:

The claimer argued, that the legacy of £500 was payable only to William Ralston on his majority; and in the event of his decease, it went to the sisters, or the survivor of them also attaining majority. But as they all died in pupillarity, the bequest necessarily lapsed. The argument for the claimer consisted in separating the latter portion of the clause from the first part, and in maintaining that the latter was the regulating portion; and in regard to the payment of interest, it was alleged to be a settled point that it did not cause the legacy to vest, unless it could be held to do so by the rest of the deed.—See Hume's Cases, p. 530; Hume v. Hume; and Campbell, 12th June 1810, S. and D., and *ante*, Vol. XII. p. 515.

The respondents argued.—That the regulating portion was contained in the first part of the clause, and that the second part merely imported management as to payment, in which alone William Ralston and those claiming through him were concerned; and that the expression, "in the event of his death," had reference merely to the legatee predeceasing the testator, and not otherwise; and consequently, that if he survived the testator, the legacy vested. The legatee survived the testator, but died in pupillarity, and the consequence of that was maintained to be, that the sisters, if they had been in life, failing them the claimants, took as next of kin. Then the provision, as to the daughters, merely suspended to them the period of payment. Wood, in Hume's Cases, p. 271, 2d July 1813.

Lord Justice-Clerk said, he agreed with the result of the Lord Ordinary's judgment, but not in the representation his Lordship made, that the cases which had been decided afforded no fixed rule for deciding on questions of this kind. Many principles had been fixed in consistency with one another, which, when due observance was made, yielded a sure enough guide. No rule could overcome intention when it was sufficiently expressed, and in that case, certainly, intention must prevail; but in the class of cases to which this question belonged, many principles had been laid down of general application, and the Court would require a very plain indication of intention before making an exception to the cases. It was quite possible that many of the cases had been decided differently from the meaning testators had in view, but that was the fault of the intention not having been properly framed, and where the law had therefore been left to be guided according to the rules of construction established by decisions. In this case nothing turned on the death of William Ralston, for the trustees are directed to pay over the sum to him, under the only condition that it was to be held by them till he attained majority. The residuary legatee was

decidedly excluded by the first part of the bequest; for it was declared—"I appoint my said trustees to make payment of the gifts and legacies following: to," &c. Now that direction expressly excluded the residuary legatee, in consequence of the legatee himself, William Ralston, having survived the testator. The rest of the clause was merely for the sake of management, and was a provision in which he and those claiming through him had an interest. Besides, the vesting was clear from the additional circumstance, that interest was declared to be payable instantly that the legacy was exigible,—for the use of interest and profits had always been held as a conclusive element and test of vesting. Of course there were exceptions to this; but when trustees were directed to pay over to A B, who survived the testator, a legacy on his attaining majority, with interest from that period, that would be conclusive of its having vested, supposing A B thereafter died. The interest here made payable was the accessory of the vesting of the principal which the trustees were required to pay to A B by his surviving the maker. Hence his Lordship considered this the clearest case of vesting that could occur, and by surviving the testator, but deceasing before majority, the legatee transmitted the right to his next of kin. Campbell's case was inapplicable, in the circumstances in which it arose; and besides, there was no clause as to interest.

Lord Medwyn concurred.

Lord Moncreiff.—I am of the same opinion. Different views might be taken of the case. It might be a question, whether the legacy vested by surviving the testator; and in the terms of the deed, I think it did so, as the terms of the deed are very strong. The only thing that can be said against this, is the observation that there is a farther provision as to the legacy being payable only on majority, and that William Ralston never attained that period. But here the clause does not admit of that construction; for before it can be said that there is no vesting, it must be maintained that the clause constitutes a conditional institution. I think, however, it is impossible to carry it that length, and that, to say the least of it, all that can be said is, that it is a substitution. The clause is as follows (reads). The payment of interest is an important element, and it shows that a vesting was meant; because, as it provides that interest shall be payable to the guardians, that could only be the result of vesting during minority, else why give it to the guardians. It is by no means accurate to say that the decisions afford no rule for cases of this nature. The case of Wallace affords very distinct and important principles. The case of Campbell is clearly inapplicable to the present; for there the question was as to an attempt to get the fund before the period of payment.

Lord Meadowbank absent.

The Court unanimously *adhered*, and further, found the claimant, *McDougall Ralston*, liable in expenses.

Lord Ordinary, Cockburn.—For *A. M. Ralston*, Shaw; John Paterson, *Agent*.—For *J. and J. Ralston*, Cowan; Hunter, Campbell and Co., *Agents*.—*T. Clerk*.—[G.D.F.]

8th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 252.—*GEORGE HOME, Pursuer, v. JAMES HARDY and OTHERS, Defendants.*

Process—Record, Authentication of, by Lord Ordinary—Personal Exception—Where the counsel for the parties had authenticated the record by their signatures, and signed a minute agreeing to close the record on the interlocutor sheet, which was followed by a minute signed by the Lord Ordinary closing the record in terms of the minute of counsel, but the revised papers did not bear the signature of the Lord Ordinary, it was held, in the circumstances, (1.) that this was a sufficient compliance with the Judicature Act; but, opinion, (2.) that even supposing that the want of the Lord Ordinary's signature was an error, it was capable of being cured or waived; and accordingly, where a party had litigated after closing the record, as if it had been properly authenticated, and had allowed the record to be given in evidence at a jury trial without objection—held that he was barred from objecting thereafter,

and opening up the proceedings, on the ground that the record was not duly authenticated by the Lord Ordinary.

In this case a record had been made up by the parties, consisting of summons, defences, condescendence and answers, &c. An issue was thereafter approved of, and a jury trial—at which the defenders allowed the record to be given in evidence by the pursuer—took place, which resulted in a verdict for the pursuer. The defenders then moved the Court for a new trial on various grounds; but the present question arose out of the following notice of motion which the defenders served on the pursuer:

"TAKE NOTICE—That on Tuesday, the 21st current, the defenders will move the Court,—in respect the record of the pleadings has not been subscribed, authenticated, signed and closed, in terms of the Statute 6 Geo. IV. c. 120—1st, to find that the whole proceedings in this cause are null and inept from and since the date of Lord Jeffrey's Interlocutor of 19th December 1840, inclusive of that interlocutor; and, 2d, to find that it is incompetent to move or to proceed further in the cause until said proceedings are recalled and the record duly closed, in terms of the above Statute."

To explain the notice, it appeared that after the usual interlocutors for adjusting, and for avizandum with a view to close, and the enrolment by the Lord Ordinary to that effect, the counsel for the pursuer and defenders signed, on the interlocutor sheet, a short minute to the following effect:

"We, the counsel for the parties, hereby agree to close the record upon the revised condescendence and revised answers, with the amendment of the libel and additional defences, Nos. 11, 38, 39 and 40 of process."

After the above minute, the Lord Ordinary signed the following:

"The Lord Ordinary, in respect of the above-signed minute, holds the record closed, and appoints parties to debate thereon."

The counsel, respectively, then subscribed the revised condescendence and revised answers as finally adjusted, and "authenticated" the same "as part of the record," and there was a similar subscription and authentication, as part of the record, of an amendment of the libel, and the additional defences; but on the revised papers there was no signature of the Lord Ordinary authenticating the same as the record. In this state of matters, the Lord Ordinary remitted the case, after hearing parties, to the issue clerks, and thereafter an issue was returned, and approved of by his Lordship, in the usual manner.

The defenders' objection depended upon the construction to be given to the 10th section of the Judicature Act, which, after directing that the adjusted condescendences, and answers, and pleas, should be signed by the counsel for the parties, provides, that "before any order shall be pronounced, or judgment delivered as to the disposal of the cause, the record of the pleadings as adjusted, shall be authenticated by the Lord Ordinary by his signature." Here the record was not signed by the Lord Ordinary; and it was accordingly maintained, that a statutory nullity had been committed, which rendered the whole proceedings nugatory from the time of the adjustment of the record, and including the trial before the jury.

Answered.—That the Statute pointed out no particular form according to which the record was to be authenticated; and that here, as the signature of the

Lord Ordinary immediately followed the minute, by the counsel holding the condescendence and answers as adjusted, and as part of the record, the enactment was sufficiently complied with; and, besides, even supposing that there was any irregularity, the defenders must be held as having waived it, by the whole procedure in the cause. In particular, by their having acted all along as if the record had been properly authenticated; but more especially were they barred by allowing the record to be given in evidence at the trial. They ought then to have objected, and the objection might then have been sustained as sufficient against the record being received in evidence. All this procedure formed a complete personal bar to the objection being now insisted in: See *Reid v. McCormack*, 13th January 1830; S. and D., Vol. VIII. p. 300. *Cooper*, 7 S. and D., 8, 31; 7 C. and F., p. 325,—House of Lords Rep.; and *Galway v. Becher*, *libro cit.*

Replied.—That the provision was not merely directory but imperative, and that the omission constituted a statutory nullity, which consent or waiving of parties was not capable of curing. It was now an objection *ex parte judicis*, which the Court must enforce equally rigidly as one arising on the stamp laws; and the Court had no alternative, for the words were express, that “before any order shall be pronounced, or judgment delivered as to the disposal of the cause, the record of the pleadings as adjusted shall be authenticated by the Lord Ordinary by his signature.” Referred to *M’Ivor*, 22d December 1837; 16 S. and D., 292. *Cumming*, 19th November 1833.

During the trial before the jury, portions of the revised condescendence and answers were founded on and put in evidence.

Lord Justice-Clerk wished to know from Mr Rutherford if this did not obviate the objection.

Rutherford.—The plea is, that there is no record by the omission of the Lord Ordinary’s signature, and therefore the objection could not be removed.

At advising, the Court were of opinion that the Judicature Act, in the 10th section, was merely directory, and contained no sanction under nullity of the procedure, where such an omission took place as the one referred to in the motion, especially so, as the Act pointed out no form or schedule according to which authentication was to be regulated.—(See *Maxwell and Company v. Stevenson and Company*; *ante*, III. p. 409,—House of Lords, 4th April 1831.) Their Lordships were accordingly of opinion, that if any irregularity had taken place, it might still be cured by obtaining the signature of the Lord Ordinary, and that it would have required a very explicit enactment to oblige the Court to hold as null and void the whole procedure, after the defenders had litigated so far, and taken their chance of obtaining a verdict in their favour. Their Lordships further held, that there was an express waiving of the objection, supposing it existed, by the conduct of the defenders in the progress of the cause—the different interlocutors—the obtaining the issues, &c., but especially by their allowing the record to be given in evidence at the trial without objection. The objection now raised might have afforded solid ground for excluding the record as evidence; and accordingly the Court were of opinion, that by not objecting at the

proper time, the defenders must be held as having waived their right afterwards to object.

Lord Meadowbank absent.

The Court unanimously *refused* the motion, and found the defenders liable in expenses.

Act. Rutherford, Handyside; L. Mackintosh, S.S.C., *Agent*.—*Alt.* Solicitor-General (M’Neill), Milne; J. A. Robertson, *Agent*.—R. Clerk.—[G.D.F.]

9th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 253.—WILLIAM SMITH and OTHERS, *Raisers*, v. HENRY ANTHONY HARDMAN and OTHERS, *Claimants*.

Foreign—Testament—Construction—Held, in regard to a will executed in Grenada by a party who died, and was domiciled there, and where the bulk of the estate and effects were situated, but which also had reference in its provisions to certain funds of the testator situated in Scotland, that the true import and effect of the will must be determined by the law of England, within the territory of which law the deed was prepared and executed.

The late Moritz Hardman, who died in Grenada in 1817, domiciled there, left a last will and settlement which was executed in that island, and bearing date 7th May 1817. The testator’s estate and effects were principally situated in Grenada, but there were certain funds belonging to him in Scotland.

The settlement contained the following clause:

“I will and direct that the full sum of £10,000 Sterling be taken from my funds or capital in the hands of my correspondents, Messrs Leitch and Smith, merchants in Glasgow aforesaid, and placed immediately after my decease in any bank, or be retained separately by my executors in Europe, on perpetual interest. The interest thereof I give, devise, and bequeath to my two mulatto girls, called Eliza (the claimant Mrs Rouget), and Catherine, to be paid them for their support and maintenance after they attain the age of twenty years, and be then considered their own legal property; and afterwards the then accruing interest on the said principal sum of £10,000 shall also be considered their property, and be paid to them occasionally for and during his, her, or their natural lives; but should it happen that one or either of the said girls should die previous to their becoming of age or having issue, then the whole of the accruing interest, as aforesaid, shall be given and paid to the survivor of them; but in case it should so happen that both of the said girls, as aforesaid, should die without issue, then it is my will and pleasure that the said sum of £10,000, as aforesaid, with the accruing interest thereon, be reverted to, and be considered as part and parcel of my said capital, in trust as aforesaid, with my said executor in Europe: I will and direct that the whole rest, residue, and remainder of my estate, either real or personal, that may be in the hands and possession of my executor and trustee aforesaid, after all debts, legacies, and other bequests and demands whatsoever that may come against my estate are paid and discharged, then it is my will, that whatever balance so remaining in the possession of my executor, shall still remain in trust, as aforesaid, with my executor and trustee John Guthrie aforesaid, for and during the term of twenty years after my death; and at the expiration of the said term, I give, devise, and bequeath to my nephew, Henry Anthony Hardman, and his lawful begotten children, the whole rest, residue, and remainder of my estate, either real or personal, in trust as aforesaid, save and except £500 Sterling, to be divided amongst them, share and share alike, and to their heirs and assigns for ever,” &c.

It also provided:

“It is my express will and desire that my executors and trustees in the said island of Grenada, save and except my execu-

tor and trustee in Europe (namely John Guthrie of the city of Glasgow), shall not draw, intermeddle, or make use of any part of any moneys, capital, or funds in the hands of my correspondents, Messrs Leitch and Smith, merchants, carrying on trade in the city of Glasgow, in North Britain, or may happen to be in the hands or possession of any person or persons whatsoever in Europe, but shall be subject only to the trust of my property, either real or personal, in the island of Grenada and the West Indies, there being sufficient funds to satisfy all my debts without interfering with my capital in Europe; and all and every my messuages, lands, tenements, and hereditaments and premises, with their and each of their appurtenances, together with all my slaves, mortgages, bonds and judgments, bills, West India debts, moneys, and security for money, and all and every real and personal estate and effects whatsoever I may die possessed of in the island of Grenada, shall remain in trust with my executors and trustees in the said island of Grenada, hereinafter named and described, until all other debts, legacies, and other bequests be paid off and satisfied, subject nevertheless to the farther true intent and meaning of this my last will and testament; and all my money and moneys, capital or funds, in the hands of my correspondents, Messrs Leitch and Smith, merchants in Glasgow aforesaid (or elsewhere), or in the hands or possession of any person or persons whatever in Europe, shall remain in trust with my executor and trustee in Europe (namely, John Guthrie aforesaid), subject, nevertheless, to the further true intent and meaning of this my last will and testament."

The testator's daughter, Catherine, died under age, and without issue; and thereafter a question having arisen respecting the party entitled to the interest of the above provision, the Court, in a process of multiplepounding raised by Mr Guthrie, the trustee, to settle that point, found that the question involved, and must be regulated by, English law. In consequence, Mrs Rouget was preferred to the interest of the sum. On the death of Guthrie, the present raiser was appointed judicial factor, and he brought this multiplepounding on the elapse of the time specified by the testator for the payment of the funds, in which the claimants lodged a joint minute, consenting to take the opinion of English counsel as to whom the fee of the provision belonged. The opinion of Messrs Pemberton and Knight Bruce was accordingly taken, and they concurred in holding that the fee was in Mrs Rouget; and in these circumstances Mrs Rouget (or her trustees) claimed the £10,000, *pleading*—1. That the last will and testament of a party deceased must be regulated and interpreted according to the law of the country where he was domiciled and died, and where the will was executed, and not by the law of the country where the funds may be situated, particularly if these funds be moveable. 2. That the testator being domiciled, and having died in Grenada, and his will having been executed there, it falls to be regulated by the law of the island, which is the law of England, although his funds may have been partly in Europe and partly in the West Indies, and as such placed under the management of different executors. 3. Besides, it having been decided by this Court *foro contentioso* in a question between the same parties, that by the said will the trust thereby created, in so far as respects the interest of the fund *in medio*, was an English trust, and fell to be regulated by the law of England, the same law must regulate the payment of the principal sum. 4. By the law of England, as ascertained by the opinions of English counsel, taken under the authority of the Lord Ordinary, the fee of the £10,000, being the fund *in medio*, belonged to Mrs Rouget, daughter of the said

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Moritz Hardman, and now to the respondents as her trustees and assignees.

The claimant, H. A. Hardman, who was the residuary legatee, contended that the will created two trusts, viz., one for the management of the West India property, and the other in regard to the Scots estate and effects; and he *pleaded*—1. That by the will of Moritz Hardman, a separate trust was created in regard to the £10,000 in question: That this was a Scots trust, to be administered in Scotland, and by a Scots trustee; and consequently, that the trust, and the subjects of it, and the questions regarding it, must be ruled and decided according to the law of Scotland, at least so far as regards the right to the capital of the £10,000 in question. 2. According to sound construction, the £10,000 in question does not belong to Eliza Hardman or Rouget, and she is not entitled to the fee of that sum, or to demand payment thereof. And, 3. In the event of the said Eliza Hardman or Rouget dying, and of there being no issue of her body, the sum of £10,000 in question reverts to the residue of the estate of the testator, and goes to the respondent, H. A. Hardman and his children.

The Lord Ordinary pronounced the following interlocutor:

"28th May 1842.—The Lord Ordinary having heard the counsel for the parties on the closed record and whole process, finds that the construction of the last will and testament of the deceased Moritz Hardman, and the true import and effect of the several provisions it contains, must be determined exclusively by the law of England, within the territory of which law the testator was exclusively domiciled, and the instrument itself prepared and executed in the style, and according to the formalities used and required by that law: And before further answer, appoints the cause to be enrolled, that parties may explain whether it is proposed to bring any further evidence of the construction which that law would put upon the said last will and testament, in relation to the questions in dispute between the parties in this cause, than is afforded by the concurring opinions of Messrs Pemberton and Knight Bruce, which have been already lodged in process on a case adjusted by the parties, and approved of by the Lord Ordinary.

"Note.—The Lord Ordinary can see no reasonable ground for doubting as to the point now decided. Even without the conclusive fact of the domicile, he should have held that the mere circumstance of the will being executed within the territory of the law of England, and in the style and with the formalities peculiar to that law (for it is evidently a technical instrument, and framed by a professional person), would be sufficient to bring all questions as to the meaning and effect of the expressions it contains (as well as of its general validity), within the exclusive cognizance of that law. That a part of the funds (all personal) thereby disposed of were locally within Scotland, and placed and directed to be continued under the management of a Scottish executor, can have no effect on the primary question of construction, by which it must be settled to whom these funds are truly devised; though such circumstances of local situation and administration may no doubt affect the manner in which they should be taken up or transmitted. Of this last nature, accordingly, was the case of Milligan, referred to in the argument (6th February 1826, 4 Shaw, p. 432), in which it was distinctly conceded by the party, who contended (successfully) that the *lex rei sitæ* should regulate the forms necessary for vesting the legatee with the property, that it was indisputable that the radical question as to 'who was truly entitled to succeed' must be wholly ruled by the law of the domicile, or of the place where the instrument was made. In a former litigation, accordingly, as to the meaning of another part of this very will, it appears clearly to have been considered as depending entirely on the construction which would be given to it by the law of England; and accordingly, the report bears that 'the Court

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ordered the opinions of the English counsel to be taken on a joint case, and judgment was ultimately given in conformity with the opinions so obtained. (Hardman and Cook, 6th June 1828; 6 Shaw, 920.) Nay, in an intermediate litigation between the very parties now comparing, as to who should be entitled, under the same will, to the interest of the very sums, the principal of which is now in dispute, the same course was followed, and the right of the surviving daughter established upon principles and conditions derived wholly from the law of England; and indeed, when the Lord Ordinary looks at the joint minute in the present action (No. 36 of process), by which, so long ago as March 1838, all the parties agreed that the opinion of English counsel should be taken, and that without any saving or reservation on any part of a right afterwards to object to the authority of any such opinion, the Lord Ordinary cannot but believe that they were all then satisfied and ready to admit that the law of England alone must regulate, and that the plea against the authority of that law, now maintained by one of the parties, has been suggested only by finding that this authority was against him.

"The Lord Ordinary has himself no doubt that the opinions already taken on a joint case, adjusted by judicial authority and from eminent counsel, suggested by the parties themselves, and approved of by the Judge, being clear and concurrent, must be conclusive of the question. But as the party excluded by that opinion has stated on the record that he has obtained or can obtain opposite opinions, it has been thought right, before issuing any final decree, to let him be heard upon the matter."

Hardman reclaimed. At advising,

Lord Justice-Clerk.—I don't think that this point is open.

Lord Medwyn.—There can be no doubt it is not.

Lord Moncreiff.—I can't hold that there is any doubt about such a question at all. The Lord Ordinary is perfectly right, even if there were no precedent for it. But the point has been decided, and in favour of the interlocutor; and there is no point clearer in international law, than that a will must be construed by the law of the place where it was made, and particularly so, if the maker was domiciled there. Indeed, all that can be said about the deed constituting two separate trusts, is just construction on the will; and the counsel for Mr Hardman cannot open his mouth without construing the will. But we cannot judge of that, and it must go for opinion elsewhere.

Lord Justice-Clerk.—I have no doubt at all, and agree with what has been said. I think, with the Lord Ordinary, that there is a want of good faith in now repudiating the opinion of English counsel, after the parties had settled on that course.

Lord Meadowbank absent.

The Court accordingly adhered, with additional expenses.

Lord Ordinary, Jeffrey.—Act. Dean of Faculty (Wood), Tawse; Tawse and Bonar, W.S., Agents.—Alt. G. G. Bell; W., A. G., and R. Ellis, W.S., Agents.—R. Clerk.—[G.D.F.]

9th July 1842.

SECOND DIVISION.—(G. D. F.)

No. 254.—DUKE OF SUTHERLAND, *Suspender*, v. HUGH ROSS, *Respondent*.

Process.—Jury Trial.—Issue.—Salmon-Fishing.—Statutes, 1318, c. 12; Robert I.; James I., 1424, c. 12; 1427, c. 6 or 116; 1429, c. 22 or 131; James II., 1457, c. 34 or 66; James III., 1469, c. 13 or 87; 1478, c. 6 or 73; James IV., 1488, c. 16; 1489, c. 16; 1503, c. 17 or 72; James V., 1535, c. 16; Mary, 1563, c. 3; James VI., 1579, c. 27; 1581, c. 3; 1685, c. 20; 1696, c. 35; 1698, c. 3; 1705, c. 12.—A party having presented an application for interdict against a certain salmon-fishing, an issue was prepared in the usual terms, whether the defender has wrongfully fished for salmon by means of stake-nets or other fixed machinery placed in a situation or situations prohibited by law. The Court refused a motion for the defender to hear parties, prior to any jury trial, on the question of law as to the situation prohibited by the Statutes in reference to salmon-fishing—the averments of fact as to the

situation of the machinery complained of being not admitted, but denied by the defender.

See ante, Vol. XIII. p. 580. The respondent, who was infest in his lands of Cambuscurry and Tarlogie, "cum lie zair et salmonum piscationibus," having proceeded to fish, and to erect certain fixed machinery for killing salmon on his said lands, which are situated on the Water of Dornoch, to the eastward of the Meikle Ferry, the suspender, who is proprietor *ex adverso* of the lands of Mid-Fearn and others, on the south bank of the stream, and of the river Shinn which falls into it, and of the salmon-fishings, presented this application for interdict against the respondent's operations as illegal, on the ground that the machinery complained of was not placed in the sea, but in an estuary or river, and in a locality falling within the prohibitions of the Statutes in regard to salmon-fishing. The averment of the suspender was as follows:—"The spot where the respondent was erecting this stake-net is not situated in the sea, but in an estuary or river mouth, *intra fauces terræ*, formed by the confluence of fresh water streams. The water running through Bonar Bridge, which is situated at a short distance above Meikle Ferry, is formed of the united waters of the Oyckell, Cassly, Shinn and Carron, and the Water of Mid-Fearn also joins above the Meikle Ferry; and it is the united water of these streams that constitutes the great body of water opposite to Cambuscurry. This estuary or river mouth, though periodically affected by the tide, receives little or no mixture of salt water. In consequence, at low water the channel of the river is distinctly visible below the lands of Cambuscurry, containing only the *flumina insulsa*, or descending fresh water stream; when the tide flows through the *fauces terræ*, or mouth of the estuary at the Gizzen Briggs, it only renders the water slightly brackish." These allegations were denied; and in reference to the question the respondent *pleaded*—1. That according to the true construction and effect of the ancient Statutes founded on by the suspender, the prohibitions could not be held to operate lower down than the point or line where the fresh waters descending from the upper streams meet the salt water of the sea in the Firth of Dornoch, at the lowest point of ebb-tide, below which line stake-nets and all other engines, being in the sea, are lawful. 2. The stake-nets in question, being situated below the said line in the Firth of Dornoch, were in the sea, and therefore not struck at by any of the statutory prohibitions; and the suspender not having averred that the same are above the said line, has not stated any relevant ground of suspension and interdict. 3. Under the terms of the respondent's titles, and having regard to the circumstances and evidence before averred and set forth, he is entitled to erect and use yairs, stake-nets, or other fixed machinery, for the catching and killing of salmon in the Firth of Dornoch, opposite to his lands before specified, in respect the said firth is not a locality to which the prohibitions of the Statutes against fixed machinery are in any way applicable.

The following issue was prepared by the issue clerk:

"Whether the defender has wrongfully fished for salmon opposite his lands of Cambuscurry, Tarlogie and others, or any of them, in the years 1841 and 1842, or either of them, by means

of stake-nets or other fixed machinery, placed in situations or a situation prohibited by Statute."

The Lord Ordinary approved of this as the issue to try the cause, but the respondent thereupon served the following notice on the suspender:

"TAKE NOTICE—That the Second Division of the Court will be moved on Saturday first, the 9th instant, to recal the subjoined interlocutor of the Lord Ordinary, approving of the issue hereto annexed; and before approving of any issue (*vide* Lord Chancellor's speech, *ante*, Vol. XII. p. 151), to hear the defender on the questions of law arising in the cause, and on the expediency of a remit to an engineer or person of skill before farther procedure."

At advising, it was *argued* by the respondent from the Tay case, and the terms of the judgment of the Lord Chancellor in the Cromarty case, and the Statutes referred to (see rubric), that there was a question of law as to the point or line designated by the Statutes, and set forth in the pleas of the suspender, within which it was illegal to fish, and that that question ought to be determined prior to any issue being sent to a jury.

Answered—That the motion was incompetent, as the facts on which the alleged illegal fishing turned were not admitted. The facts, as averred by the suspender, if proved, would exclude the point of law altogether.

Lord Moncreiff.—The respondent is just arguing the usual question, and wishes to get the law before the ascertainment of the facts, which are denied.

Buchanan, for the respondent, argued, that the case was not fit for a proof at large.

Lord Justice-Clerk could not agree to that.

Lord Moncreiff.—If jury trial had existed at the time of the Tay case, I am satisfied it would have at once been tried on an issue, and not disposed of as it was.

Lord Medwyn.—If this had been the first question of this nature, probably we might have seen reason for the motion; but that is not the case; and I cannot certainly now agree to it.

Lord Meadowbank absent.

The Court unanimously *refused* the motion—expenses reserved.

Act. Rutherford, A. Anderson; W. Mackenzie, W.S., *Agent*.—*Alt.* Buchanan; Sang and Adam, S.S.C., *Agents*.—Nimmo, *Clerk*.—[G.D.F.]

9th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 255.—ALEXANDER BLAIR, *Treasurer of the Bank of Scotland, Petitioner*, v. THOMAS RANKEN, *Common Agent in the Ranking and Sale of Land, Respondent*.

Ranking and Sale.—Decree of Certification—Process—*A petition to open up a decree of certification in a ranking and sale, presented after the lands were sold and vested in a purchaser, but while the price was still in manibus curiæ, for the purpose of rearing up a burden on the lands through a title which did not exist at the time the petitioner and other creditors had joined issue on a closed record in the process in regard to their claims and interests, refused as incompetent.*—Observed, that the object of the petition (if at all competent) could be discussed only in the ranking and sale, or in a reduction of the decree of certification.

In 1831, a ranking and sale of the estate of Land was brought, in which, after claims and interests were

given in, the usual decree of certification was pronounced on 24th May 1832.

Amongst other properties comprehended in the ranking, were included the lands of Knocksting, in the stewartry of Kirkcudbright. After the usual preliminary steps, these lands were exposed to sale, and were purchased by Mr M'Turk on 6th March 1833. The purchaser duly consigned the price. A decree of sale was pronounced in the usual form, and extracted in the purchaser's favour, and by virtue of this title, the purchaser has since that time been in possession of the lands. The Bank of Scotland put in a claim as heritable creditors over the lands of Knocksting. Their claim arose out of a loan of £9000 made by the Bank in 1824 to Alexander Smith of Land (the father of the common debtor, William Smith), and his brothers, James Smith of Jerburgh, and John Smith of Kirkconnell. In security of this loan, Alexander Smith disposed his lands of Knocksting, while his brothers also conveyed certain other lands to the bank. These brothers having become bankrupt, the lands so disposed to the bank became, amongst with their other estates, the subjects of a separate process of ranking and sale, called the ranking of Jerburgh. The Bank of Scotland entered a claim as heritable creditors for the debt of £9000 in the ranking of Jerburgh, as well as, in so far as the lands of Knocksting were concerned, in the present ranking of Land.

In the ranking of Jerburgh, the Bank of Scotland drew full payment of their debt, with interest; but as this was at the expense of two postponed creditors, the National Bank of Scotland and Mr Graham of Calside, who were claimants in both rankings, the Bank of Scotland were taken bound to assign to them their right over the lands of Knocksting, which was accordingly effected.

It appears that in the ranking of Land, the claim of preference on the part of the Bank of Scotland, in virtue of their heritable bond, was objected to by the common agent, on the ground that although there was a good personal right in Smith, yet that, owing to certain blunders in making up the feudal title, his infestment was inept. A record was made up in reference to the objection, by revised condescendence and answers, and closed on 5th July 1833. It appeared that no direct judgment was pronounced on the question, but it came indirectly to be decided by the judgment in the case of the common agent against Mrs Hoggan or Smith, whose claim of terce, so far as sought to be extended over Knocksting, was objected to on the same ground, of a defective feudal title in the husband. The objection there was sustained by the Court, 13th February 1833, and the judgment was affirmed on appeal, 30th July 1840.—See Vol. XIII. p. 408.

In this position the present petition was presented by the Bank, in which, after alluding to the previous procedure in the ranking, the petitioner set forth, "That objections having thereafter, in the course of the proceedings, been stated to the sasine, in so far as it regarded the property thereby conveyed by the said Alexander Smith in security of the said debt, the petitioners expedite a new infestment on the said bond, which is dated the 7th, and recorded in the Particular Register of Sasines at Dumfries, the 9th day of December 1840, which has since been produced in pro-

cess, but as this last production was made after the decree of certification had been pronounced in the process of ranking and sale, the petitioners have been advised to make the present application to your Lordships, to recal the foresaid decree of certification and reduction, to the effect of allowing the last instrument of sasine, dated and recorded as aforesaid, still to be received, notwithstanding of the said closed record, in order that such effect may be given thereto in the ranking as may be just." And they craved the Court accordingly. But the common agent in the ranking of Land, objected to the application as incompetent, as an attempt to open up a decree of certification regularly obtained, and which had been followed by a sale of the lands, while these, again, had been vested for years in the person of a purchaser. The Bank, it was alleged, were not the true parties for whom the application was made; it was made for behoof of the postponed creditors. But the bank had drawn full payment of their debt; and though they had assigned their right, yet it was only such right as stood in their persons at the time of the assignation. Now at that time the error as to the seisin existed. They had no valid right, as was plain from the decision in the question with Mrs Smith; and it was not now competent to attempt to bolster up that defective title, by expeding a new seisin, on the supposition of the precept not being exhausted, after certification, and after the lands were sold and vested in a purchaser. It was also incompetent on another ground to do this, for after issue had been joined in the competition, as depending on the title then set forth and disclosed on the closed record, the petitioner was not entitled, *pendente lite*, and after the closing of the record, to substitute a totally different title, and on that to seek to prevail. It might be competent to open up a decree of certification to the effect of admitting grounds of debt previously possessed and omitted to be produced; but here that was not the case, for previously no title existed, and the proposal was to introduce a new one. But decree of certification strikes at the construction of a new title, or what is the same thing, one subsequently made up, and endeavoured to be substituted for that originally founded on.

By the 54th Geo. III. c. 137, § 10, it is provided,

"that when the estate of a debtor is brought into the Court of Session by process of judicial sale and ranking, the decree of sale to be pronounced by the Court shall be held as a general decree of adjudication in favour of every creditor who shall afterwards be included in the decree of division; and the effect of such general decree shall be the same in all competitions or questions of ranking and preference, as if it had been pronounced and extracted of the date of the first calling of the process of sale before the Lord Ordinary in the Outer-House; and no separate adjudication shall be allowed to proceed during the dependence of a judicial sale."

By this enactment, the hands of all creditors are expressly tied up from taking any proceedings towards making good a preference by diligence, during the subsistence of the process. It was, therefore, altogether inconsistent with this provision, and the plainest principles of justice, if, while every other creditor was prevented from acquiring a preference, it should be open to one to make good such a preference by proceedings during the subsistence of the process, such as were here attempted. It was also objected to as an attempt to

affect the lands sold by rearing up an heritable security which did not exist at the time of the sale under the ranking.

At advising,

Lord Justice-Clerk said, that this petition was clearly incompetent, after what had taken place in the ranking, and the petitioner, if he wished a remedy, could apply for it, by appearing in the process where the record had been closed, if he chose.

Lord Medwyn.—The petition might be competent in point of form; but he was of opinion that the substance of the request was quite incompetent.

Lord Moncreiff considered it was impossible to grant the application, and that if the petitioner wished redress, he ought either to go back to the process of competition, or to bring a reduction *reductivè* of the decree of certification. But it was impossible to grant the application on such a statement as it contained.

Lord Medwyn.—To grant the application, would be in effect to put an heritable burden now on the estate which never previously existed. It was also impossible, after what had been done in the process, to think of opening up the decree of certification.

Lord Meadowbank absent.

The Court unanimously *refused* the application, with expenses.

Act. Young; A. and W. Goldie, W.S., *Agents*.—*Alt. Rutherford*, Penney; T. Ranken, S.S.C., *Agent*.—*T. Clerk*.—[G.D.F.]

12th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 256.—ROBERT KIRK, *Pursuer*, v. ANN FORBES, *Defender*.

Process.—Relevancy.—Summons.—Malice.—Diligence, Illegal use of.—Damages.—Reparation.—*A raised an action of damages against B for an alleged illegal use of diligence, which he averred had been obtained on the dependence of a groundless action brought against him to recover damages. Before this latter action was tried, the first was remitted, on summons and defences as the record, to the jury clerks to prepare an issue, who refused one, on the ground that the summons did not aver that the diligence had been obtained maliciously. In the interval, damages were found due in the other action, in consequence of which the Lord Ordinary was moved to dismiss the suit at the instance of A, as it was now shown by the result that B's action was not groundless, &c.—Question raised, Whether, in the circumstances, it was necessary for A to allege malice? and the parties allowed to give in additional statements as to the result of B's action, as bearing on the said question.*

The pursuer set forth in the summons in this case, that the defender

"lately raised a groundless action of damages against him, concluding, for alleged causes therein specified, for payment to the defender of the sum of £500 Sterling in name of damages, and of the farther sum of £100 Sterling, or of such other sum, more or less, as the expenses of the process to follow thereon: That the summons to that action of damages was dated and signed the 12th day of April last, 1841, and was executed of that date against the pursuer: That no previous intimation was given to the pursuer by the defender of any alleged cause of action against him, whereby, if true, he might extrajudicially have adjusted and settled any misunderstanding betwixt them; but in the absence of giving any such intimation to him for that purpose, the defender, most wantonly, nimiously, and oppressively, of even date with the date of her summons of damages, raised letters of inhibition and arrestment, which were signed on the following day, at her instance against the pursuer; whereby, without his knowledge, and without any just and proper cause for so doing, she caused one of our messengers-at-arms to fence and arrest the sum of £1000 Sterling in the hands of each of

the following persons," "all to remain in their hands under sure fence and arrestment at the instance of the defender."

The summons then proceeded:

"That in aggravation of her wanton, nimious, oppressive, and injurious measures of using arrestments to that extent, which amounted to the sum of £11,000 in the hands of the foresaid several persons, who were the pursuer's own tenants, the defender wantonly, nimiously, oppressively, and injuriously, used another and an additional arrestment of same extent against the pursuer in the hands of Mrs M'Lean, residing in Cassels Place, Leith Walk, near Edinburgh, who was not one of his tenants, but tenant of a different proprietor, and who resided in a different tenement of land from what belonged to the pursuer, meaning thereby unnecessarily to spread discredit against him: That in still further aggravation of her wanton, nimious, oppressive, and injurious measures, the defender, of even date with the date of signing her said letters of inhibition and arrestment, caused one of our said messengers also to inhibit and discharge the pursuer from touching or affecting his heritable property, for his own or other proper purposes; all as more fully set forth in the executions of her said diligence of inhibition: That she also published that prohibitory diligence to our whole lieges, and, upon the 23d day of said month of April last, the defender wilfully, nimiously, oppressively, injuriously, and maliciously recorded the same, and the executions thereof, in our general register of inhibitions, to render it an effectual and a lasting encumbrance on the pursuer's heritable property: That the pursuer was at that time negotiating for a considerable loan over his heritable property, to enable him to retire, when due, certain current obligations which he had granted in payment of the expenses of extensive repairs given to the barque 'Ospray' of Leith, consisting of 381 tons old measurement, now on a voyage from the port of Liverpool to the port of Bombay in India, whereof the just and equal one-half belongs to himself: and in consequence of the encumbrance thereby produced on his said heritable property, by the registration and improper use of that prohibitory diligence, and execution thereof, or of reports injurious to his credit, raised and circulated by and through the adoption and use of that groundless action of damages, and oppressive diligence used thereon, the pursuer has since failed in procuring a loan of money to the extent of £2300 Sterling, on the security of his heritable property, after a previous arrangement had been made with the proposed lenders to give it; and who had agreed to take the said security for the same, whereby the pursuer has sustained great loss, injury, damage and expenses, and thus been put to very great uneasiness in peace of mind, and to pecuniary inconvenience: That the pursuer has also been put to considerable expense and inconvenience, in procuring a partial loosing of the foresaid arrestments, and he is still exposed to the risk of incurring other and still greater expense, to extricate himself from the remaining effect of the defender's diligence."

The pursuer then subsumed:

"That the raising and executing of the foresaid groundless action of damages, and the raising, passing, and executing of the foresaid oppressive diligence of inhibition and arrestment, have annoyed, embarrassed, and injured the pursuer in his credit, peace of mind, character and reputation,—all as already mentioned: And although," &c.

The defender admitted having raised and executed the diligence set forth in the summons, which, she alleged, was done in the *bona fide* belief that it was necessary for the action which she had instituted against the pursuer. The diligence was besides regular in all respects, she averred, and had been competently obtained; and the arrestments had not attached more than £100. In defence she pleaded—1. That the diligence not having been recalled, as being nimiously or oppressively used, it is incompetent, while it subsists, to found upon it as inferring a claim of damages: 2. That as it is not averred in the summons that the diligence complained of, which was undoubtedly compe-

tent, was used maliciously, the action is irrelevant to infer its conclusions: 3. That the diligence complained of was competent and regular, and lawfully used by the defender.

The case was remitted on summons and defences, as the record, to the jury clerks for an issue, and before a trial had taken place in the action at the instance of Forbes against the pursuer, but they refused to give one, on the ground stated in the second plea in defence. By the time, however, it had returned to the Outer House, Kirk's action had been tried, and it appeared that the jury had returned a verdict on one issue in her favour—damages £50. This verdict was afterwards applied by the Court.

In this state of matters the Lord Ordinary was moved by the pursuer to allow an issue on the summons and defences; but the defender, on the other hand, moved his Lordship to dismiss the case, in respect of the verdict which had now been returned by the jury in her favour, which proved that the substance of the action—which, as alleged, was the nimious use of diligence on a groundless action—was without foundation. The Lord Ordinary found "that it is not necessary for the pursuer to aver malice," and again remitted to the jury clerks to prepare an issue. His Lordship appended the following note to the interlocutor:

"This case being an action of damages, was sent of course to the Issue-Chamber, but it was brought back to the Lord Ordinary, on the statement that the clerks refused to give the pursuer an issue, because, in so far as concerned the execution of the diligence complained of, there was no averment of malice in the summons.

"The Lord Ordinary has decided this point, and has purposely avoided giving any other, because this is the only one that has been properly raised. It may still be a question whether, after the verdict in the original cause, this action became maintainable, or whether, independently of malice, there be other adequate terms in the summons, and which of them, or whether all of them are to be put into the issue? But this is for the issue clerks in the first instance. The only point now is, whether the absence of the imputation of malice excludes the pursuer from having an issue,—in other words, is his action relevant, without malice being inferred?

"The Lord Ordinary thinks that it is.

"But undoubtedly the practice of the Court has not been uniform, either in the issues that have been granted, or in the principles on which they have proceeded. It rather appears to him, however, that all the cases which have been held so far privileged as that the defender could only be reached by an allegation of malice, have been of three kinds, viz., where the act complained of was done, or relevantly averred to have been done, 1st, in the performance of a duty; or, 2dly, in the course of a judicial proceeding; or, 3dly, while seeking the protection, even though extrajudicially, of the officers of criminal justice. An exemption from responsibility for collateral injury, where no malice is offered to be proved, is extended to all these cases upon obvious grounds of public policy.

"But what public policy is there in protecting a party against the ordinary legal consequences of his improper conduct, merely because he has inflicted injury by means of a formal *ex parte* warrant? The defender's argument is, that such warrants are judicial; and in one sense this is true. In form they issue from a court. But they are obtained for the asking, without any judicial inquiry or control, at the discretion, and at the risk of the applicant, who, in seeking them, is prosecuting his own private interest only. The Lord Ordinary can see no principle for giving any privilege to such cases,—and this, whether the diligence be employed to injuring another in his person or his property. In truth, though not in form, it is all extrajudicial.

"Still there are cases in the books which it is difficult or

impossible to reconcile with this, or perhaps with any general principle. But on the whole, the Lord Ordinary agrees with Lord Jeffrey in his reasoning and exposition of precedents in the case of Swayne, 27th June 1835. The case of Duffus, 4 Murray, 558, is the likeliest in the nature of wrong said to have been done; but there the pursuer averred malice, and therefore this question could not arise."

The defender reclaimed, praying the Court

"to recal the foresaid interlocutor, and to find that it was necessary for the pursuer to set forth that the diligence complained of was maliciously used, and also that the summons is otherwise not relevant, in respect of the result of the action on which the said diligence was used, and therefore to dismiss the present action with expenses, or to do further or otherwise in the premises as to your Lordships shall seem just."

The Court, without expressing any opinion on the general question as to malice, or whether the pursuer was bound to insert malice in the present summons, considered it to be premature to decide that, as it might not, after all, be necessary for the disposal of the case, and rather thought that the course was to allow the defender to have an opportunity of making an addition to her defence, so as to bring out the fact, which could not be disputed, that a verdict had been returned in her favour, with power to the pursuer to give such explanation as he thought proper; and to allow the Lord Ordinary to recal or vary, or otherwise alter his interlocutor, after considering the bearing of the additional matter on the question. The Court

"Recal, *hoc statu*, the interlocutor complained of, and remit to the Lord Ordinary to receive such additional statements of fact as the parties may be advised to offer, arising on the result of the action at the defender's instance, upon the dependence of which the diligence here complained of was used, and to proceed farther thereon as to his Lordship may seem just."

Lord Ordinary, Cockburn.—*Act.* Thomson, Hector; J. Meiklejohn, W.S., *Agent.*—*Alt.* Pyper; D. Mitchell, jun., S.S.C., *Agent.*—*T. Clerk.*—[G.D.F.]

12th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 257.—THOMAS COREY and MANDATORY, Advocators, v. WILLIAM ANDERSON, Respondent.

Process.—Advocation.—Bill-Chamber.—Statutes 6 Geo. IV. c. 120, § 40, and 1 and 2 Vict. c. 86, § 1-6.—A. S., 11th July 1828, and 24th December 1838.—*Held that, in advocating against an interlocutory judgment of a Sheriff allowing a proof, the proper course is to present the note of advocation to the Lord Ordinary in the Bill-Chamber, and not to lodge the note in the hands of a clerk of the Court of Session, omitting the Bill-Chamber.*

The advocators raised an action against the respondent before the Sheriff of Forfar, at Dundee, in reference to the freight of a vessel called the Millford, and after certain procedure, the Sheriff pronounced this interlocutor:

"Dundee, 8th March 1842.—Before answer, allows a proof to both parties *habile modo* of their respective averments in the closed record, in so far as not admitted, and to each of them a conjunct probation, the pursuers being to lead their proof within one month from this date, and to give the defender three days' previous notice of the time and place fixed for proving, and the defender to lead his proof within one month thereafter, and to give the pursuers similar notice of the time and place fixed for proving: Grants warrant for letters of diligence, at the instance of both or either of the parties, against witnesses and havers, and commission to Messrs David Cobb, William Reid, Archibald Duncan and Duncan M'Lachlan, writers, Dun-

dee, or any of them, for taking the depositions of the witnesses and havers, and receiving and marking their exhibits, and assigns for reporting said proofs the respective periods above specified." (Signed) "JOHN I. HENDERSON."

The pursuers of the action then presented a note of advocation in the following form:

"That the above interlocutor was pronounced in an action in which the said Thomas Corey and William Allen Flowerdew, as mandatory foresaid, are pursuers, and the said William Anderson is defender, depending before the Sheriff of Forfarshire. That as the claim in said case exceeds in amount the sum of £40 Sterling, it is competent to the complainers to have the cause advocated in terms of the Act of Parliament 6 Geo. IV. cap. 120, § 40; and the complainers are desirous to avail themselves of the provision in said Statute.

"May it therefore please your Lordships to advocate the said action from the said Sheriff to your Lordships, and to discharge the said Sheriff, and all other inferior judges from farther proceeding therein; or to do otherwise in the premises as to your Lordships shall seem proper."

There was no statement of facts attached to the note, but the advocators, as usual, appended additional pleas in law in support of the note. The note of advocation, with the pleas, was lodged at once in the hands of one of the clerks of the Court of Session, without any intermediate procedure in the Bill-Chamber.

The regularity of the step was brought in question by the respondent on the following plea:—This advocation has been incompetently brought, and ought to be dismissed, in respect that being an advocation under the 40th section of the 6th Geo. IV. c. 120, a bill or note of advocation ought to have been presented to the Lord Ordinary on the bills, and the case could not, *de plano*, be advocated to the Court of Session without passing through the Bill-Chamber.

The Lord Ordinary repelled the objection; on which the respondent reclaimed, praying the Court

"to alter the above interlocutor submitted to review; to find that the advocation has been incompetently brought into Court; to dismiss the same, and to find the advocators liable to the respondent in the expenses incurred by him in the advocation."

He argued.—That by the 40th section of the 6th Geo. IV. c. 120, all advocations of such interlocutory judgments pronounced in the Inferior Court, allowing a proof, where the cause of action was above £40, must proceed by bill of advocation in the Bill-Chamber; and that as to the present case, and others of the same nature, which were not advocations of final judgments, it was not provided, in the 1st and 2d Vict. c. 86, § 6, that they, like advocations of final judgments, should, as under the 1st section, be lodged at once with a clerk of session; and, accordingly, that such cases must be held to be excepted, and not provided for by 1st and 2d Victoria; and consequently, that they fell under the provisions of the 40th section of the 6th Geo. IV. c. 120, which specially provided that the first step in advocating was by a bill of advocation lodged in the Bill-Chamber. Section 10 of the Act of Sederunt, 24th December 1838, merely provided that the form of advocations of interlocutory judgments should be altered, and instead of a bill it should be by a note, in the same way as in advocations of final judgments. But the Act of Sederunt did not provide that the mode by which the advocation was to be introduced into Court, should be by lodging the note in the hands of the clerk of the Court of Session, nor did it dispense with

the Bill-Chamber. It was accordingly not objected here, that the form of the note was wrong, as the Act of Sederunt specially provided it should be by a note,—the objection being only to the way it had been introduced into Court. And it was argued, that even if the Act of Sederunt had dispensed with the mode of passing through the Bill-Chamber, it was *ultra vires* of the Act of Sederunt to defeat the imperative words of the Statute (6 Geo. IV.)

Answered—That the general and usual course had been followed in this case as in all others, and that the Act of Sederunt, 1838, was sufficient authority for the practice, by which it was provided, that the form of the advocacy of an interlocutory judgment should be the same as that of a final judgment.

The Court were unanimously and clearly of opinion, that the Act of Sederunt, 1838, did not provide that such cases should at once be introduced into Court by a note lodged with the clerk of the Court of Session, but merely altered the form by way of bill to that of note, and nothing more; and that as such was the case, and the 1st and 2d Vict. did not repeal the 6th Geo. IV., the argument of the reclaimer was insuperable, that the note here ought to have been presented in the first instance to the Lord Ordinary on the bills. But as a strong averment was made as to the practice being without exception of the nature under consideration, their Lordships granted the prayer of the reclaiming note, without finding the reclaimer entitled to expenses.

Lord Ordinary, Cuninghame.—*For Reclaimer*, Rutherford, Cowan & W. Miller, S.S.C., *Agent.*—*For Advocators*, P. Robertson, Milne; Greig and Morton, W.S., *Agents.*—*R. Clerk.*—[G.D.F.]

14th July 1842.

FIRST DIVISION.—(H. B.)

No. 258.—WILLIAM BROWN, *Charger*, v. THOMAS SAMUEL and COMPANY, *Suspenders.*

Partnership—Adventure—Contract—Clause.—*A manufacturer engaged to give the shipper one-fourth of the profit or loss on his goods, it being understood that he was to invoice them at the fair market price of the day; but in the event of loss on that price, to reduce it to prime cost. A trifling loss having been sustained—Held that the manufacturer was not bound to reduce the market price further than necessary to cover that loss.*

William Brown, carpet manufacturer, Kilmarnock, entered into an arrangement with Mr Thomas Samuel (afterwards Thomas Samuel and Company), founded on the following letter written by the latter, and accepted by the former:

"Wishing to confine the exertions of my friends in South America to you, viz., at Buenos Ayres, Valparaiso, St Iago de Chili, and Lima, I have made a purchase of Brussels carpeting from Kidderminster, purely to prevent any interference in that or any other article in your line, knowing from you that it is your intention to manufacture this kind also, the amount will be from £300 to £400. I have therefore to propose to you, if perfectly agreeable, to give you an interest in these and future sendings of Brussels carpeting, provided it shall be deemed advisable, to the extent of one-half amount of profit and loss after all charges, interest, &c., is deducted, provided that you allow me an interest of one-fourth amount of profit or loss on your own manufacture, it being understood that yours are to be invoiced at the fair market price of the day; but, in the event of loss arising on these prices, you are to reduce the invoice price to prime cost, covering manufacturing charges."

Four shipments of carpeting were accordingly made—the last only yielding a profit, and the others resulting in a trifling loss. In apportioning the loss, a misunderstanding arose between the parties. Brown maintained, that under the agreement he was not bound to reduce the invoice price further than was necessary to cover the amount of the loss; whereas Samuel and Company maintained, that by the mere fact of a loss, however small, he was bound to reduce the invoice price to prime cost, including manufacturing charges, though the effect of this reduction should be to yield them a profit while it left him none. Samuel and Company having rendered their accounts on this footing, Brown brought an action against them for the difference, before the Magistrates of Glasgow, and having succeeded in obtaining a decree, extracted it, and gave a charge to the defenders, who suspended.

The Lord Ordinary, "of consent of parties, who state that the cause is fitter for written than verbal discussion," ordered cases, and afterwards made *avizandum* to the Court, who pronounced the following interlocutor:

"Find the letters orderly proceeded, and repel the reasons of suspension: Find no expenses due in this Court, and decern."

Lord Ordinary Cockburn, for Jeffrey.—*Act.* Penney; Gibson-Craig, Dalziel and Brodie, W.S., *Agents.*—*Alt.* Mackenzie; J. and J. Macandrew, S.S.C., *Agents.*—*B. Clerk.*—[H.B.]

14th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 259.—JOHN WALDIE, *Advocator*, v. THE COMMERCIAL BANK, *Respondents.*

Personal Exception—Landlord and Tenant—Circumstances in which a landlord, who might otherwise have claimed an article as a fixture in a dwelling-house let by him, was held to be precluded, personali exceptione, from so doing.

The advocator, who had for many years been agent for the Commercial Bank at Kelso, was proprietor of the house in which the business of the agency was transacted, and the Bank held the premises on a lease from him from year to year. On their entry they fitted up the premises as a bank office, and built into the wall a stone safe, having an iron door and lock fixed or built into the wall. When the advocator was relieved of his appointment, he gave up an "inventory of the furniture belonging to the Commercial Bank of Scotland at Kelso," and he included therein "1 stone safe, with iron door and inner chest;" and at a meeting of parties in reference to the winding up of the agency business there, a minute was written out, which was signed by Waldie, which contained the following passage:

"Mr Waldie having received a letter from the secretary of the bank, dated the 5th instant, intimating that the directors had resolved to relieve him of his charge as agent for the bank at Kelso, and requesting that he would hand over to Mr Mackenzie all the bank's property in his official custody, and this time having been appointed for that purpose, Mr Waldie accordingly delivered over to Mr Mackenzie the keys, cash, bills, books, &c., in his possession.

"Mr Waldie also delivered over the furniture and fixtures in the office belonging to the bank, conform to inventory annexed, signed as relative hereto."

The Bank having proceeded to remove the iron door, &c., of the safe, the advocator applied to the Sheriff to prevent their so doing, on the ground of being fixtures, and to restore them if carried away.

The Bank appeared, and *argued*—That after Waldie had, by the above inventory and minute, admitted that the safe was theirs, and had agreed to deliver it over, they were entitled to remove it; and in so doing, they stated they were willing to fill up the opening in the wall occasioned by the removal, and to be at the expense of putting it in a proper state, to the advocate's satisfaction.

The Sheriff,

"in respect the stone safe and others referred to are truly fixtures and therefore the property of the petitioner, and that the mere mention thereof in the inventory (No. 1. of production) was not *per se* sufficient to transfer the property to the respondents, Repels the defences, confirms the interdict, and ordains the respondents to restore to the petitioner's premises the door, lock, and others which were carried off by them or their agents, and decerns: Finds the respondents liable in expenses, and appoints an account thereof to be given in and taxed."

The Bank advocated. The Lord Ordinary pronounced the following interlocutor:

"19th March 1842.—The Lord Ordinary having heard counsel in this advocacy, and thereafter considered the record and whole process.—In respect it is established by documents under the hand of the original pursuer himself, that the stone safe, with iron door and lock, specified in the record, was not a fixture under the lease, or other title whereon the advocates possessed the premises under him—advocates the cause, sustains the defences, and recalls the interdict complained of: Finds the pursuer liable in expenses, both in this and in the Inferior Court.

"*Note*.—The plea of the pursuer in the present case appears to be unfounded in law, and contrary to justice and good faith. He was long agent for the Commercial Bank at Kelso; and, in order to obtain accommodation for their business, the bank took a lease of a house belonging in property to the pursuer. Some time before the termination of the lease, that bank wrote to him for a statement of their property in these premises, and on two separate occasions he transmitted lists, which included the safe in dispute as part of the bank's property.

"In these circumstances, the Lord Ordinary cannot help viewing it as a plea quite untenable and preposterous for the pursuer now to allege, that he made out these lists as bank agent, and not as landlord, as if the same man could, by any change in his character or designation, retract or contradict a fact which he himself had recently before attested.

"It is supposed, also, that the *ratio* assigned by the learned Sheriffs for their judgments in the Court below is equally inadmissible. It is laid down that the pursuer's acknowledgment cannot operate as a *transfer* of heritable property. But when a landlord admits that such an article as a safe belongs to the tenant, the effect of the admission is, to show that the fixture or article never was a part of the freehold transferred to, or inheritable by, the landlord.

"The direct effect of all special agreements as to fixtures between landlord and tenant is, to bar the plea that particular erections made by the tenant shall ever form any part of the heritable property; and when the landlord here gave in lists to the bank as tenants, setting forth this safe as part of the tenant's property, that document is equivalent to a declaration that the article in question was erected and put up originally in the premises on the faith and understanding that it should be removable by the tenants.

"There cannot be a doubt that this was a fair and competent arrangement between landlord and tenant, when they contracted with each other. In a passage quoted from Professor's Bell's Commentaries, in a learned pleading before the Inferior Court, sundry cases are cited to show that soap-boilers' vats, and bakers' ovens, may be declared moveable by the agreement of parties. (1 Bell's Com., p. 753.) And why should the stone safe of a banker, or the stone cistern of any other tenant (if that had been erected by him under a similar covenant), be competently held of the same description? It rather appears to be singular that the pursuer should have thought it worth while to put so much expense to hazard in trying such a question."

On a reclaiming note, Waldie *pleaded*—That the safe was a fixture, and as such belonged to him as landlord, and that it could not be removed, though it might leave a question of melioration as between him and his tenant.

The Court were of opinion that he was not now entitled to plead that it was a question as between landlord and tenant, after he had admitted, as between the bank and him as agent, that the article belonged to the bank, and had agreed to deliver, or rather had in fact delivered it over to them; and their Lordships were unanimously of opinion that the judgment of the Lord Ordinary was right; but as it was clear, from the explanations of parties, that the article was a fixture, their Lordships varied the interlocutor so as to meet that fact.

The Court

"Recal the interlocutor complained of; but in respect that, by the minute of 9th September 1840, it is proved *scripto* of the reclaimer that he then delivered over to the superintendent of the Commercial Bank the stone safe with the iron door, referred to in the petition to the Sheriff of Roxburghshire, as the property of the bank, Alter the interlocutor of the Sheriff, and recal the interlocutor complained of, and remit to the Sheriff with instructions to see that the room be restored to its former condition, or a door placed on the safe, in terms of the proposal contained in the addition to the answers for the Commercial Bank in the Sheriff Court, and that in the option of the reclaimer: Find the reclaimer liable in the expenses incurred by the respondents in this Court, and in the Inferior Court, up to the date of the Lord Ordinary's interlocutor reclaimed against, and no further expenses; appoint an account," &c.

Lord Ordinary, Cuninghame.—Act. G. G. Bell; Robert Laidlaw, S.S.C., Agent.—Alt. J. S. More; J. A. Campbell, C.S., Agent.—F. Clerk.—[G.D.F.]

15th July 1842.

SECOND DIVISION.—(G. D. F.)

No. 260.—THOMAS ANDERSON (*Smith's Trustee*), Pursuer, v. THE TRUSTEES of the deceased ARCHIBALD WALKER, Defenders.

Proof.—Evidence.—Jury Trial.—Circumstances in which the Court refused a motion to set aside the verdict of a jury, as being against evidence.

Bankrupt.—Reduction.—Statute 1696, c. 5.—Circumstances in which an heritable bond by a party within sixty days of bankruptcy, in favour of a creditor who had made prior advances on the faith of the security being granted, was found not to come under the sanction of the Act 1696, c. 5.

On 1st February 1840, Andrew Smith granted an heritable bond and disposition in security to Archibald Walker, as for an instant loan of £1300, in the usual terms. The deed contained no particular reference as to the way and manner, or the circumstances in which the loan was contracted. Walker was immediately infest, and on the 12th February thereafter, Smith was sequestrated, when his trustee brought an action to reduce the bond as a preference illegally granted to a creditor within the sixty days of bankruptcy.

The following issue was approved of, and tried by a jury:

"It being admitted that the pursuer is trustee on the sequestrated estate of Andrew Smith of Eilenbank, and that the said Andrew Smith granted the bond and disposition, No. 5 of process, sought to be reduced:

"Whether, on the 1st day of February 1840, the date of the said bond and disposition, the said Andrew Smith was notour bankrupt, or at least was so within sixty days after the time

when the said bond and disposition was granted; and whether, contrary to the Statute 1696, c. 5, the said Andrew Smith granted the said bond and disposition in satisfaction or security of a prior debt due by the said Andrew Smith to Archibald Walker, writer and banker in Auchtermuchty, in preference to the other creditors of the said Andrew Smith?"

It appeared from the evidence in process, that Smith had applied to Walker for a loan over his property in 1839, long prior to his bankruptcy, and that the latter was either to procure it for Smith, or to advance it himself. Walker was a bank agent in the neighbourhood of Smith, and it appeared that Smith had been allowed to overdraw his account before the loan was procured, on the assumption that a loan would be got, but as that did not take place, it appeared from the evidence as if the bond had been granted in security to Walker for the over drafts, for which, of course, Walker was liable to his own constituents.

The following verdict was returned:

"At Edinburgh, the 29th day of March 1842 years, before the Right Honourable the Lord Justice-Clerk, compared the said pursuer and the said defenders by their respective counsel and agents, and a jury having been impanelled and sworn to try the said issue between the said parties,—say upon their oaths, that in respect of the matters proven before them, they find that, on the 1st day of February 1840, the date of the said bond and disposition, the said Andrew Smith was notour bankrupt, or at least was so within sixty days after the time when the said bond and disposition was so granted: Find, that at the time of advancing the sum of £1190, or previously to such advances, it was expressly stipulated and agreed upon, as a counterpart of the transaction, that the borrower, Andrew Smith, should give an heritable security for whatever sums Walker might obtain, or advance as a loan for Smith to the extent of £1500, over the specific subjects described in the security afterwards granted on the 1st of February: Find, that although such stipulation for a specific security was not reduced into any binding agreement or formal writing at the date thereof, yet it is evidenced by writings applicable to, and prior to the advances, as well as by the facts and circumstances of the transactions between the borrower and the defender: Find that the sum of £1190 was advanced by the defender at different times, after such express stipulation and agreement, in reliance upon the same, and that the sums would not have been advanced, except in respect of that stipulation for a specific security over specified heritable subjects, as the counterpart of the transactions: Find that Walker becoming liable for sums drawn out by Smith from the bank, beyond the amount for which there was caution, did truly make advances thereby to and on account of Smith; and in doing so, he relied upon an express stipulation as aforesaid, previously entered into for specific security to be granted for the sum of £1500, being more than the amount of the sums for which Walker so became liable: Find that the original stipulation for a security was not exclusive of the transaction taking the turn it actually did, of Walker himself making the advances on the faith of the intended security, if he did not get a loan from another."

The pursuer now moved the Court to set aside the verdict as against evidence, but the Court *refused* the motion.

At advising,

Lord Medwyn.—There appears to me to be quite sufficient evidence to support the verdict, and I can't hold it to be against evidence.

Lord Moncreiff.—I am of the same opinion; and that the evidence is sufficient to support the verdict. There is evidence *scripto* that money was to be given or procured by Walker for Smith, long before the bankruptcy, and there is evidence *aliunde* that the money was given by Walker to Smith in security of which Smith was to convey his property. It may be true, that it is somewhat doubtful whether Walker was himself to give the loan, or to get the money for Smith from another; but it is

plain the deed was as if for a loan, which was previously arranged to the date of the bond. It was said that Smith did not know that Walker was bound for the over drafts, but Smith says, "I knew that he was personally interested, as I got money from him, and that it was necessary that he personally should be covered." And then there are payments in consideration of the bond, and these are entered in Smith's books as to account of the bond. If there be a point of law left by the verdict, as to the competency of the bond covering the over drafts, it is still open to be raised by the pursuer, so I don't say any thing about it.

M'Neill said, it was not intended to be raised.

Lord Moncreiff.—My opinion is, that there was a prior agreement to make a loan, and that the evidence supports the verdict.

Lord Justice-Clerk.—I concur. I asked the jury at the trial to insert certain findings in the verdict, that any point of law, if there was one, might be afterwards raised. But then, that point was totally distinct from the evidence, which, in my opinion, supports the verdict, and makes out the agreement that Walker was under an obligation previously to make the advance. The evidence adduced to the jury clearly makes out this; and the advances were made on account of the bond. The more it is looked at, the more the evidence appears to me to support the verdict.

Lord Macdowbank absent.

Presiding Judge, Lord Justice-Clerk.—*Act.* A. M'Neill; J. W. Arnott, W.S., *Agent*.—*Alt.* Deas; T. Leburn, S.S.C., *Agent*.—[G.D.F.]

16th July 1842.

FIRST DIVISION.—(H. B.)

No. 261.—COLONEL HUGH DUNCAN BAILLIE, *Suspender and Interdictor*, v. DONALD MACKAY, *Respondent*.

Landlord and Tenant.—Lease.—*A tenant in an agricultural subject, held not entitled, without the landlord's consent, to erect upon it a shed for public stabling, and that at a short distance from an inn belonging to the landlord.*

Donald Mackay held under Colonel Baillie of Redcastle the two farms of Kessock and Easter Kessock. On the former farm there is an inn, which was held along with it; but the lease having expired at Whitsunday 1842, without being renewed either as to the lands or the inn, Mackay was proceeding to erect on the farm of Easter Kessock, which he still held; and at the distance of about three hundred yards from Kessock inn, a large wooden building, to be used as stabling for the accommodation of the public, and of horses intended to be kept for hire. Against this proceeding Colonel Baillie presented a note of suspension and interdict, in which he *pleaded*—That the proceedings complained of and threatened, would have the effect of appropriating a portion of the subject of lease to a purpose inconsistent with the nature of the subject, and with the conditions of the respondent's title of possession, and are therefore illegal: *Milne v. Mitchell*, 23d February 1787, Mor. 15,254.

The respondent *pleaded*—1. The use which the respondent proposes to make of the said building or shed is a perfectly lawful one, and cannot be held or considered as an inversion of the proper uses of the farm, under the missives and relative minute of lease. 2. As the lease contains no prohibition to the contrary, the respondent is entitled to convert the said building into a stable and coach-house, for the purpose of carrying on his business of a licensed hirer, for his own advantage, and for the accommodation of the public;

and the complainer, on the other hand, is not entitled to prevent him from doing so, on account of any interest, direct or indirect, which he, as landlord, may have in the prosperity of the neighbouring inn at Kessock.

The Lord Ordinary pronounced the following interlocutor:

"1st July 1842.—The Lord Ordinary having resumed consideration of this cause, and heard counsel for the parties, passes the note, and continues the interdict.

"*Note.*—The respondent admits,—1. That the farm of Easter Kessock was let to him as an *agricultural subject*, (answers to concordance, art. 5); 2. That the wooden building in dispute 'is not at all required for the purposes of the farm,' (respondent's statement, art. 5); and 3. That it is with a view to convert it to use in a *totally different line of business*, that the proceedings against which interdict is sought have been instituted. In such circumstances, the Lord Ordinary has not been satisfied that the respondent's right so to do is so very clear, as that the note should not even be passed to *try the question*. It may be that the cases referred to do not precisely run on all fours with the present in their details; but the principle is the same. For the turning point in all was the tenant's want of right to *invert the uses* (either in whole or in part) for which the subject of lease had substantially been let.

"There is another point. The inn which the respondent formerly held under the complainer was, during his possession of it, used as a *posting station*. It is to be presumed it was let to, and taken by the present tenant with a view to a similar occupation. The suspender, as landlord, could not, after letting the inn under such circumstances, have been warranted in setting up in its immediate vicinity, as the respondent proposes to do, a *rival establishment*. It is his duty, therefore, if he be entitled, with reference to the limited objects of the respondent's lease, to prevent the respondent from stepping beyond these objects, by converting a portion of his *farm* into a *rival posting house*."

The respondent reclaimed; but the Court, without calling on the suspender, *adhered*.

Lord Ordinary, Ivory.—For *Suspender*, Solicitor-General (M'Neill), G. Dundas; Horne and Rose, W.S., *Agents.*—For *Respondent*, Whigham, Inglis; W. Mackenzie, W.S., *Agent.*—N. Clerk.—[H.B.]

16th July 1842.

FIRST DIVISION.—(H. B.)

No. 262.—THE NEW CLYDE SHIPPING COMPANY, *Pursuers and Advocators*, v. THE RIVER CLYDE TRUSTEES, *Defenders and Respondents*.

Reparation—Damages—Trustees, Statutory—Liability for the Misconduct of their Officers and Servants—Held that trustees under a public Act, declaring that the trust-funds are to be appropriated solely for the purposes of the Act, are not liable for the negligence or misconduct of their officers.

The New Clyde Shipping Company brought an action before the Sheriff of Lanark against the River Clyde Trustees, in which they claimed "relief and reimbursement from the defenders, as trustees aforesaid," to the extent of £196. 16. 4., as the amount of loss sustained, and disbursement made in consequence of the listing of their steamer, the *Alert*, in the harbour of Broomielaw, and which listing was libelled to have been caused by the partial scooping out of the channel of the harbour by a dredging machine belonging to the defenders, and by the omission of the harbour-master "to order the necessary operations for removing the threatened danger," though urgently requested by the manager of the pursuers.

In support of the action the pursuers *pleaded*, that public bodies are responsible for the loss which may be sustained through their fault or negligence, or the fault or negligence of those employed by them.

The defenders *pleaded*, that persons who, under the authority of an Act of Parliament or otherwise, elect and pay public officers, are not responsible for the actings of their officers.

During the dependence of the action, the case of Duncan and Findlater was decided in the House of Lords, and on the authority of this case the Sheriff, on appeal from the Sheriff-substitute, who had decerned in terms of the libel, assoltized the defenders.

The pursuers having advocated, the Lord Ordinary pronounced the following interlocutor:

"20th May 1842.—The Lord Ordinary having resumed consideration of this advocacy, with the revised cases, proof in the Inferior Court, and whole process, Finds that the advocates, under their libel in the Inferior Court, claim damages from the respondents, the Parliamentary Trustees for improving the navigation of the river and frith of Clyde, for damages sustained from the fault and omission of the defenders' harbour-master at the Broomielaw to provide safe harbourage for a vessel of the pursuers in August 1836, which, it is alleged, was placed in an unsafe and improper berth by the said harbour-master, whereby she *listed* or was upset in the harbour, and received damage to the extent of £196 in her cargo and hull: Finds, in point of fact, that it is established by the proof that the steam-boat, called the *Alert*, belonging to the pursuers, was moored in a berth of the Broomielaw harbour, selected or sanctioned by the harbour-master or other servant of the defenders, and that she had then a full cargo on board: Finds it proved that the damage in question arose from the unskilful and improper operations followed by the servants or workmen employed by the defenders in deepening the *solum* of the harbour next the said berth, whereby the vessel was laid on unequal ground at low water, and was exposed to be wholly or partially laid over on the return of the tide: Finds it proved, that from that cause the pursuers sustained damage at the date libelled on to the amount concluded for in the libel; but finds it not proved that that damage was in any respect caused by any personal misfeasance or *culpa* on the part of the defenders: Finds, in point of law, that the said proof is not sufficient to establish a claim against the defenders, or the trust-funds in their hands, which they are bound to appropriate in terms of the Statutes under which they act, and in no other way. On these grounds, approves of the interlocutors of the Sheriff-depute on the merits; but finds that, from the state of the law as understood and acted upon in Scotland under decisions of this Court in analogous cases for years previous to the institution of the present action, and down till the decision of the House of Lords in the case of Findlater, which was not pronounced till this process was in an advanced stage, it is not reasonable or just to subject the pursuers in any expenses; and of new assoltizes the defenders from the conclusions of the action; but recalls the Sheriff's interlocutor as to expenses, and finds no expenses hitherto incurred due by the pursuers, and decerns.

"*Note.*—The learned Sheriffs in the Court below pronounced opposite decisions in the present case; the Sheriff-substitute acting upon the law as understood in Scotland for a series of years prior to 1839, while the Sheriff-depute assoltized the defenders, holding the question as governed by the decision of the House of Lords in the well-known case of Duncan and Findlater, 23d August 1839. Robinson's Appeal Cases, Vol. I, p. 911.

"When the advocacy came to be discussed before the Lord Ordinary, it was stated by the advocates, that there were peculiarities sufficient to distinguish the present case from that of Duncan; and as the question has been before this Court since the decision of Duncan's case, in which the principles of that judgment, and the extent to which it falls to be applied, fell to be considered, the Lord Ordinary allowed parties to state their

argument in cases. On considering the argument in these papers, however, he has not been able to satisfy himself that there are any grounds for giving a different determination in the present case from that which was decreed by the Court of last resort in the case of Duncan and Findlater.

"In the present case, as in Duncan's case, the defenders act solely as parliamentary trustees over the estate committed to their charge. That estate is held by them, not for private interest or profit, but solely for the benefit and use of the public. It is not alleged that the defenders personally were guilty of any wrong, either in the excavation of the harbour, or in the selection of the berth for the pursuers' vessel. In both cases the trustees have power to name overseers, and the defenders appointed a *harbour-master*, whose general qualification for that duty is not impeached; and in this case as well as in Duncan's, the trustees are very strictly limited by the terms of the Statute under which they act, in the appropriation of the rates received by them.

"These are circumstances common to both cases. In what then does the present case and that of Findlater differ? The main speciality relied on by the pursuers seems to be, that their damage is said to have arisen from a failure on the part of the defenders to fulfil the *counterpart* of the very contract under which the pursuers paid harbour-dues. They stated that they paid £2000 of such dues annually to the defenders,—that these were given for *safe shelter*, and if their property was negligently so placed by the defenders' servants as to suffer great damage, there was an implied stipulation on the part of the defenders to repair the loss. This certainly appears a strong view of the case, both on legal and equitable principles. But it is doubted if the very same argument was not equally maintainable in Findlater's case. The travellers on a road pay tolls for well-constructed and *safe roads*; some stage-coaches pay as large a sum of tolls as the pursuers pay here of harbour-dues, and it is now laid down, by authority not to be questioned, that if a coach is overturned when filled with passengers, whose lives are of the greatest value to their families, yet, if the injury has arisen from the negligence of subordinate persons whom trustees are authorised to employ, the sufferers must seek redress only from the wrong-doers, and not from the trustees or trust-funds. In such cases, where the funds are appropriated by Statute to specific purposes, and every other application of them prohibited, there is no implied contract which entitles any party to attach them for any damage or failure of duty committed by subordinate servants. The remedy is against the individuals who committed the wrong, and not against the trustees.

"This seems to be the import of all the cases in English practice, which are now held to be equally applicable to our law. According to the view taken of the law in Findlater's case in the House of Lords, it was held that the powers and liabilities of statutory trustees should in general be the same in both ends of the island; and as it was thought there was no practice in Scotland prior to 1820 which recognised the right of private parties to sue road trustees for damage not authorised or contemplated by any Statute, the House of Lords held that the responsibility and liability of trustees in this country must be governed by the same rules under which such trustees act and are protected in other parts of the kingdom, subject to the Statutes of the same Parliament. But if so, there appears to be a series of cases in England excluding the claim of private parties against public trustees in analogous cases with the present.

"Thus, in the case of Harris (4 Maule and Sel. Rep., p. 27), the trustees of a public road, who were empowered and directed to place *lamps* along a road at night, if they should think necessary, and to levy *tolls* to light and watch the same, and to make contracts for cleaning the road, were held *not liable* in an action on the case for an injury suffered by an individual in falling over a heap of scrapings negligently left on the road side *without lights*. Of course the ground of that decision was, that it was the *contractors* and not the trustees who were liable. In like manner, in the case of Hall (9 Moore, 226), it was found that a clerk to commissioners under a *lighting and paving Act* (who was sued as representing the commissioners), was not liable in damages for any injury occasioned by the negligence of artificers and labourers employed under their authority. While, on the other hand, the case of Jones (5 Bar. and Ald., 837),

affords an example of a case where action was sustained against the operative *bricklayers* employed by commissioners of sewers for performing their work in such a manner as to occasion damage to a neighbouring house. Generally the rule of law seems to be firmly established in England, that no action lies against public functionaries personally for acts done by them in a corporate capacity, from which detriment happens to the plaintiff, at least not without proof of negligence.—Harman, 1 East, 555. These are rules of common law laid down after long and deliberate discussion in the English Courts, though apparently at variance with some of their earlier cases; and it is apprehended, from what passed in the House of Lords in Duncan's case, that their Lordships were of opinion, that there was no authority or practice in Scotland to preclude the Court from giving effect to the same principles in our law in favour of public trustees, as effectually founded on justice and public policy.

"There was only one ground on which it occurred to the Lord Ordinary that a plea of feasible relevancy might be set up for the pursuers. If it had been made out that the damage was sustained by operations on the bed of the harbour, apparently in the course of a permanent alteration and improvement of its construction,—as such operations cannot all be completed in one day or week, while in their unfinished state vessels frequenting the port must be exposed to certain hazards, which are unavoidable,—a question might arise whether the damage could not be claimed as part of the necessary expense of improving the harbour. But if that were a legitimate claim under this Act, it should have been brought in terms of the Act 6 Geo. IV., § 84, within twelve calendar months after 'the damage or injury were sustained.' The action here was not brought for nearly two years; and that of itself is fatal to any claim as against the trustees.—See Lord Oakley v. Kensington Canal Company, 5 Barn. and Ald., 138. Besides, the action is not laid on the ground now indicated, but on the ignorance or misfeasance of the *harbour-master*, for which the statutory trustees are now held not to be responsible."

The pursuers reclaimed, and prayed for a recal of the interlocutor, except in so far as it found no expenses due to the defenders, and advocated the cause. The defenders reclaimed against the findings in fact, and the refusal of their expenses.

The Court *adhered*.

Lord Ordinary, Cuninghame.—*Act. Moir; Wotherspoon and Mack, W.S., Agents.—Alt. Anderson, Aytoun; J. C. Reddie, W.S., Agent.—B. Clerk.—[H.B.]*

16th July 1842.

FIRST DIVISION.—(H. B.)

No. 263.—JOHN CULLEN, *Appellant*, v. JAMES MACFARLANE, *Respondent*.

Bankrupt.—Sequestration.—Trustee, Claims to Vote for—

1. *Where separate sequestrations were awarded of two firms carrying on business at different places, but in both of which the same individual was sole partner—Held, that but one and the same estate was to be disposed of in their sequestration.*
2. *Held unnecessary, under the new Bankrupt Act, that the accounts of creditors claiming to vote should be signed.*
3. *Acknowledgment of debt by the bankrupt on the eve of bankruptcy, and sworn to by creditors, not sustained as a good title to vote in the election of trustee.*

Daniel Ritchie carried on business at Glasgow and Port-Glasgow under two distinct firms,—that at the former place being "Daniel Ritchie and Company," and that at the latter "The Crown Foundry Company." Having become bankrupt, he applied to the Court, and obtained separate sequestrations of the estates of the two firms, and in each of them of himself as sole partner. As the sequestrations thus awarded fell under the jurisdiction of different Sheriffs, separate meetings of the creditors were held at Glasgow and

Greenock, at both of which John Cullen was appointed interim factor. Subsequently, a competition arose between him and James Macfarlane for the office of trustee, when the following leading objections, *hinc inde*, were taken to the votes of creditors:—1. That their affidavits did not bear that the debts were due by Daniel Ritchie and Company, or by the Crown Foundry Company, though these were the estates of which sequestration was awarded, but only by Daniel Ritchie, carrying on business under these firms. 2. That the accounts were not sufficiently referred to in the affidavits, and not properly authenticated as being the documents therein mentioned, by the subscriptions of the respective creditors,—the accounts being written on separate pieces of paper in noways attached to the affidavits. 3. That a number of the claims rested on acknowledgments forming a species of voucher not in the ordinary course of business, but evidently *ex facie* prepared in concert with the bankrupt for election purposes.

The first objection was sustained by the Sheriff-substitute of Lanark, and repelled by the Sheriff-substitute of Renfrew, but the second and third objections were repelled by the former, and sustained by the latter. The result was, that interlocutors were pronounced by both Sheriffs, declaring Mr Macfarlane duly elected trustee.

John Cullen presented two notes of appeal; and when the cause was advised, the Court, finding "that there is but one and the same estate to be disposed of in these sequestrations," repelled the first objection, and ordered minutes of debate on the others. The cause being again advised,

Lord President.—The leading objection here is, that the affidavits are not properly connected with the accounts. As to this, I am satisfied that the regulation laid down by the new Bankrupt Act is totally different from that of the former Act. The former provides for the production of the "grounds of debt, or a copy of the account signed by the party to whom it is due;" whereas the new Act merely provides for the production of, with the oath of "such accounts and vouchers as shall be necessary to prove" the debt. It therefore appears to me that this objection to the votes of Fleming and others is not good. It is not necessary that the accounts should have been signed, as under the former Act; and they seem sufficiently connected with the affidavits to satisfy the requirements of the new Act. The other class of objections is of a different nature. A person appears with a number of mandates from individuals claiming a right to vote as creditors, on acknowledgments of debt obtained from the bankrupt on the eve of bankruptcy, and several of them in favour of his near relations. Votes proceeding on such documents give rise to very strong suspicions; and my impression is, that they ought not to be admitted. On both of these objections, therefore, I think the merits rest with Mr Macfarlane. As to the first of them I have no doubt; but as to the second, I must confess I feel considerable difficulty.

Lord Gillies concurred.

Lord Mackenzie.—I concur as to the first class of objections, and with great doubt also as to the second. The only documents sworn to and produced in connection with the oath are acknowledgments by the bankrupt. This is very awkward in itself, and the circumstances make it still more so. These acknowledgments were granted on the eve of bankruptcy, when, of course they ought to be considered as not made against the bankrupt himself, but against his creditors. They have completely the air of having been given for the purpose of affecting the election of trustee. The oath should have been taken—not to mere acknowledgments, but to accounts.

Lord Fullerton.—I have no doubt as to the first objection,

which founds merely on the fact, that the accounts are not connected with the affidavits by signature. Under the new Act it is not necessary that they should be so connected. As to the other objection I have great difficulty, but concur. In one sense, an acknowledgment by the debtor seems a better proof of debt than an account not vouched; but it can hardly be said that such acknowledgment is the proper voucher in the sense of the Statute. The parties swear merely to the debtor's acknowledgment, and of course swear very safely; but to make the oath sufficient, they should have sworn to the account.

The Court found Mr Macfarlane entitled to the office of trustee, with expenses, and remitted to the Sheriff to confirm his election.

For Macfarlane, Mackenzie; Ritchie and Hill, W.S., Agents.
—*For J. Cullen, Dean of Faculty (Wood), More; William Young, W.S., Agent.*—*B. Clerk.*—[H.B.]

16th July 1842.

SECOND DIVISION.—(G. D. F.)

No. 264.—*JOHN MONCUR, and his Trustee ANDREW IMRIE, Petitioners, v. THE COMMERCIAL BANK OF SCOTLAND, Respondents.*

Bankrupt Statute, 2 and 3 Vict. c. 51—Affidavit—Construction—Clause—Citation—Prescription—*Where a creditor applied for sequestration of the estate of a deceased debtor, and in the affidavit set forth his debt as due by various accounts, and that "the estates of the said" X "is still justly indebted and owing to this deponent the foresaid sum," "together also with interest, being the aggregate amount of principal sums due to the deponent, as contained in the said account-current," "and that no part of the said debt has been paid, or compensated, or extinguished in any manner of way, and that the deponent holds no security for the same, or any part thereof, except the several vouchers of debt enumerated and set forth in the foresaid inventory"*—*Held that that was not a proper compliance with the 9th section of the Bankrupt Statute, which provides, that the petitioning creditor shall, in his affidavit, state "what other persons (if any) are, besides the bankrupt, liable for the debt, or any part thereof, and specify any security which he holds over the estate of the bankrupt, or of other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect."* Questions raised, *whether a sequestration sleeps?—as to citing the next of kin besides the heir, and how obviated?—and as to the effect of prescription alleged to arise on the debt set forth in the affidavit?*

The late David Scott, W.S., died in January 1839, indebted both to the Commercial Bank and also to the petitioner Moncur,—the latter of whom some time after presented an application to the Lord Ordinary on the bills, under the recent Bankrupt Act, to sequestrate his estates. On this application, which was presented more than seven months after the debtor's death, the Lord Ordinary granted the usual order to cite the debtor's successor, and this was done by citing Scott's heir-at-law, omitting the heirs *in mobilibus*.

The affidavit which Moncur lodged along with the application was in these terms:

"Compeared John Moncur, plumber and glazier in Edinburgh, who being solemnly sworn and examined, deposes, That the late David Scott, Esquire, writer to the Signet, and builder in Edinburgh, was, at the time of his death, justly indebted and owing to this deponent the sum of £671. 9. 2½. Sterling, being the aggregate amount of principal sums, and £182. 0. 5½. Sterling of perpetual interest at the rate of 5 per cent., on the various items of the said aggregate amount of principal sums, amounting together to the sum of £853. 9. 8. Sterling, conform to particulars thereof, as contained in an account-current between the said

David Scott and the deponent, from the 31st day of December 1830, to the 22d day of January 1839; and conform also to the respective accounts and vouchers of debt referred to in said account-current, and as enumerated and set forth in an inventory thereof; both of which said account-current and inventory are signed by this deponent and the said Justice of the Peace, as relative hereto. Depones, That the said David Scott, according to the best of this deponent's knowledge, information, and belief, died upon the said 22d day of January 1839; and that at the time of his death he resided, or had a dwelling-house near Thurso, in the county of Caithness, and that he was, at the time, owner of heritable or moveable estates in Scotland. Depones, That the estates of the said David Scott is still justly indebted and owing to this deponent the foresaid sum of £853. 9s. 8d., together also with the lawful interest of the foresaid sum of £671. 9. 2½., being the aggregate amount of principal sums due to the deponent, as contained in the said account-current from and since the said 22d day of January 1839; and that no part of the said debt has been paid or compensated, or extinguished in any manner of way; and that the deponent holds no security for the same, or any part thereof, except the several vouchers of debt enumerated and set forth in the foresaid inventory, and referred to in said account. And all this is truth, as the deponent shall answer to God."

Moncur himself being thereafter pressed by diligence used by the respondents, applied for sequestration of his own estates, which was granted, and parties friendly to the interest of the bank were appointed the trustee and commissioners on the estate, while their usual law-agent acted as agent in the sequestration. The result was, that the application to sequester Scott's estate lay over for a great length of time, till at last Moncur's creditors changed the management, and appointed Imrie to act as trustee in room of the previous trustee, with orders to proceed with Scott's sequestration.

Imrie accordingly joined Moncur in an application to the Lord Ordinary to resume consideration of the original petition at Moncur's instance, and having observed that the affidavit previously lodged did not in words comply with the 9th section of the Statute, they gave in together a supplementary affidavit, with the view of complying with the strict reading of the section cited. The Lord Ordinary of new granted warrant to cite the successor, and this order was gazetted in the usual form. The Lord Ordinary's interlocutor was dated more than year and day from the date of the previous order for intimation.

In this stage of the proceedings the Commercial Bank,—who had had themselves confirmed executors-creditors to Scott prior to Moncur's application for Scott's sequestration, after the seven months from the death,—gave in a minute to the Lord Ordinary on the bills, objecting on several grounds to the granting of the application by Moncur and Imrie. The objections were:—1st, That Moncur's original application was asleep: 2d, That it had lapsed through *mora*: 3d, That the next of kin or executors had not been cited: 4th, That the affidavit did not comply with the requisites of the 9th section of the Statute; and 5th, That the debt was prescribed, for it appeared that more than three years had expired since the date of the last article in the account for furnishings referred to in the affidavit.

Parties were heard before the Lord Ordinary on these objections, the answers to which were in substance as follows:

(1.) Sequestrations never fall asleep like processes in the Outer-House, though not moved in for more than year and day,

as they are Bill-Chamber proceedings, or, in other words, Inner-House processes, to which the rule, on which the objection was grounded, never applies: That in truth a sequestration is not so much a judicial process, though of course necessarily originating in Court, as a ministerial proceeding for the distribution of an estate, of which the great part is managed extrajudicially, and so the common rules of form do not apply. But, on the other hand, there was, besides, authority against the rule. By the Act of Sederunt, 8th July 1831, it was provided, that suspensions and advocations should fall asleep if not moved in within year and day. These were proper Bill-Chamber processes, and to them the rule was to apply; but nothing was said in regard to sequestrations, which were of course in the Bill-Chamber; and consequently, as they were excepted, it must be held that the rule as to them did not apply. Again, it showed that prior to the Act of Sederunt, no Bill-Chamber process fell asleep at all. Then there was an omission founded on a specialty in the case, that the Lord Ordinary having ordered intimation of new, subsequent to the year and day, the objection was obviated, as that had the effect of a waking; and parties were not entitled to look beyond the last order.

(2.) As to the process having fallen through *mora*, attributable to the petitioner, it was argued to be *jus tertii* for the bank to urge such objection. They themselves had obtained a control over Moncur's own sequestration and estate, and delayed to proceed—consequently it was their act, not that of the petitioner.

(3.) As to the executors not having been cited, it was argued—that the Act was not precise in its enactments, if it were meant that they should be called as well as the heir. The Act had clearly a distinction in view between a sequestration of a deceased debtor obtained with consent, and without consent. In the first of these cases, the Act (section 4) provided that the "successors" must concur;—in the other, that the "successor," used in the singular number, should be cited. It was true that section 3 provided, that words in the singular number were to be held as in the plural, where the noun was of the masculine gender; but here the noun might either be masculine or feminine; and therefore, that part of the enactment did not apply. Besides, section 3, in explaining the meaning of the term "successors," as importing heirs of the various descriptions known in law, used the plural number, and not the singular—consequently it was not clear that the heirs in *mobiliis* were to be called, where the application was without consent as here. Moreover, the objection, if well founded otherwise, was not a fatal objection, but merely required that the process should be sisted till the next of kin were called. But here the objection was cured in the present instance by the appearance in the cause of the bank as executors-creditors confirmed. Their confirmation gave them a preference to the whole moveables, and the confirmation set forth that there were no other moveables remaining than those confirmed, unless some which had been preferably secured by other creditors, but that those exhausted the estate: See also Alexander's Bankrupt Act, ed. 1842, p. 292, note.

(4.) In reference to this objection it was maintained—that a liberal construction must be given to the Act, and that it was sufficient if the clause were complied with in substance. The affidavit, it would not be doubted, complied with, and set forth the substance of the Act; for, as it said that the petitioner held no security, and nothing but the estates of the deceased liable for the debt, it followed of necessity, that by implication it also set forth very sufficiently that there was no obligant for the debt. It was admitted that it did not state the fact in words; but it was argued that a judicial construction could not be taken where the Act (section 3) provided, that it should be construed in the way most beneficial for promoting the ends in view. If there was any objection, it could not be said to be fatal to the affidavit and sequestration, but might be remedied by a supplemental affidavit, which had been given in with this view. Under the English procedure, such matters were permitted to be remedied by a supplementary affidavit. See *ex parte Maughan*, 1 Glyn and Jameson, p. 365. Archbold's Bankrupt Law, ed. 1840, pp. 77–82. Rolledge, 2 Rose, 369. Cooke's Bankrupt Law, ed. 1823. 1 Deacon's Rep. p. 111. Duiken, 1 Montagu and Chitty, p. 73. It was also maintained

that it was impossible to comply with the 9th section of the Statute. The affidavit clearly imported, from necessary implication, that there was no security or obligant, and nothing responsible for the debt but the debtor's estates. Therefore the objection came to this, that the affidavit was invalid because it did not set forth that the deponent held the deceased liable. Now, it was absurd to say that this was required to be done when the party was long dead. That could not with propriety be set forth; and accordingly, as it was set forth that the estates were only liable for the debt, and that there was no security, that was sufficient, as it appeared plainly that, in these circumstances, there could be no obligant liable for the same.

(5.) In regard to prescription it was pleaded, that all that was necessary at this stage, before sequestration was awarded, was to set forth a *prima facie* case of debt. The grounds of debt and their validity might afterwards, no doubt, undergo scrutiny, but the investigation was not competent at this stage. But prescription did not cut off a debt, except the long prescription. It shifted the *onus* of proof from one party to another, but still a debt might remain capable of being substantiated *scripto vel juramento*. The short prescription merely affected the nature of the proof. But the triennial prescription was not here applicable. The debts were due on contracts in missives for the supply of certain building materials for houses which Scott was then erecting, in which case the vicennial prescription at once applied. Besides, these contracts had been put in suit against Scott, and likewise against the Commercial Bank, as creditors holding heritable securities over these houses; and that action only terminated about the time of Scott's death, so that, even if the triennial prescription applied, the period had not elapsed.

The Lord Ordinary pronounced the following interlocutor:

"24th June 1842.—The Lord Ordinary having resumed consideration of this cause, and heard parties' procurators upon the objections to the sequestration stated by the Commercial Bank, and made *avizandum*: 1. Repels the objection that the process is asleep. 2. Repels also the objection that the process has fallen or lapsed through the petitioner's *mora*, or from his failure duly to carry on the same, or in any other manner. 3. Repels the objection that the petition was not served upon the next of kin, or other executors of the deceased,—in respect that the Commercial Bank, who, so far back as August 1839, obtained themselves confirmed executors-creditors in certain portions of the moveable estate, themselves set forth in their application to be so confirmed, that though 'there may be other subjects belonging to Mr Scott, yet, so far as they know, they have all been seized by the Crown or road trustees for one set of taxes or another, or taken possession of by individual creditors who had assignments or other rights thereto, or have been seized by the heritable creditors under pointings of the ground;' and—while the rights of the said bank, as well as of all such parties, are now secure, by more than seven months having elapsed after the deceased's death before any step was taken towards obtaining sequestration of his estates,—it is not alleged that there remained at the date of the application for sequestration any portion of the deceased's moveable succession in the possession of, or vested in, any person or persons whatsoever, which could have been carried by, or taken up under that application. 4. But sustains the objection, that, by the 9th section of the Statute, it is necessary, in order 'to entitle a creditor to petition, or concur in a petition for sequestration,' that he shall, *inter alia*, in his oath to the verity of the debt claimed by him, 'state what other persons (if any) are, besides the bankrupt, liable for the debt, or any part thereof, and specify any security which he holds over the estate of the bankrupt, or of other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect;'—whereas, this notwithstanding, the petitioning creditor in the present case has omitted or failed to depone that he holds no other person than the deceased, or the successor or successors immediately entitled to represent him in his estate, bound to him as said is: Therefore, dismisses the petition for sequestration, as not duly

supported in terms of the Statute by said oath; reserving to the petitioning creditor, if so advised, to apply of new in a habile and regular manner: Finds it unnecessary, in this state of matters, to pronounce any deliverance on the remaining objection, that the petitioning creditor's debt was not habile to support the petition, in respect of its being prescribed: Finds no expenses hitherto incurred due to either party, and decerns.

"Note.—1. The objection which the Lord Ordinary has reluctantly sustained, turns upon matter of express statutory requirement; and looking to the very precise terms of the enactment, it seems as difficult to get the better of it, as it was under the former Statute to get over the kindred injunction, that, in certain cases, the securities held by the creditor should not only be valued, but that, on the face of the affidavit, this value should be expressly deducted, and the balance specified.—See 2 Bell Com., 340; Jeffrey, 20th January 1821; Murray, 22d June 1821. It was there held to afford no answer, that the affidavit had substantially complied with the law, by furnishing all the necessary data out of which to ascertain the claim. The words of the Statute were held imperative; and the Court did not consider that they were entitled to receive or entertain equipollents.

"As to the observation, that the word '*bankrupt*' does not strictly apply to a deceased debtor, the Court have already refused so to narrow the construction of the Statute in the recent case of *Lord Melville*, (decided this session by the First Division).

"And the case of a deceased debtor being thus once brought within the scope of the regulation, there can, it is thought, be no difficulty in accommodating the words of the affidavit, so as to meet in spirit and substance the requirement of the Statute.

"2. The objection of *prescription*, had it been necessary to deal with it, the Lord Ordinary, as at present advised, would, with every deference for the contrary opinion expressed by Professor Bell (2 Com. 323 and 345, and *Suppl.* 46), have been disposed to overrule. The English practice in regard to debts struck at by the *Statute of Limitations*, furnishes no analogy. The principle which there rules is, that the debt itself is extinct, so as no longer to afford ground either for action at law or claim in equity; and accordingly such a debt in England is not even admitted to be proved (*Dewdney*, 15 Ves. 479). So also would it be with us, in regard to an obligation which stood peremptorily and finally cut off by the long negative prescription. But, in the shorter prescriptions, it is only the evidence of the debt that is affected, while the debt itself may remain; and accordingly, it may at any time be made the ground of action in our Courts. Indeed, Professor Bell himself admits, that a debt affected by the shorter prescriptions will afford a good ground of claim in the process of sequestration,—'this claim being,' as he adds, 'analogous to an action for the debt;' and not only so, but that such a debt will be good even to support sequestration itself, provided the debtor concur in the application. Now, such a concession seems fatal to the whole principle and ground of the objection. Besides, it is not necessary that the petitioning creditor's debt be constituted:—It is enough that it be capable of constitution. And, therefore, where no voucher has ever existed for the debt (2 Bell Com., 344-6),—or where the voucher has been lost and its tenor not yet proved (*Ibid.* 344),—or finally, where the voucher cannot be received or looked at from objection under the Stamp Acts (*Geddes*, 4th June 1824; 2 Sh. App. Ca., 250; 2 Glyn, 414),—still, if the debt itself exist, and be sworn to by the creditor, it will be good to support the application for sequestration. A debt struck at by the triennial prescription falls within the same category. For what is it but a debt, which, though there be no written voucher to prove, and in regard to which *parole proof* is no longer competent, is yet, to all intents, capable of being established by a third mode of proof equally familiar to our practice, viz., the admission or oath of the debtor. And if the debtor's concurrence in the petition for sequestration,—which is nothing but his voluntary admission,—would (according to Mr Bell) put an end to the objection, surely all opposition on his part, to the application, when made by a creditor, must be neutralised and fall to the ground, if he cannot avoid making a similar admission when the fact is put to him, or if, when the debt is referred to his oath, he finds himself constrained to affirm its existence.

"The Lord Ordinary may just observe in conclusion, that it is very doubtful whether there be here *termini habiles* for the plea of prescription. For (not to mention other matters noticed in the debate) it is stated by the Commercial Bank (*minute, No. 57 of pro., p. 2*) that 'Scott, before his death, had been convened in an action' for the debt;—and, as he died in January 1839, it is more than probable that the date of this action must have fallen within less than three years of the date of the last article of the account."

Both parties reclaimed; but as the fourth objection, sustained by the Lord Ordinary, was the leading and most important one, it alone was discussed, as—if adhered to by the Court—it superseded consideration of the remaining objections.

Lord Moncreiff.—I cannot get over the words of the 9th section, and accordingly I agree with the finding of the Lord Ordinary. The petitioner ought to have set forth that he held no obligant, as obligant is different from security.

Lord Medwyn concurred.

Lord Justice-Clerk also concurred; and as the sustaining this objection superseded the others, it was unnecessary to consider them.

Lord Meadowbank absent.

The Court

"Adhere to the interlocutor reclaimed against, in so far as it dismisses the petition for sequestration as not duly supported in terms of the Statute by the oath of verity emitted by John Moncur, reserving to the petitioning creditor, if so advised, to apply of new in a habile and regular manner: Find it unnecessary, in this state of matters, to pronounce any deliverance on the other objections specified in the interlocutor reclaimed against: Find the Commercial Bank of Scotland entitled to the expenses incurred by them since the date of the Lord Ordinary's interlocutor reclaimed against; appoint an account," &c.

Lord Ordinary, Ivory.—*Act. Rutherford, G. Dingwall Fordeyce; George Monro, S.S.C., Agent.—Alt. Dean of Faculty (Wood), J. S. More; J. A. Campbell, W.S., Agent.—R. Clerk.—[G.D.F.]*

16th July 1842.

SECOND DIVISION.—(G. D. F.)

No. 265.—JOHN HENRY ALEXANDER, *Suspender, v.*
J. H. ANDERSON, *Respondent.*

Interdict—Suspension—Competency—10 Geo. II. c. 28; 43 Geo. III. c. 142—Theatrical Entertainment—Construction—By the 10th Geo. II. c. 28, all performances of every kind on the stage are prohibited every where, except within the city of Westminster and liberties, and the place where the Sovereign is personally residing for the time; and, in consequence of the Statute, it has been customary to pass an act in Parliament for pesting any locality with the privileges of a theatre. By the 43d Geo. III. c. 142, such an Act was passed repealing the previous Act, so far as it extended to Glasgow, and granting to the Sovereign liberty to establish a theatre in Glasgow and suburbs. Letters-patent were issued thereafter in favour of certain persons, granting to them "power, license and authority for collecting, receiving, forming, managing, having and holding a company of comedians for performing and acting such tragedies, plays, comedies, operas, and other entertainments of the stage only as have already been permitted by our Chamberlain, or may hereafter be permitted." And full and exclusive power, license and authority, was also given by the letters-patent "for permitting such persons" "to perform plays and entertainments of the stage, of every description, in peace and quietness, without blame or impediment of any person—Held, that the lessee under the patent was entitled to an interdict, to the effect of preventing a party enacting within the city of Glasgow or suburbs, all tragedies, comedies, operas, plays, farces, interludes, melo-dramas, burlettas, and all other entertainments of the stage of any description whatever, whether the same were licensed by the Lord Chamberlain or not, or any part or parts thereof.

Lis Alibi—Process—Expenses—Interdict—A party presented an application to the Sheriff for interdict. The respondent, who had lodged a caveat, and the complainer, were heard on the application for interim interdict. The Sheriff refused interim interdict, but ordered service of the application on the respondent, and answers in fourteen days. The complainer then applied to the Court of Session for an interdict in very nearly the same terms, and thereafter, by a note on the Inferior Court process, stated that he had abandoned that process, reserving all other remedies, but tendered no expenses—Held that this was no bar, as a *lis alibi*, against insisting in the application for interdict in the Court of Session.

The complainer, who is lessee of the Theatre Royal of Glasgow, presented this application (on caution) against the respondent, as designing himself of the minor theatre there, praying their Lordships to interdict and prohibit the respondent from representing and enacting the performances now to be referred to.

By the 10th Geo. II. c. 28,—entituled an Act to explain and amend so much of an Act made in the twelfth year of the reign of Queen Anne, entituled, "an Act for reducing the laws relating to rogues, vagabonds, sturdy beggars, and vagrants, into one Act of Parliament; and for the more effectual punishing such rogues, vagabonds, sturdy beggars, and vagrants, and sending them whither they ought to be sent," as relates to common players of interludes,—various provisions were made in regard to the stage.

The first and second sections imposed certain penalties on all who should perform any entertainments of the stage "without authority, by virtue of letters-patent, from his Majesty, his heirs, successors, or predecessors, or without license from the Lord Chamberlain of his Majesty's household for the time being;" and specially referred to persons committing the offence who had no legal settlement in the place where the offence was committed; and it was provided, that they should be held as rogues and vagabonds under the 12th of Queen Anne, stat. 2, chap. 23, and punished as such; and the second section declared, that all persons offending against the Act, whether having a legal settlement in the place or not, should pay a penalty of £50 for each offence.

By the 3d section it is provided:

"That from and after the said 24th day of June 1737, no person shall, for hire, gain, or reward, act, perform, represent, or cause to be acted, performed, or represented, any new interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, or any new act, scene, or other part added to any old interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any new prologue or epilogue, unless a true copy thereof be sent to the Lord Chamberlain of the King's household for the time being, fourteen days at least before the acting, representing or performing thereof, together with an account of the playhouse, or other place where the same shall be, and the time when the same is intended to be first acted, represented, or performed, signed by the master or manager, or one of the masters or managers of such playhouse, or place, or company of actors therein."

The 4th section enforced this provision by declaring a penalty of £50 on offenders, and vested the Lord Chamberlain with a power of prohibiting all unlicensed plays.

The 5th section, upon which the present discussion in some measure hinged, is in the following terms. It is enacted,

"That no person or persons shall be authorised, by virtue of any letters-patent from his Majesty, his heirs, successors, or predecessors,

sors, or by the license of the Lord Chamberlain of his Majesty's household for the time being, to act, represent, or perform for hire, gain, or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in any part of Great Britain, except in the city of Westminster, and within the liberties thereof, and in such places as his Majesty, his heirs or successors, shall in their royal persons reside, and during such residence only, any thing in this Act contained to the contrary in anywise notwithstanding."

By this Statute, accordingly, it was illegal, even with the license of the Sovereign or letters-patent, to enact any performance on the stage, except within the city of Westminster and liberties, and the place where the Sovereign might be residing in person for the time,—a special Statute being necessary for the passing of letters-patent, in order to extend the privileges of a theatre to any particular locality.

In 1803, an Act (43 Geo. III. c. 142,) was passed, entitled "an Act to enable his Majesty to grant letters-patent for establishing a theatre under certain restrictions in the city of Glasgow. On the preamble, that "whereas a licensed playhouse in the city of Glasgow would be of convenience to the said city, and to persons resorting there," it enacted,

"that so much of an Act of Parliament which passed in the tenth year of his late Majesty's reign, entitled, 'an Act to explain and amend so much of an Act made in the twelfth year of the reign of Queen Anne, entitled an Act for reducing the laws relating to rogues, vagabonds, sturdy beggars, and vagrants, and sending them whither they ought to be sent,' as relates to common players of interludes, whereby all persons are discharged to represent any entertainments of the stage whatever, in virtue of letters-patent from his Majesty, or by license of the Lord Chamberlain of his Majesty's household for the time being, except within the liberties of Westminster, or where his Majesty is residing for the time being, be, and the same is hereby repealed, so far as the same respects the city of Glasgow, suburbs, or neighbourhood thereof, and that it shall and may be lawful to his Majesty, his heirs and successors, to grant letters-patent for establishing a theatre or playhouse in the city of Glasgow, suburbs, or neighbourhood thereof, subject to such restrictions as to the number of persons to be interested therein, and in the profits thereof, and with such privileges, and under such provisions and regulations, for the due and orderly conducting and managing the same, as to his Majesty shall seem fit." "Provided always, and be it enacted, That the said theatre or playhouse, and management thereof, shall be under and subject to the control and inspection of the Lord Provost, Bailies, Dean of Guild, and Deacon-Convener of the Trades of the city of Glasgow, and of the Sheriff-depute of the county of Lanark for the time being."

In virtue of this Act, his Majesty granted letters-patent to Mr Macdowall of Garthland, and Mr Alexander of Southbar, afterwards assigned to the committee of a joint stock company, which erected a Theatre Royal in Queen Street. This theatre was destroyed by fire in 1829; and with the view of carrying on theatrical entertainments in another part of the town, new letters-patent were granted in the year 1830. These letters were granted in favour of Mr Campbell of Blythwood and Mr Monteith of Carstairs, in trust for the purposes of the patent; and the letters conveyed to these gentlemen and the survivor or their assignees,

"for and during the full term and period following, viz., to commence at the date of these presents, and to terminate on the 24th day of June 1847, being the time to which the letters-patent hereby recalled were limited, full and exclusive power, license, and authority, for collecting, receiving, forming, managing, having and holding a company of comedians in our

service, for performing and acting such tragedies, plays, comedies, operas, and other entertainments of the stage only as have already been permitted by our Chamberlain, or may hereafter be permitted, within any theatre, built or to be built in any fit place in the city of Glasgow, its suburbs or neighbourhood, in place of the other recently destroyed, during the said period."

It was also declared, that

"We, by these presents, for us, our heirs and successors, grant to the said Archibald Campbell and Henry Monteith, and their survivor, and their or his said assignees, full and exclusive power, license and authority, for permitting such persons, during the pleasure of the said Archibald Campbell and Henry Monteith, and their survivor, and their or his assignees aforesaid, from time to time, to perform plays and entertainments of the stage, of every description, in peace and quietness, without blame or impediment of any person or persons whatsoever, for the pure gratification of such as desire to witness the same. Nevertheless, under the regulations hereinafter recited, and such others as the said Archibald Campbell and Henry Monteith, and their survivor, and their or his said assignees, shall, from time to time, consider, in their wisdom, to be reasonable and necessary for our service."

On obtaining these letters-patent, the grantees assigned them to Messrs Monteith, Maxwell, and others, the proprietors of the old theatre in Queen Street, agreeably to a provision in the patent so limiting their power of assignment. A power was given by the patent to grant leases of the privileges thereby given, provided they should not be of longer duration than five years, and with a certain limitation on the amount of rent to be demanded. Under this provision the suspender, Mr Alexander, became the lessee of the letters-patent. He paid for his lease a price or grassum of £1050, and pays besides a nominal yearly rent.

The respondent had lately fitted up, as alleged by the complainant, a large wooden building, formerly occupied as a circus, fronting the Green, as a place of public amusement or theatre, with stage, side wings, scenery, orchestra, and other appurtenances of a theatre, with accommodation for an audience of 800 to 1000 persons, in which, by the aid of a large company, he represented, or caused to be represented, entertainments of an essentially dramatic character, such as are acted on the stage, composed of a dialogue, &c., continuous story or plot,—such as "The Dumb Orphan of Genoa, or The Bandit Merchant,"—"The Idiot Witness, or A Tale of Blood,"—"Gilderoy, or The Farmer and His Herd,"—which were performed on certain evenings condescended on, and admitted by the respondent, and that he carefully "excluded from his performances all such theatrical entertainments as have been licensed by the Lord Chamberlain."

Against these performances, &c., as infringing his patent right, and directly invading his patrimonial interests in the Theatre Royal, on which he had expended, as alleged, upwards of £21,000, the complainant presented this note of suspension, on offer of caution, praying the Court

"to suspend the proceedings complained of, and to interdict, prohibit and discharge the said respondent, and all others representing him, or acting by or under his authority, or otherwise, from acting, representing or performing, or causing to be acted, represented or performed, at the place mentioned in the said statement of facts, or any other place in the city of Glasgow, or in the suburbs or neighbourhood thereof, all tragedies, comedies, operas, plays, farces, interludes, melo-dramas, ballets, and all other entertainments of the stage of any description whatsoever, whether the same have been licensed by the

Lord Chamberlain or not, or any part or parts thereof; or to do otherwise in the premises as to your Lordships shall seem proper."

The respondent objected to the interdict as craved; and while he admitted that his exhibitions consisted of exhibitions of mechanical skill, scientific experiments, and such burlettas, ballets, and melo-dramas as were not licensed by the Lord Chamberlain of her Majesty's household, he stated that he always studiously excluded from his performances all such theatrical entertainments as had been licensed by the Lord Chamberlain, and included in the letters-patent.

In reference to what he contended were the privileges granted to the complainer, the respondent averred they were limited to "such tragedies, plays, operas, and other performances of the stage only as have already been, or shall hereafter be, licensed by the Lord Chamberlain of his Majesty's household." That neither the patentees of the theatre in Glasgow nor the suspender, as their lessee, ever obtained any exclusive privilege from the Crown of acting or performing in Glasgow or elsewhere, such performances of any description as should not be licensed by the said Lord Chamberlain; and that according to the usage which had followed upon the Statute 43d Geo. III. c. 142, and the letters-patent, the exclusive privilege granted to the patentees had not been held to include such burlettas, ballets, melo-dramas, and similar entertainments as were not licensed by the Lord Chamberlain; and the same had been performed at minor theatres established from time to time in Glasgow, notwithstanding the existence of such patents. Such entertainments, as burlettas, ballets, and melo-dramas, were comparatively of modern invention. They were unknown at the date of the Statute of the 10th Geo. II., and were and had been in constant use of being performed at minor theatres every where throughout Great Britain, although such minor theatres were not established by letters-patent.

In support of the interdict the suspender *maintained*, under the letters-patent, that he had the exclusive right of performing all dramatic entertainments, of every sort whatever, within the city of Glasgow;—that the circumstance of the plays being unlicensed—a circumstance which involved an infringement on public police, as well as private property,—could afford the respondent no defence, but was, on the contrary, an additional reason for the interdict; and that the complainer's patrimonial interests being directly injured by the proceedings of the respondent in acting unlicensed plays, he was entitled to have the respondent interdicted from doing unlawfully that which the complainer had the exclusive right to do lawfully.

In regard to the 10th Geo. II. c. 28, &c., the suspender *maintained*—That all persons were interdicted and prohibited from performing dramatic entertainments of any kind whatever within the city of Glasgow, except in so far as permitted by the Statute, or other special Acts; and the respondent not possessing any legal authority to act any thing of the kind whatever, the complainer was entitled to have him interdicted from performing all dramatic entertainments, without distinction. And the respondent was not entitled to have any exception made from the interdict of unlicensed dramatic pieces, inasmuch as, (1.) The statutory prohibition ap-

plied to all dramatic performances whatever, without distinction; and, (2.) The respondent was not entitled to ask the Court, directly or indirectly, to protect or sanction unlicensed dramatic performances.

On the other hand, the respondent *maintained*, and his pleas resolved into this general argument—That as the suspender, by his patent, was limited to the performance of such plays as should be licensed by the Lord Chamberlain, it was only as to such plays that he was entitled to obtain protection by interdict. The respondent, it was admitted, might subject himself to pains and penalties at the instance of the public prosecutor; but still, while admitting that, it could form no competent ground to the complainer in support of the application, as it was *jus tertii* to him to found on it, being a ground only open to the public prosecutor; neither had he any title or interest to ask the interdict, on the medium of being indirectly affected by the performances of the respondent; because, as he was only entitled to an interdict against the employment of licensed pieces, he could not competently ask an interdict against a party doing that which he himself had no right, title, or interest himself to do.

The Lord Ordinary (Ivory) passed the note, and granted interdict *ad interim*,

"to the effect of prohibiting the performance of all interludes, tragedies, comedies, operas, plays, farces, including melo-dramas and burlettas, and all other entertainments of the stage whatsoever, or any part or parts thereof, unlicensed as well as licensed, which require to be submitted to the Lord Chamberlain for his license."

The following note was appended to the interlocutor:

"The Lord Ordinary has, with the respondent's consent, granted interdict *ad interim* in the broadest terms for which he can find a precedent, having adopted, in fact, the very words of the judgment in *Hamilton v. Alexander*, 14th February and 15th November 1827.

"He has great doubts whether the complainer is in any view entitled to more. The present application being laid solely on the title and interest arising by force of the exclusive privilege conferred by the patent or license, it does not occur that the complainer can insist for any thing beyond an interdict which shall protect him in the exercise of that which his license expressly covers. It was well argued for the respondent, that as the complainer could not insist for interdict against one performing plays beyond the territory of his privilege, so neither can he do so against performances which do not fall within the range of the subject of his privilege. It is nothing that *consequently* his interests may suffer. An indirect prejudice of this kind, from acts in respect to which there is no exclusive privilege conferred, has never been considered as constituting encroachment or invasion of the privilege in a legal sense. One who has an exclusive privilege to manufacture woollen cloths, would not, by the mere force of that privilege, be entitled to interdict another in the manufacture of *cottons*, how illegally soever the latter might be proceeding in his own department, or however much prejudice might indirectly and consequentially arise in competition from the markets being occupied by an additional commodity.

"It is a different matter whether, in respect of the illegality of the acts done, the complainer may not protect himself, independently of his exclusive privilege, through the medium of the Statute which declares those acts illegal, or in other words, by the enforcement against the wrong-doers of the statutory pains and penalties. But in such a case the Statute alone must be the source as well as the measure of redress. Where, indeed, the act done is *not only* an offence against the law, *but also* an innovation of the privilege, there would of course be open to the complainer a *double* remedy—(University of Glasgow, 3d

March 1837). But where the act complained of amounts only to the statutory offence, without at the same time constituting an invasion of the privilege, the Lord Ordinary does not see how the statutory illegality can on principle enlarge the operation of the privilege, or extend the patrimonial title and interest under the license. Nor does the opinion delivered by Lord Glenlee in *Siddons*, 24th February 1825, appear, when properly read, to lead to such a result. The objection which his Lordship was there dealing with was one of a totally different kind from that in support of which his opinion has been here cited. It was, that Mrs Siddons's license did not confer *exclusive privilege*, but merely operated to the effect of relieving herself from the statutory penalties imposed on those who act without license; and hence, that she had 'no title to apply for interdict at all,' even within the class of performances to which the license reached. The answer was, that the patent *did* 'vest her with an exclusive privilege, and every person was entitled to interdict others from doing any illegal act whereby an injury was suffered in the exercise of a lawful act';—still, however, assuming that the illegal act was within the scope and operation of the license—and to this plea, in the sense in which it was thus submitted, Lord Glenlee gave his sanction, but he does not appear to have done so in any other or more extended sense. That his Lordship did not mean to lay down the general proposition, that whether the illegal act did or did not fall within the scope of Mrs Siddons's patent, she was entitled to an interdict against it in respect of its mere illegality, is apparent from the concluding passage of his opinion. Nothing of the kind was indeed necessary for the disposal of the only matter then competently before the Court.

"Be this, however, as it may, the Lord Ordinary is not prepared, in the present stage at least, to grant a broader interdict than he has done. Such an interdict appears to have been expressly refused by Lord Hermand in 1818; and from any thing said in *Mrs Siddons's* case, it would seem that Lord Glenlee and the Court did not call in question that decision. The interdict asked by Mrs Siddons in 1825 was expressly limited to *licensed* plays. That granted in Hamilton, *supra*, was confined to such as *required license*. Nor was the older interdict in Jackson, 26th February 1793, Dict. 10,611, conceived in a different spirit.

"On the whole, therefore, in so far as the complainer insists for interdict against performances which do not 'require to be submitted to the Lord Chamberlain for his license,' it has been thought best to go no farther at present than to pass the note, and leave the question to be deliberately tried in an ulterior stage.

"The objection of *lis pendens* the Lord Ordinary understands to have been given up, at all events, as a bar to passing the note, by the respondent's consent that an interdict should go out to the limited effect for which it has now been granted. In any view, the Lord Ordinary should not have felt disposed to deal definitively with it to the effect of refusing the note as incompetent, without hearing farther on the subject. He has therefore passed the note, holding the case to remain open on this point as on the rest. Of course the objection of *lis pendens* may be renewed by the respondent, if so advised, when the note, as now passed, comes to be discussed."

Afterwards, a record was made up, and mutual cases ordered.

In the record the respondent stated a plea of *lis alibi* as a bar to the application for interdict. It appeared that the complainer had presented an application to the Sheriff of Lanarkshire for an interdict against the respondent, in terms almost similar to the present. The respondent, who had previously lodged a caveat with the Sheriff-clerk, craving to be heard in case of any such application, entered appearance to the application. Parties were heard thereon, when the Sheriff issued a note as to the interim interdict craved, in which he found that the complainer had not instructed such a *prima facie* case as to warrant the granting of the interim interdict. His Lordship, however, re-

served the whole pleas of parties, and appointed service of the application, meantime, on the respondent, and answers within fourteen days. The petition was, however, never served. In this state of matters, the application for interdict was made in this Court, and after that the complainer inserted a note on the Inferior Court record, stating that he had abandoned that process, but reserved other proceedings. No expenses were tendered to the respondent, and there was no interlocutor interposing authority to the abandonment.

In reporting the cause to the Inner-House, the Lord Ordinary, Cuninghame, stated his opinion in the following note:

"This case was heard before Lord Murray last winter, and it is understood his Lordship's view was to report it to the Court. The Lord Ordinary concurs in the propriety of that course, as questions are involved in it which have been formerly the subject of much discussion before the Court.

"The suspender and complainer, Mr Alexander, is the lessee under the *patentees* of the Theatre Royal in Glasgow, who had a patent, granted under a special Act of Parliament, for erecting a theatre in Glasgow (43d Geo. III.) to act 'such tragedies, plays, comedies, operas, and other entertainments of the stage only as have already been permitted by our Chamberlain, or may hereafter be permitted,' &c. &c. &c. The respondent, Anderson, again, is the lessee or occupant of a place of public amusement, called a minor theatre, opened near the Green of Glasgow, for the performance of pantomimes, comic operas, and other similar exhibitions, got up at a small cost to entertain the humbler class of society.

"The suspender, the lessee of the regular theatre, pleads, that under his letters-patent, he not only has the exclusive privilege of all dramatic performances in Glasgow, but also that he has a legitimate title and interest to apply to this Court to enforce the Act of 10th Geo. II. cap. 28, by interdicting all entertainments of the stage attempted to be got up by the respondent, or any other party, in violation of that Act.

"On the part of the respondent, again, a plea was at one time indicated, that the Act of 10th Geo. II. was repealed *in toto* as to the city of Glasgow, and that, by the phraseology of the Act 43d Geo. III., it could not be enforced within any part of that royalty. That plea does not seem to be now insisted on. It is plain from the whole provisions of the Act 43d Geo. III., taken together (though undoubtedly it is framed with great looseness and inaccuracy), that the meaning of the Legislature was simply to authorise his Majesty to grant a patent for opening one theatre in Glasgow for the representation of *licensed* dramatic performances, and with that intent, and to that effect, only to repeal the Act of 10th Geo. II., while manifestly the Statute was to be in force *quoad ultra* against the erection of other theatres. In any other view, and particularly if the Act 10th Geo. II. had been repealed *in omnibus* as to Glasgow, the limitation of the Sovereign's right to license *one* theatre only in that place would have been unnecessary and absurd.

"The respondent's chief plea, however, seems to come to this, that he in no respect violates the suspender's patent. The right of that party, it is said, extends only to the legitimate drama, or to such entertainments of the stage as the Lord Chamberlain (acting under the 10th of Geo. II.) shall permit; but that he (the respondent) does not exhibit any such performances, but confines himself exclusively to *unlicensed* dramas, or to such representations as *do not require a license*.

"With respect to the *first* of these pleas, the Lord Ordinary must own that he extremely doubts its relevancy. He apprehends that it is not in any party's mouth to allege that he exhibits entertainments *forbid by Statute*; and it seems equally clear, that the suspender has a good title and interest to apply for an interdict against any deliberate violation of the Statute by the respondent or any other parties. It is apprehended that his monopoly includes all dramatic performances and entertainments of the stage which the law allows to be exhibited in this country. The patent, no doubt, is so expressed as to compre-

hend those entertainments permitted, or that may be permitted by the Lord Chamberlain, but it was necessarily implied in such a grant, that no other party shall be allowed to exhibit, either licensed performances, or, *a fortiori*, entertainments of the stage *unlicensed*, within the bounds of the patentee's right.

"Accordingly, this was very clearly and forcibly laid down by Lord Glenlee in the case of *Mrs Siddons v. Ryder*, in 1825 (3 Shaw, 576), when his Lordship delivered an opinion partially quoted in these papers; but the whole of which well deserves perusal in the present question. It is true that the Court, in that case, only interdicted Ryder from performing *licensed* dramas, because no more was asked; and that case did not go further than the *Bill-Chamber*. But it is manifest that the opinion of the learned and eminent Judge referred to, went the full length of the interdict now claimed by the suspender.

"Accordingly, it is thought that there is not a little inconsistency in the course taken by the respondent in the present case. While maintaining strenuously the argument now adverted to, he, towards the close of his paper, expresses his assent to the interdict which Lord Ivory granted in the *Bill-Chamber*. By that interdict the respondent was prohibited from the performance of 'all interludes, tragedies, comedies, operas, plays, &c. &c., and all other entertainments of the stage, &c., *unlicensed* as well as *licensed*, which require to be submitted to the Lord Chamberlain for his license.'

"It is possible that the interdict, in the preceding terms, properly enforced by the Judge Ordinary on the spot, might be sufficient for the protection of the suspender's right. At the same time, as the Act of 10th Geo. II. prohibits all entertainments of the stage from being performed which are not licensed, it is possible that some evasion of the Act, and of the suspender's privilege, may be successfully practised, if it has not been the usage to submit to the Lord Chamberlain every class of stage entertainments which fall within the Statute. Thus, it is not known whether it may have been customary for the Lord Chamberlain to license pantomimes, melo-dramas, ballets and similar entertainments. But whether it has been so or not, it seems to be held in sundry English cases quoted, that such performances fall within the entertainments of the stage prohibited by the Act 10th of Geo. II.

"The cases tried in the English Courts are obviously precedents of weight in the consideration of this British Statute in Scotland. At the same time it deserves remark, that the cases relative to houses of public entertainment in London often depend on another Statute (25th Geo. II. cap. 36, relative to dancing and music rooms), which is exclusively applicable to London and Westminster, and can throw no light on the present question.

"Keeping these considerations in view, it is for the Court to consider whether it would not be proper, both in reference to the rights of the suspender, and to obviate future expense and litigation, to make the interdict, if possible, more *special* and *precise* than it is under the interlocutor in the *Bill-Chamber*. The respondent admits, in the outset of his paper, that he exhibits in his theatre 'burlettas, ballets and melo-dramas.' It is for the Court to judge whether these are not *entertainments of the stage* in the sense of 10th Geo. II. It will also be considered by the Court if the programmes circulated by the respondent (*vide* appendix to suspender's case, pp. 52, 53), of the pantomimes, melo-dramas and other pieces brought out at his theatre, should not have been licensed by the Lord Chamberlain. Both parties have been very sparing of their information as to the practice followed in the Chamberlain's Office as to such pieces, which is remarkable in a class of cases litigated so often and so keenly as that now under discussion. But if necessary, the Court can order additional information to be furnished as to the practice of the English theatres in this matter."

At advising, the Court unanimously considered that the plea of *lis alibi* was untenable. There had been no service, and consequently there never was a process, properly speaking, in the Inferior Court. In regard to the merits, their Lordships held that the 10th Geo. II. was not repealed, and coincided in the views indicated by the Lord Ordinary; and accordingly,

"Suspend the proceedings complained of, and grant interdict as craved, and decern: Find the suspender entitled to the expenses incurred by him; appoint an account," &c.

Suspender's Authority.—*Laidlaw v. Smith*, 8th March 1834; Shaw, XII. 538.

Respondent's Authorities.—*Chitty's Treatise on the Prerogatives*, p. 391. *Webster's Law and Practice of Patents*, p. 85. *Tailors of Perth v. Lyon and Others*, 10th December 1756; Mor. 1947. *Syme v. Steel*, 10th August 1765; Mor. 14,979. *Darby*, 10th February 1796; Mor. 7907. *University of Glasgow v. the Physicians of Glasgow*, 3d March 1837; 15 Shaw, p. 736. *Siddons v. Ryder*, 24th February 1825; 3 Shaw, 397. *King v. Handy*, 6 Durnford and East, p. 286.

Lord Ordinary, Cuninghame.—*Act. Dean of Faculty* (Wood), Penney; A. Hamilton, W.S., *Agent*.—*Alt. Solicitor-General* (McNeill), J. Inglis; Handyside and Wilson, W.S., *Agents*.—*Beveridge, Clerk*.—[G.D.F.]

16th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 266.—ARCHIBALD WATT, *Suspender*, v. WILLIAM KNOX, *Charger*.

Process.—Poor.—Assessment.—Consuetude.—Suspension.—According to use and wont for a length of time, *poors' assessment* had been levied on certain lands, as situated within the parish of St Ninians, but on an action for payment of the assessment of a particular year, the proprietor of the subjects pleaded that the action ought to be dismissed, on the ground that the subjects were situated within the parish of Stirling, and so not liable for the assessment. After a proof as to the situs of the lands, the Sheriff-substitute dismissed the action, but the Sheriff, proceeding on the usage as to the mode of assessment, the proof of which he held to be complete, and enough for the decision of the case, reversed that finding, and decerned for the assessment and expenses of process.—Held that suspension was a competent mode of review of the Sheriff's judgment; but opinion indicated, that the main question as to the situs of the lands, and consequent liability to a particular parish, could only be raised by declarator.

Knox, who is collector of *poors' money* for the parish of St Ninians, brought an action in the Sheriff Court of Stirlingshire against the suspender, who is factor for Spittal's Hospital in Stirling, for payment of £2. 6s. 3d. as the amount of *poors' rates* for the period from Whitsunday 1836 to Whitsunday 1837, alleged to be due by the hospital for their lands of Southfield, as situated within the parish of St Ninians. Along with the summons there was lodged a certificate under the hands of the minister of that parish, to the effect that the sum claimed was the "quota assessed upon the lands of Southfield, in this parish, belonging to the said hospital." In defence it was pleaded, that the action could not be maintained, because, as alleged, the lands in question were not situated in the parish of St Ninians, but lay within the parish of Stirling; in support of which averment, reference was, *inter alia*, made to a variety of the steps of the progress of the titles, in virtue of which the hospital came into possession of the lands, and which distinctly set forth, as alleged, the fact as stated by the suspender. On the other hand, the collector averred that the lands were situated within the parish of St Ninians, or were so reputed from time immemorial, and had invariably been assessed upon as in that parish, and had accordingly paid, without challenge, till the institution of the present action, the *poors' assessment*, schoolmaster's salary, and the other usual parish burdens—as exigible from these lands—as being locally situated within the parish.

This was admitted, but it was averred that the payments had been made in error. It was also set forth by the collector, that from time immemorial the hospital had exercised and enjoyed the rights and powers of heritors in the parish of St Ninians in respect of these lands; and that they had been in the habit, from time to time, of attending and acting at meetings of heritors. The hospital also possessed seats in the church, and burying-ground in the churchyard of St Ninians, in virtue of an allocation to them as heritors.

The hospital was alleged to have been instituted for charitable purposes, in support of which the lands in question had been disposed to the trustees in 1684 by the Crown "*pro usu et utilitate pauperum*," but a portion of the subjects had been feued out, and the revenue of the hospital consisted for the most part of feu-duties.

The Sheriff-substitute having allowed a proof to both parties of their respective averments, pronounced this interlocutor:

"*Stirling, 31st January 1840.*—Having considered the proofs of parties, productions, and whole case.—Finds that the pursuer has proved seats have been set apart for the lands of Southfield in the parish church of St Ninians, and the defender's constituents have derived a revenue therefrom, and that they still do so: Finds that the defender has not proved that the lands in question have been localled on, or that he has paid stipend therefor to the minister of Stirling, as averred in article ninth of his revised condescendence; but finds it proved that the lands in question are situated in the parish of Stirling, and cannot therefore be subjected in payment of poors' rate to the parish of St Ninians: Therefore, assolizies the defender from the conclusions of the action; dismisses the same, and decerns: Finds the pursuer liable in the dues of extracting and recording this decret, but finds no other expenses due, and decerns."

(Signed) "Jo. HAY."

On an appeal, the Sheriff pronounced the following interlocutor:

"*Stirling, 5th February 1841.*—The Sheriff having considered the appeal for the pursuer, and advised the whole process—the Sheriff-substitute, as advised by the Sheriff, sustains the appeal, alters the interlocutors appealed from, repels the defences, decerns against the defender, as factor for Spittal's Hospital, for the sums concluded for in the libel: Finds the pursuer entitled to expenses of process; allows an account thereof to be given in, and when lodged, remits to the auditor of Court to tax the same, and report."

(Signed) "Jo. HAY."

"*Note.*—Without going into the question of whether the Sheriff's duty, as pleaded by the pursuer, is merely ministerial, and not judicial, in questions of payment of assessment for poors' rates, the Sheriff is of opinion that the *usage* of rating lands in a particular parish affords a sufficient ground for the Sheriff *de plano* decerning for the assessment laid on by the heritors. In this case the *usage* is unquestionable, extending from the present time as far back as can be traced, and not confined to assessments for the poor, but extending to all parochial burdens. Besides, there are the facts, 1. That the privilege of sittings in the parish church were, so long ago as in 1751, allotted to the lands assessed. 2. That these sittings have been let, and the rents drawn by the factor for the hospital, having the right of property in the lands assessed. 3. That a portion of the new kirk-yard was, at its foundation a great number of years ago, allotted to the lands assessed. In addition, there is the total failure to show, as averred by the defender, that the lands assessed have ever paid stipend or any parochial burdens to the parish of Stirling. These circumstances appear to the Sheriff amply sufficient to entitle the pursuer both to decree for the assessment imposed, and to vindicate the right of the heritors and kirk-session of St Ninians to continue to assess the lands of Southfield until the hospital shall, by a regular process, establish their exemption from payment in future of parochial burdens to that parish.

"The Sheriff will indicate no opinion of his own on the comparative value of the evidence hitherto brought by the parties to prove in which of the two parishes the lands of Southfield are situated. But the shape which this case, originating as it did in the Small-Debt Court, has taken by the proof allowed, though before answer, of the particular parish in which the lands lie, made the present Sheriff devote to the case a very deliberate and anxious consideration before giving effect to the views he entertained of the proper and limited question for his disposal in it. The expense of process must, under the circumstances, of course fall on the defender."

The expenses were modified to the sum of £31. 1s. On a charge being threatened for the same, as well as the original assessment, a suspension was presented on caution, and on the following pleas:—1. As the action by the respondent had for its object to constitute a liability against the complainer, on the ground that the lands were locally situated within the parish of St Ninians, it was incumbent on the Sheriff to give judgment on the evidence as to whether the lands were situated within the parish of St Ninians or not. 2. It was not competent under the Acts of Parliament to assess lands situated in one parish for poors' rates payable in another parish; and it having been proved that the lands in question were situated, not in the parish of St Ninians, but in the parish of Stirling, it was not competent for the heritors to assess these lands, nor was it competent for the Sheriff to give effect to the illegal and incompetent assessment made by the heritors. 3. The alleged usage of payment was not warranted by the Acts of Parliament as a ground for levying poors' rates in respect of lands not situated in the parish, and it was therefore incompetent for the Sheriff, in respect of such alleged usage, to ordain the complainer to make payment of the poors' rates claimed by the respondent. 4. It was competent for the Sheriff to decide incidentally, and to the effect of ascertaining whether the complainer was liable in poors' rates,—whether the said lands were situated in the parish of St Ninians or not. 5. Even if the lands were locally situated within the parish of St Ninians, the complainer was not liable in poors' rates, in respect that Spittal's Hospital was a charitable institution, and the lands were mortified for the use of the poor; and farther, in respect the hospital was the superior, and the revenue derived therefrom consisted of feu-duties. 6. The Sheriff did wrong in ordering the expenses to be taxed on a scale exceeding £8. 6. 8.

The respondent *pleaded*—1. The lands of Southfield were locally situated within the parish of St Ninians, and were generally and immemorially reputed to be so. 2. The duty of a Sheriff, in enforcing payment of the ordinary parochial assessment for the poor, was merely ministerial, and provided he was furnished with the usual attestation by the minister of the parish within which the assessment was laid on, was bound *de plano* to interfere to compel payment by the party assessed, and his order to that effect was not liable to review by suspension or otherwise. 3. The suspender's allegation, that his lands were not within the parish of St Ninians, could not competently be entertained in the Court below, and his alleged immunity thereon founded, could be considered in this Court only in a process of declarator. 4. The suspender, by his own actings, as well as by those of his predecessors, was barred from maintaining (at least in this process) any plea founded

on the allegation of his lands not being within the said parish. 5. The decree sought to be suspended was well founded, and the reasons of suspension fell to be repelled, with costs.

The Lord Ordinary pronounced the following interlocutor:

"2d June 1842.—The Lord Ordinary having heard parties on the competency of the suspension—Repels the objection to the competency; and in respect that the charger intimates that he is not to acquiesce in the interlocutor, finds him liable in expenses, and remits the account, when lodged, to the auditor to tax and to report.

"*Note.*—It was admitted by the charger that the suspender had never refused to pay in the meantime, and that there was no attempt to stop the levying of the assessment, or in any way to interfere with the supply of the poor. In this situation, the Lord Ordinary considers the case of Crawford, 31st May 1838, to fix that suspension is a competent process for trying the question; but besides the question at issue as to liability of these lands, the Sheriff gave expenses, and the charge is partly for these. It is surely competent to suspend a charge for expenses, and although the charger says that the Sheriff was acting purely ministerially, and had no power except to enforce the assessment, the fact is, that with the virtual consent of the charger himself, he acted otherwise, for he allowed a proof, and it was on facts said to be established by this proof that both the Sheriff-substitute and depute decided."

The charger reclaimed, praying the Court

"to recal the said interlocutor, to sustain the objection to the competency of the suspension, and to find the suspender liable in expenses; reserving to the suspender to institute an action of declarator, or such other action as may be competent in the premises."

At advising, the Court were unanimously of opinion that the suspension was competent, but indicated also an opinion that the main question raised by the suspender in his pleas ought properly to form the subject of a declarator. Their Lordships accordingly *adhered*, and found the reclamer liable in additional expenses.

Lord Ordinary, Cockburn.—*Act.* Shaw; Dundas and Jamieson, W.S., *Agents.*—*Alt.* A. S. Logan; A. Dun, W.S., *Agent.*—*T. Clerk.*—[G.D.F.]

19th July 1842.

FIRST DIVISION.—(H. B.)

No. 267.—THE EARL OF KINNOULL, *Pursuer, v. The Rev. Dr Robert Gordon and Others (Trustees of the Ministers' Widows' Fund), Defendants.*

Church—Patronage—Vacant Stipend—Statutes 1592, c. 117, and 54 Geo. III. c. 169, (Ministers' Widows' Fund)—*Where a presbytery had rejected a presentee on the veto, and refused to proceed with his trials after it had been found that they were still bound to do so—Held that, subsequently to the date of the citation in an action of declarator directed against all having interest, the stipend falling due during the life of the presentee belonged not to the trustees for the Ministers' Widows' Fund but to the patron.*

Continuation of the Auchterarder case. The summons contains the following alternative conclusion:—

"Or otherwise, it ought and should be found and declared, by decret fore said, that the pursuer, Thomas Robert Earl of Kinnoull, has legally, validly, and effectually exercised his right as patron of the church and parish of Auchterarder, by presenting the pursuer, the said Robert Young, as aforesaid, to the said church and parish, and that the said Presbytery of Auchterarder, and the individual members thereof, have illegally, and in violation of their duty, and of the several laws and statutes before libelled, refused, and continue to refuse to make trial of

the qualifications of the said Robert Young, presentee fore said, and to admit and receive the said Robert Young as minister of the church and parish of Auchterarder; but have illegally, and in violation of their duty, and of the laws and statutes libelled, as aforesaid, rejected the said Robert Young as presentee to the said church and parish (all which has now been decreed), and therefore, that the pursuer, Thomas Robert Earl of Kinnoull, has right to, and is entitled to receive and retain the whole stipend and emoluments of and pertaining to the said church and parish of Auchterarder, from the date of citation hereto, and in all time coming during the life of the said Robert Young; and it being so found and declared, the said Presbytery of Auchterarder, and the said (naming them), the present individual members thereof, and their successors, and Dr Andrew Grant, one of the ministers of Edinburgh, collector nominated and appointed under the several Statutes passed for the better raising and securing a fund for a provision for the widows and children of ministers of the Church of Scotland, and all others, ought and should be decerned and ordained, by decret fore said, to desist and cease from molesting and disturbing the pursuer, the said Thomas Robert Earl of Kinnoull, in the possession and use in time coming, during the life of the said Robert Young, of the said localised and modified stipend, manse, glebe, and other emoluments belonging and pertaining to the said church and parish of Auchterarder: And it being so found and declared, the said (naming them), heritors of the said parish of Auchterarder, ought and should be decerned and ordained, by decret fore said, to make payment to the pursuer, the said Thomas Robert Earl of Kinnoull, of the stipend payable by each of them respectively, according to their several proportions, in terms of the subsisting decrees of locality, and that from the date of citation hereto, and in time coming during the life of the said Robert Young."

Mutual cases having been lodged on this point of the case by the Earl of Kinnoull, and by Dr Gordon as collector for the Widows' Fund, in obedience to an interlocutor of the Lord Ordinary, his Lordship reported the cause to the Court, who ordered cases to be prepared upon the point, "Whether the trustees for the Ministers' Widows' Fund can legally claim the stipend of vacant charges, in case it appear that these remain vacant by the illegal proceedings of the Church?" and appointed the parties to box them to the Judges of the Second Division and Permanent Lords Ordinary for the opinion of the whole Court.

The following opinions were returned:—

Lord Medwyn:

"The Reverend Charles Stewart, minister of the parish of Auchterarder, having died on 31st August 1834, Lord Kinnoull, the unquestioned patron, granted a presentation in favour of Mr Young, a licentiate of the Church, which was laid before the Presbytery on 14th October 1834, with all the requisite documents of acceptance, &c. On 27th October the Presbytery so far sustained it as to find themselves prepared to appoint a day for moderating in a call to Mr Young, which was appointed accordingly for 2d December 1834. Dissents from the call and presentation were called for by the Presbytery on that occasion, and, on ascertaining that there was a majority of dissents, the Presbytery, on 7th July 1835, rejected the presentee, acting in obedience to the Act of the General Assembly anent Calls.

"According to this state of matters, the executors of Mr Stewart being entitled to draw the first half of the stipend for crop 1834; and the other half due at Michaelmas being payable, as the ann. vacant stipend would be due only at Whitsunday 1835, before which time, in the usual course, if there had been no obstruction to Mr Young's trials, and he had been found qualified, he would have been admitted, and would therefore have been entitled to the first half of crop 1835; so that in such a case no vacant stipend would have arisen.

"In the summons of declarator raised by Lord Kinnoull and Mr Young, on account of his rejection, besides the conclusion against the Presbytery as to their refusal to take Mr Young on trials, and admit him if qualified, there is an alternative conclu-

sion, that Lord Kinnoull has legally exercised his right of presentation, that the Presbytery have illegally, and in violation of their duty, refused to admit the presentee as minister of Auchtermarder, therefore that he, Lord Kinnoull, has right to, and is entitled to receive and retain the whole stipends and emoluments of the said church and parish from the date of citation, and in all time coming during the life of Mr Young; and that the Collector of the Widow's Fund, and all others, should not molest or disturb him in the possession and use of these. The date of citation is 25th October 1835. So that the vacant stipends payable at Whitsunday and Michaelmas of that year, 1835, are not claimed, but will go to increase the Ministers' Widows' Fund; while that payable at Whitsunday 1836, and what is subsequent thereto, only falls under this summons.

"A multiplepoinding has also been raised in name of the heritors, and a collector has been appointed by the Court. The case then may be viewed as a competition, in which the patron and the Collector of the Widows' Fund each claim; and the question is, which of them, or whether either of them, has shown a right to the vacant stipend which arose after the 25th October 1835.

"The claim depends upon the import of the Act 54 George III. c. 169, in favour of the Ministers' Widows' Fund, and whether it is to be held that the enactment of that Statute is so broad, and the words so stringent, that whenever, by an illegal act of the Church, a benefice is not filled up in terms of law, the stipend which would in due course have fallen to the minister must be paid to the Collector of the Widows' Fund. Whether, in short, it must be said here, *Lex non distinguit, neque nos*.

"I think there cannot be a doubt that in this country originally, it was one of the privileges of patrons to enjoy the fruits of vacant benefices. The claim of the Pope to the annates was with us effectually resisted: in this respect we were more resolute and successful than they were in England. Accordingly, we find that by 1546, c. 4, an Act was passed expressly 'with the consent of the Prelates, Earls, &c., and all others patrons of benefices, both spiritual and temporal, that all kirkmen slain in this present armie, their nearest of kin are to have the presentation to his benefice, and the profits of the benefice, with the fruits speciallie on the ground, with the annat thereafter, to pertain to them and their executors.' To this Act the consent of all patrons was necessary, and was given. And in like manner, upon the Reformation, Queen Mary stated, as an objection to a request of the General Assembly as to patronage, 'that her Majestie thinks it noways reasonable that she should defraude herself of sa great a part of the patrimonie of the Crowne, as to put the patronage of benefices furth of her awin hands; for her awin necessitie in bearing of her port and common charges, will requyre the retentiuon of ane good part in her awin hands.' Buke of Univ. Kirk, p. 63.

"Accordingly Stair distinctly laid it down—'In benefices patronate, the patron had right to the teinds *sede vacante*. But several Acts of Parliament have restricted the rights of patronage, and now the patron has only the application of vacant stipends to pious uses within the parish.' B. IV. t. 24, § 7.

"Now this right continued till the benefice was filled up, not merely by presenting a person, but by his being admitted so as to have in him *jus in re*, and the right to draw the teinds and sue the heritors.

"When the Presbyterian form of church government was sanctioned in 1592, it was made a condition that patronage should continue, as it had also been when the Reformed Church was adopted instead of the Papistical; and presentations were now to be directed to presbyteries, who were to be bound and astricted to receive and admit the presentee; but considering the views of the leaders of the Presbyterian party, it was thought proper expressly to provide, 'in case the presbytery refuses to admit any qualified minister presented to them by the patron, it shall be lawful to the patron to retain the baill fruits of the said benefice in his ain hands.' (1592, c. 117.) This applies no doubt to the case where the patron has done all that in him lay to fill the benefice; but I do not think that, either from the phraseology thus used in this Act (and the same words are used in the Act 1612, c. 1,) or in the law language of Scotland, I can affirm that they import anything different from what

in subsequent Statutes is termed vacant stipend, or that stipend of a parish where the presbytery refuses to admit a qualified presentee, is not vacant stipend. The fruits of the benefice was then the legal description of the emoluments of the beneficiary, because, although the reformed clergy in general had only stipends assigned to them out of the thirds, all were not in the same situation (see 1592, c. 161); and this was expected to be a temporary arrangement, and only as long as the Popish incumbents survived. Accordingly that very year, (1592, c. 15, Thomson's Acts, Vol. III. p. 545,) and as part of the same plan for establishing the true Kirk, besides an Act ratifying an Act of the Privy Council made in February 1587, in favour of 'the Ministrie their Stipends and Rents,' an Act was passed appointing a 'Commission to confer and treat with the ministrie anent the provision of sufficient and local stipends to the ministrie.' (1592, c. 27, *ib.* p. 553.) I think the object of the enactment was this, while it secured to the patron the right he already had to retain the whole fruits of the benefice, as long as the church was vacant by the presbytery refusing to admit his qualified presentee, if another was admitted, whether selected by themselves, the General Assembly, or the people, the patron was still to have this right; this latter it was important to provide, and when the patron had thus the right to retain these fruits, he might apply them as he thought proper.

"The Act 1661, c. 52, proceeds on the narrative, that by divers Acts it is found that stipends during a vacancy should be employed on pious uses. Now, I am not acquainted with any such Acts, except the Act 1644, c. 47, (Thomson's Acts, Vol. VI. p. 128,) which directed that 'stipends and benefices of kirks now vaking, or which may hereafter vaik by decease, deposition, suspension, or transportation of ministers, or by disunion of kirks, or any other wayes, during the vacancy thereof, shall be employed upon pious uses' within the parish, by the patrons, with the advice and consent of the respective presbyteries. This Act fell of course by the Act rescissory at the Restoration; but, like many other beneficial Acts, it was re-enacted by the Statute already referred to, which 'ordains all stipends or benefices of kirks that are vacant, and not already disposed of, or which shall vaik by decease, deposition, suspension, translation, or any other wayes, to be employed, in the manner there pointed out, and a collector was appointed for collecting them; and the records of Parliament (See Vol. VII. pp. 123, 235, 240, 282, &c.) are full of warrants upon him for payments to loyal clergymen and their families who had been dispossessed by the covenanting party.

"Now there is evidence in these proceedings as to what was considered vacant stipend, and collected as such. For a petition is given into Parliament by the heritors and inhabitants of Newbottle, 'mentioning that the kirk had been a good while vacant and without a minister; that the elders and heritors did, according to the constitution of that time, call a worthy person to be their minister, who was not actually received by the presbytery, but allowed by them to preach and to do all ministerial acts, which he very well performed to their satisfaction, yet the presbytery would not, on their earnest pressing sute, admit him;' (1661, c. 108, Vol. VII. p. 198.)—also mentioning that a bridge needs reparation; and it prays that some fit proportion of the vacant stipend of the said kirk be given to the minister, and the remanent for the reparation of the bridge. The Parliament accordingly gave 500 merks to the minister, and the remainder for the bridge, and appoint Wilkie the collector to allow the same accordingly. See also 1661, c. 186, p. 267; 1662, c. 23, p. 390.

"Thus, then, vacant stipend, under an Act which specifies stipends vaking by decease, &c., or any other wayes, was held to embrace stipends of churches kept vacant for years by the act of the presbytery; and I think it reasonable to infer, that when the subsequent Statutes, 1672, c. 20, and an intermediate one not mentioned by the parties, 1663, c. 62 (Thomson's Acts, Vol. VII. p. 491), as well as 1685, c. 18, simply speak of 'vacant stipends,' without specifying in what manner they become vacant, that these words have the precise import of the more enlarged expressions in the two Acts first noticed; that, in short, it is the generic expression for the precise subject of these Acts. This last Act restored to patrons their ancient rights as to vacant stipends, except that they must be employed on pious

uses within the parish, and more particularly for building and repairing of bridges, repairing of churches, or entertainment of the poor, as the patron shall determine, yearly. The Act 1690, c. 23, which took away the patron's right of presentation, specially reserved his right 'to employ the vacant stipends on pious uses' within the parish; and by 10 Anne, c. 12, patrons are restored to their ancient rights of presenting ministers to vacant churches, and of 'disposing of the vacant stipends for pious uses within the parish.'

"On this footing, the patron's right remained till the year 1814, when a bill having been brought into Parliament for amending former Acts establishing the Ministers' Widows' Fund, a provision was introduced as to vacant stipends, upon which alone the claim of the collector in this competition is founded. The provision was introduced with the express consent of the Crown, and the tacit consent of the other patrons, or at least without opposition from the latter. It is of importance to consider the precise amount of the grant so made, and whether it can bear a construction so obviously beyond the meaning and intention of the parties, as that whenever a church continues vacant, not from any delay in the patron issuing a presentation, nor from any necessary delay by the presbytery in going through the requisite trials of the presentee, or in disposing of any relevant objections stated by any parishioner to his appointment, but from an illegal act and resolution of the Church, contrary to the law; and moreover, when this is persisted in after it had been declared to be illegal by the competent authority in the State, the stipend which accrues during these years is to go to increase a fund in which the ministers of the Church at large are so deeply interested on behalf of such of them as are married—I say, against the meaning and intention of the parties; for I cannot believe that such a case of refusal and rejection as Lord Kinross complains of here, was 'in the contemplation of the patrons and of the other parties in the Church who were the promoters of this Act,' and for this plain reason, that no sane man would have paved the way for such an Act passing, if any avowal had been made of an intention by this clause to provide for such illegal proceedings on the part of the Church as have kept this parish of Auchterarder vacant now for nearly seven years, with an obvious advantage to the Widows' Fund. At the time this Act was passed, all attempts on the part of the church courts to disturb the right of patronage had been long abandoned, the quiet induction of presentees was quite fixed and settled; and to commence a revival of the contest by an obstruction of the right without legislative enactment, could never be anticipated. Although I am persuaded, then, such conduct was not in the view of either of the parties, and of course no such case was contemplated nor provided for at the time of this surrender of the patron's rights, yet it does appear to me, that the words of the enactment are such as must exclude the claim of the Widows' Fund to the continuous stipends falling due beyond the date of citation in this action.

"The Act was obviously, in this branch of it, framed upon the model of the Acts 1644 and 1661, but with this remarkable difference, that while it specifies how the parish becomes vacant by particular events occurring to the incumbent, it does not add, 'or any other ways.' There must have been some reason for this marked departure from the phraseology of Acts which were plainly lying before the framers of this one. The words of the Statutes in the seventeenth century have been already given: the enactment of the nineteenth century is, 'That when any parish in the Church of Scotland becomes vacant by the death, translation, resignation, or deprivation of an incumbent holding the pastoral cure and benefice of such parish, and that vacant stipend *thereby* arises,' subsequent to 1813, 'such vacant stipend, in so far as it has heretofore been applicable by the patron to pious purposes, shall thenceforth and in all time to come be levied in manner hereafter mentioned, and paid to the general collector,' &c. (54 Geo. III. c. 169, § 9.)

"And the mode in which it is to be levied is this—§ 12, 'As often as any portion of vacant stipend shall occur in any parish within the bounds of any presbytery, the moderator is hereby expressly required, within three calendar months after the terms of Whitsunday or Michaelmas, at which such vacant stipend shall become due, to make intimation thereof by a writing under his hand to the general collector at Edinburgh,

which writing shall also contain an attested list of the several heritors or others by whom such vacant stipend is payable, and of the proportion thereof payable by each of them.' The moderator is also to intimate to the heritors to pay their proportion of stipend to the collector.

"This duty is imposed upon the moderator of the presbytery, who of course knows when the benefice becomes vacant and when it is filled by admission of the presentee; and it will be particularly noticed, he is to intimate to the collector *every portion* of vacant stipend as it shall occur.

"As to the appropriation of vacant stipends, it is provided (§ 16–21,) that a capital stock or fund is to be created by accumulating the annual produce of these stipends, with various other funds mentioned in the Act, and yearly adding the interest, out of which additions are to be made from time to time, at certain intervals, to the rates of the annuities of the widows, each interval being not less than fourteen years.

"This Act, it must always be recollected, is a private Act (it is printed among the local and personal), transferring valuable privileges from one party to another, and this *gratuitously*, and is therefore to be construed with a view to carry into effect the fair meaning of the parties, but not to give it a more extensive interpretation and effect than was intended, or it will reasonably bear. It contemplates the ordinary case where a parish becomes vacant—that vacant stipend arises in consequence of some necessary, or at least not illegal delay in filling it up, either from the presentation being only near the end of the six months, or the *jus devolutum* occurring, or of some dispute about the right of patronage, or from some innocent error in judgment in the church courts, engaged honestly and conscientiously in discharging their duty. But it seems difficult to hold, that the enacting words are such as to compel the Court to say it comprehends vacant stipend, from whatever cause it can arise. If the General Assembly were to vote that patronage was unscriptural, and therefore resolve that no presbytery should receive a presentation, but should reject every presentee, would the stipends of churches kept vacant in consequence of such an illegal resolution fall to the Widows' Fund? Or if they were to resolve that it would be an advantage to the Church if this fund for the benefit of the widows of ministers were increased, and therefore that while presentations were received and sustained, no admission should be given for a given period, say one, two, or three years, would the portions of stipend thus becoming vacant be appropriated under this Act? I can scarcely think that in either of these cases this could be so.—Take this other case. The General Assembly once enacted, with the view of controlling patronage, 'that none seek presentations to benefices without advice of the presbytery within the bounds whereof the benefice is; and if any do in the contrary, they shall be repelled as *rei ambitus*.' Now if such an Act were to be again passed by the Assembly, and enforced by a presbytery, would stipend occurring during the vacancy, till redress was obtained for such an illegal resolution, become the property of the Widows' Fund? In all these cases, there might be a portion of vacant stipend which could be said to have become vacant by the death of the former incumbent, and the moderator would be fully warranted to hold this to be so, and to make intimation accordingly; but after he has made intimation as to those portions of vacant stipend, how could he, in terms of the 12th section, make intimation as to subsequent portions which were not vacant by the death of the last incumbent, but *kept vacant* by an illegal resolution of the General Assembly, which the Presbytery think themselves bound to obey? In this Widows' Fund Act there is no general declaration as to vacant stipend in certain specified events, followed by, 'or any otherways,' which might be argued to include a continuance of the vacancy from a different cause from that in which it commenced. In this respect it is limited and restricted from the simpler form of expression used in preceding Statutes, and does not even employ the generic expression of 'vacant stipend,' which might be supposed to comprehend whatever was embraced by the other and more particular enumeration; but it limits it to the case of vacant stipend arising in consequence of the death, &c., of the last incumbent. Vacant stipend, from a cause mentioned in the Act 1644, would unquestionably not fall to the Widows' Fund, viz., that from the disunion of kirks. For none such is specified in the

Act 1814: in this respect, then, it is more restricted than the old Act, even as to special enumeration, still more by the omission of all other ways whereby it may arise.

"But, truly, it seems impossible to say that the vacant stipend, which is the subject of this competition, has arisen from any other cause than from the Church persisting illegally in enforcing the Veto Act, and the Presbytery, in violation of their duty, refusing to take the presentee on trial. The Widows' Fund will be entitled to the two portions of vacant stipend falling due at Whitsunday and Michaelmas 1835; thus far it may be admitted that vacant stipend has arisen by the death of Mr Stewart; but beyond this it is impossible to go;—the fund is only to get what is vacant by his death; now the vacancy by his death would have been filled up long ago, but for the resolution to enforce this illegal Act, and therefore the subsequent portions of vacant stipend not arising 'thereby,' i. e., his death, but from a totally different cause, have not been made over to this fund.

"It must never be forgot that in the Act there is no general forfeiture of the patron's right; it is not said, patrons shall no longer, in any case, be entitled to vacant stipend for pious uses; that their right to it and interest in it shall cease and determine; but only that vacant stipend, arising by the death of the last incumbent shall be paid to the Collector of the Widows' Fund; and the words which follow, 'in so far as it has heretofore been applicable by the patron to pious purposes,' will not enlarge the gift, nor make the transfer from the one to the other more ample than is implied in the sound meaning of the words bestowing the right. The words are not, that all vacant stipends heretofore applicable by the patron for pious purposes shall hereafter be paid to the collector; neither is there any declaration that this is the pious use to which hereafter patrons shall apply vacant stipend, or the pious use to which vacant stipends shall be applied. It is nowhere in this Act said to be a pious use of vacant stipend, just as little as the donation from the bishops' rents is said to be.

"Now, then, is the Court prepared to say that this clause, so cautiously worded, conveys to this fund vacant stipend arising not from any proceeding of a presbytery in the honest discharge of their functions as a church court, though it may be occasioning undue delay, by acting mistakenly from some error in judgment, but portions of a stipend which continues vacant in consequence of an illegal resolution of the Church to resist the law, acted on by the Presbytery, in contempt of the authority of the courts of law, and in a matter of civil right? I can scarcely think that the Court will come to this conclusion, but will view the portion of vacant stipend which first arises, as totally different (as in fact it is) in origin, effect, and character, from that which continues to arise afterwards; and, therefore, though it may all pass popularly under the name of vacant stipend, because the church continues vacant, that the one is quite distinguishable from the other: so that while the one clearly falls under the Act, the other as clearly does not.

"If this be so, it is unnecessary to found much upon the case of the College of Glasgow, 1694, which proceeded on the ground that the words of the Statute there necessarily included the stipend claimed by the college; and they were not successful on this ground alone, that it was *casus incogitatus*, the words going beyond the meaning of the Statute. The case was this: The Act 1685, c. 22, which restored to patrons the right of employing vacant stipends, makes certain exceptions for five years, and among these 'the vacant stipends of the dioceses of Glasgow and Galloway shall be employed to the use of the College of Glasgow.' Under this Statute, the college had 'right to the vacant stipends for 1689, and the term used is vacant stipends' simply, and without any qualification as to how it arises or continues. It appears that Mr Wilson, the incumbent of one of these parishes, had suffered from the lawlessness of the Covenanters of the west, who, as is well known, after King James had issued his proclamation in 1687, dispensing with all tests and penal laws as to religion, broke out into such acts of violence, that the rabble in winter 1688 went about in the five associated shires and dispossessed more than two hundred clergymen, driving them and their families from their churches. The Privy Council were at that time powerless and unable to preserve the peace of the country, and order was not partially

restored till the meeting of the Estates in March 1689. Mr Wilson seems again to have officiated occasionally in his church till legally dispossessed in 1690. The college claimed the stipend when he was driven away, or *rabbled* out of his church as it was termed, as vacant stipend. It is quite true the church had not been served,—it was vacant, not by death or deposition, but 'by other ways;' and as the generic term 'vacant stipend' had the same meaning as the more ample description of the Act 1661, this stipend was vacant, and belonged to the College of Glasgow. But the Court held that 'the vacancy occasioned by the rabble's thrusting out ministers was *casus incogitatus*, and not foreseen or meant by the said Act of Parliament; and that Mr Wilson proving he served at that kirk after the 13th April 1689 (which was the date of the proclamation of the meeting of Estates), he had right to that half-year's stipend;' (16th February 1694, Fount. 4 Sup. 143). It was held that the words went beyond the meaning of the Act, and they were not allowed to comprehend a case which fell within them, but was never contemplated.

"But as I am of opinion that the words of the Widows' Fund Act do not comprehend the portions of vacant stipend here claimed, it is unnecessary to resort to this case as an authority.

"The only parties in this competition are the Patron and the Collector of the Widows' Fund; and my opinion is, that the patron is entitled to be preferred, but that he must, in terms of the Act 1685, apply these stipends to pious uses.

"But it may be a question, whether the presentee, when the patron has done all in his power to put him into the benefice, and when he has been illegally kept out of it, should not be preferred to the vacant stipend; in short, whether, if the Court cannot enforce his being received and admitted by the Presbytery as minister of the parish, they may not, as a *surrogatum*, award to him the stipend till the benefice is legally filled by himself or some other. But the presentee does not appear in this competition;—no such claim is brought forward; and therefore I do not think it necessary to discuss this point, nor show why, at present at least, I am not inclined to hold that for vacant stipend, not falling under the Widows' Fund Act, there can be any claim except through the patron.

"Upon the whole, therefore, I am for preferring Lord Kin-noull, in terms of his summons."

Lord Meadowbank:

"I concur in the preceding opinion."

Lord Cuninghame:

"I concur entirely in the views of this case expressed by Lord Medwyn, and I am clearly of opinion that the Collector of the Widows' Fund has no claim, by the Statute on which he founds, to any of the stipend of the parish of Auchterarder falling due after 25th October 1835, the date of citation in the present action. As the case involves a question of statutory and constitutional law of great interest, I trust I may be excused for stating in a few words the considerations which more particularly impress me with the untenable nature of the collector's plea.

I. In the *first* place, upon a sound construction of the Act of 1814, I apprehend that the vacant stipend transferred to the Widows' Fund by that Act is specially confined to the cases, 'when any parish in the Church of Scotland becomes vacant by the death, translation, or deprivation, of any incumbent holding the pastoral cure and benefice of such parish, and that vacant stipend *thereby* arises subsequent to the crop and year 1813,—such vacant stipend, in so far as it has heretofore been applicable to the patron to pious purposes, shall henceforth,' &c. &c., 'be paid to the general collector,' &c.

"This was a statutory transfer, not of the whole vacant stipend that might fall due in all the parishes of Scotland, from whatever cause the vacancy might be created or continued, but solely of such vacant stipend as might arise from the death, translation, or deposition of the preceding incumbent. The object and effect of the provision are well known to all conversant with the ecclesiastical law and usages of Scotland. As a patron has six months after each vacancy has occurred to fill up the benefice, and an additional period often elapses, either from the non-acceptance of presentees, or from the time unavoidably re-



quired for their trial and induction, it has necessarily happened, perhaps in the majority of settlements in Scots parishes, that on each vacancy by death, there is a certain delay, in consequence of which an arrear of stipend (seldom exceeding one term's payment in amount) arises, which the new incumbent cannot claim before induction, and which of old fell to the patron as *vacant stipend*, to be employed *ad pios usus*. That clearly is the vacant stipend, arising from *death*, which was transferred to the Widows' Fund by the Statute on which the present question depends.

"No doubt, in cases of difficulty, the extent of this transference or claim has not been measured in nice scales. When a question as to a new presentation, arising from the death of the preceding incumbent, occurs, requiring long discussion and deliberation in the civil and ecclesiastical courts, the vacant stipend may be increased beyond an ordinary amount, without fault or *mala fides* attributable to any party; and in such cases the Court has not been asked to infer, that the vacant stipend did not arise from proceedings *bona fide* rendered necessary by the death of the preceding incumbent.

"But the present case, as maintained by the opposing patron, does not fall within that class. It is alleged that the vacant stipend, which is the subject of this question, does not fairly and honestly arise from the death of the last incumbent, but has been accumulated solely in consequence of an *illegal* law of the Church recently passed by that body, of their own authority, setting a Statute of the Legislature at defiance, which they still peremptorily refuse to obey. This being the plea of the patron, I cannot hold that it is inconsistent with, or excluded by the words of the Statute, giving a right to the Widows' Fund to the vacant stipend in the limited class of cases before specified.

"Neither does it appear to me, that this plea of the patron can be obviated by any reference on the part of the widows to the probable views and intention of parties in passing this Act, as justifying any strained or very wide interpretation of its terms. It has been insinuated, no doubt, on the part of the fund, that as no mortal in 1814 anticipated that such a course of proceedings and policy would be adopted on the part of the Kirk, as has been lately exhibited, this accounts for no exception being made to exclude the widows' claim under the circumstances which have here emerged. But the patron is entitled to reply with equal probability, that if the case which has now occurred was not foreseen, no surrender on his part was asked or understood to be made, so as to bar his legal claim under this new combination of circumstances.

"This view of the case is strongly supported by the history of the Statute, and the clear deduction as to the previous rights of patrons over vacant stipends, given in the opinion of Lord Medwyn. It is clearly shown by his Lordship, that patrons, from time immemorial, had right (recognised in different Statutes) to all vacant stipends, whether created by death, resignation, deposition, or in *any other way*. It is also demonstrated by his Lordship in what manner vacant stipends arose in the earlier and more disturbed periods of the history of the Church after the Reformation, from other causes than the decease or removal of prior incumbents. The Act 1592 specially gave patrons a right to retain the fruits of the benefice in their own hands when presbyteries *refused* to induct *qualified* presentees; while the fact that presbyteries in ancient times did refuse to ordain presentees for years (generally when the law was too weak to compel them), may be gathered from other Statutes, unnecessary to be quoted. It is also matter of record in our books, that presbyteries in former times occasionally chose (as in the case of Auchtermuchty and Lanark) to induct other ministers than the legal presentees into benefices, which took away, at least in ecclesiastical law, the technical character of *vacancy* in such parishes; but nevertheless, the stipend in the latter class of cases was claimable by the patrons, and not by the incumbents preferred by the ecclesiastical courts. In this known state of the law the Act of 1814 was passed, which, as noticed by Lord Medwyn, was specially classed by the Legislature among the local and personal acts: It was thus plainly a statutory compact between the Kirk and the patrons of Scotland; whereby the latter gave up, not the whole of their rights over vacant stipends *per aversionem* to the Kirk, but the vacant stipend legitimately arising from the *three* events specified in

the Act. In these circumstances, the Act is to be construed as an agreement, and held to include all that can be reasonably presumed as intended to be given, according to the ecclesiastical law and system then administered; but certainly the words of the Statute, are not to be strained beyond their plain and ordinary sense, to extend the surrender of the patrons to cases neither expressed nor contemplated when the Act was passed. In that view, it would be absurd to infer, that patrons meant also to surrender (and that to a trust for the widows and children of ministers) such *vacant stipend* as might be created solely by the *illegal acts of the Kirk*, and their positive refusal to execute a fundamental law of their own constitution.

"II. Upon the preceding construction of the Statute, the question in the present competition comes simply to this—Whether the stipends *in medio* fall to be viewed as fairly and *bona fide* arising from the *death* of the preceding incumbent, or from any *other* cause to which the statutory assignment in favour of the Widows' Fund does not apply? On this point the facts at least admit of no dispute. It is admitted that the patron did his duty, by presenting in due time to the Presbytery a person alleged to be qualified,—that the Presbytery, in consequence of a *new* regulation of the Kirk (called the *Veto Law*), *rejected* the presentee,—that that regulation was declared, both by this Court and by the House of Lords, to be *contrary to law*; and it was farther found that the Presbytery were bound to take the presentee *on trials*; but that the Presbytery nevertheless refused, and still *refuse to obey that decree*. I am of opinion that the vacancy created or prolonged from such causes, cannot in law, or according to the common sense and understanding of mankind, be held as a vacancy arising from the *death* of the preceding incumbent,—but as a vacancy attributable solely to the *tortious and illegal* proceeding of the Kirk, and that the Statute founded on by the widows is inapplicable, and cannot support their claim.

"It has been said that the stipend was claimed as just of the same nature as the vacant stipend which has arisen in numerous cases on record, where delays have occurred in disputed questions of patronage, when the claim of the Widows' Fund was not disputed. But there is an essential distinction between the present case and every other on record prior to the passing of the *Veto Law*. In previous cases, delays of settlements no doubt often occurred from opposition, sometimes groundless, on the part of the church courts; but in none, since 1814, was the vacancy occasioned for one day, by an avowed *disobedience of the statutory law*, as expounded by the civil courts. When settlements were postponed, therefore, by a litigation on other grounds, peculiar to each case as it arose, it was not considered a point worth disputing, that the vacant stipend claimable in these instances, arose from the *death or removal* of the prior incumbent.

"The plea for the widows, in the present instance, is so stated, as if the stipends now claimed, and others accumulated in similar circumstances, formed an accidental and unexpected *accession* opening to them from ordinary and *legitimate* causes,—as if a charitable trust got a grant from Parliament of the criminal *finer* in a district, which were augmented by a sudden increase of the *population* and demoralization of that locality,—or as if they had a grant of the *tolls* on a great public thoroughfare, which were unexpectedly increased by a large addition to the traffic; in which cases, and in others analogous, by a well-known rule of statutory law, the benefit, though beyond the original calculation, accrues to the grantees, upon the unlimited terms of their right. In every view the present is a very different case. The stipends in dispute have arisen solely from the unjustifiable and lawless conduct of public functionaries; in fact, from their *quasi delinquency*, which no party can profit by, or found upon, as extending *any* previous grant in their favour. Put the case that even a charitable trust had a grant of *finer*, or of *tolls*, of a particular description, legally and usually exigible, such a grant would not include *finer* or *tolls* illegally imposed or levied *contrary to the declared judgment of the Supreme Civil Tribunals of the country*.

"Still less can the construction of the Act contended for by the widows be maintained under the specialities of the present case. The statutory grant in 1814 was a great boon granted to a fund for the benefit of ministers of the Kirk and their families,

who were intrusted with important duties in the settlement of ministers by other Statutes, which they had recognised and given effect to for many years. It is not, therefore, unfair or unreasonable to hold, that it was an *implied condition* of the grant, that the subsisting laws in the supply of vacancies would be fairly and honestly administered. It cannot be presumed that the Legislature meant that the families of the clergy should draw profit from vacant stipend created by their contumacy to the law. While the Act, therefore, is not to be so interpreted, as that widows shall be subjected to any forfeiture or loss by the fault of the clergy,—or that anything shall be withheld from the fund on which its members were fairly entitled to rely for their provision, it is only just that the fund shall not be held to acquire gain from the open and continued resistance of the law, manifested by the reverend functionaries bound to give implicit effect to it. The statutory assignment does not apply to such a case. And indeed, if a contrary interpretation were given to the Act; and if the course followed by the Kirk in the cases of Auchterarder, Marnoch, and Daviot (which have all been under review of this Court), were sufficient to support the claim of the Widows' Fund to the vacant stipend arising during the obstruction of the settlement of the legal presentees, it is manifest that ere long a large proportion of the stipends of the parishes of Scotland might be transferred to that fund. It is very far from my intention to insinuate that this was either contemplated, or had any influence on the proceedings of the Kirk, in the cases in question. But the consequences resulting from the course adopted by them, as exemplified by the claim of the widows in the present question, cannot be thrown entirely out of view.

"The circumstances under which the vacant stipend at present accumulated in the parish of Auchterarder has arisen, appear to me to be analogous in principle with the case of vacancies created by any *vis major*, which might, for a time, supersede the ordinary administration of justice in the country;—as if a civil rebellion arose,—or if a certain district were occupied by an enemy's force. In such a case it would surely be extravagant to hold that the whole stipends of emerging vacancies were claimable by the widows, as arising from the death of the last incumbents, when, in point of fact, the supply of the vacancies was obstructed by the *supercession of the regular tribunals of the country*. The case of the College of Glasgow in 1694, quoted in Lord Medwyn's opinion, is an authority in point, to show that an ordinary grant of vacant stipend was not held to include stipend, when the vacancy arose from the ascendancy and defiance of the law by a mob;—and it humbly appears to me that that decision on principle rules the present question.

"In holding that the fund now in dispute has been created solely by unwarrantable disobedience of the law, and in fact by rebellion to its authority, I need not disclaim every intention to offer any violence to the feelings and conduct of the individual members of the Church establishment who have advised or concurred in the proceedings which have fallen under the animadversion of this Court. They have of course acted in accordance with their views of their duty, and they have probably been influenced by advice and opinions which they felt that they could not honourably surrender. This is the feeling of all men who resist particular laws, or established systems of government on conscientious grounds; the purity of their motives in general is unimpeachable; but these are the very cases in which courts of justice are the more strongly called on to show that neither the influence of station nor the weight of individual character can affect the course of the law. It would be difficult to say, that the members of the Church entertain stronger feelings as to the illegality of the judgment of this Court and of the House of Lords upon the *Veto Act*, than the dissenters of Edinburgh did as to the Annuity Act, which we have been repeatedly called on to enforce; but the scruples of both must be disregarded. Till the law of patronage is altered by the Legislature, the proceedings of the church courts, as to the presentation to Auchterarder, must be viewed as a renunciation (at least as to that question) of all allegiance to the civil tribunals of the State; and where there has been so flagrant a resistance to the law, in the settlement of a legal presentee, it is impossible to hold the vacancy as in any respect attributable to the death of the preceding incumbent.

"In this view I conceive that this Court is entitled and bound,

if called on by a party having a legal title and interest, to inquire into the grounds on which the alleged vacancies have arisen, when a claim is preferred for their stipends on the part of the Widows' Fund; and here it is proper to refer to other branches of the assignment given by the Statute to the Widows' Fund. It will be particularly observed, that the Act gives the widows the vacant stipends, not merely in cases of 'death,' but of deprivation; but nevertheless, if it were alleged and offered to be proved, that the ecclesiastical courts had deposed a minister in violation of a Statute or of an express judgment of the House of Lords, it is supposed that the Court would pause before transferring any part of that minister's stipend to the Widows' Fund as vacant stipend. On the same principle, if a vacancy on death is prolonged illegally, and the settlement of the next presentee obstructed on illegal and unconstitutional grounds; still more, if induction, or the steps essential to it, are refused by the church courts in the face of a competent decree, that is equivalent to an *illegal suspension* of the presentee, and the stipend is no more claimable by the widows in the one case than in the other.

"The only difference between the claim of widows to the stipend in the case of an illegal deprivation, and of a vacancy on death, prolonged by an incompetent law of the Church, is, that in the latter case a claim may lie for a certain amount of vacant stipend in the commencement of the vacancy, as fairly devolving to the widows on the death of every incumbent; while, of course, in the case of deprivation there is no room for any such claim. But the law would be easily hoodwinked, indeed, if it could not ascertain the limit between the vacant stipend arising from the death of the incumbent, being that falling due for the period usually required in ordinary course of the law for the induction of a new minister, and that subsequently occasioned by the resolutions of the church courts to obstruct the settlement of every presentee who did not comply with their illegal resolutions. As the patron limits his claim here to the stipends falling due after 25th October 1835, enough is left upon the balance of the stipends which fell due after the death of the preceding incumbent to satisfy every claim which the widows could have realised on this vacancy, if the church courts had not unduly obstructed the settlement of the presentee.

"Indeed, it is not very clear to what extent the claim on the part of the widows is meant to be carried over the vacant stipend arising in the present and in analogous cases. Had the church courts followed up the *Veto Law* as originally passed, the Presbytery would have held the *jus devolutum* as vested in themselves by the refusal of the patron to nominate another presentee, and they would have inducted a minister of their own into the cure, to be maintained there by such resources as zealous partisans might raise, for the whole life of their chosen nominee. As the claim of the latter, however, to the civil fruits of the benefice, according to the views of this Court and of the House of Lords, could never be sustained, it remains to be asked, if the Widows' Fund could claim this stipend as vacant for ten or twenty years, or the ordinary duration of a man's life? It seems hardly possible that any parties could seriously maintain that their right by Statute to the vacant stipend arising from the death of the last incumbent, included that created by the intrusion of a *wrong presentee* into the benefice, for the whole duration of his life. It is apprehended, however, that the widows have no better claim for the stipend kept vacant by the operation of the *Veto Law*, to the extent to which it is now enforced by the Kirk, than if that Act had been carried into effect, in all its heads, by the induction of a presentee chosen by the Presbytery. In neither case can the unappropriated stipends allowed to accumulate be held as vacant stipend arising from the death of the last incumbent.

"III. On the supposition that the stipends *in medio* do not fall under the statutory assignment to the Widows' Fund, I am of opinion that they belong to the patron, at least in a question between him and the collector of that fund. Mr Erskine, in treating of the powers of patrons, observes (B. I. tit. 5, § 13), 'that they have also the power of receiving and disposing of the fruits of the benefice during a vacancy. This last right appears, by our Statutes, passed soon after the Reformation, to be not a bare right of administration, but of property; so that the

patron could have held and disposed of them as his own: 1584, c. 137; 1592, c. 115; 1593, c. 172; 1612, c. 1. But by 1664, c. 20, the patron was obliged to apply them, with the advice of the Presbytery, to pious uses within the bounds of the parish, or at least of that Presbytery; and though patrons were, by the Act rescissory, 1661, c. 15, restored to their former rights, it appears by 1661, c. 52; 1672, c. 20, &c., to have been the sense of the Legislature in the reign of Charles II., that the right of patrons to the vacant stipend was merely a trust; so that they still continued under the restraint imposed on them by the Act 1664, of applying them to pious uses.' The Statutes quoted in the opinion of Lord Medwyn, amply support this view of the law.

"It is an ulterior question whether the patron, in the present instance, will not be entitled and bound to apply a portion of the vacant stipend, if he is preferred, to satisfy such part of the claims of the presentee, Mr Young, as he may not establish in his action against the members of Presbytery whom he has convened in the separate action already before the Court, and now under appeal. Although Mr Young has not entered appearance in the present competition (possibly waiting till the title and claim of the widows should be disposed of), he may not be foreclosed from urging his claims on the patron, if the latter should be preferred. Under the competition as hitherto conducted, the Court has no materials for judging either of the competency or merits of the presentee's claim on the patron, and of course no opinion is given on that point."

Lord Murray :

"My first impression on this case was, that the Act of Parliament transferred to the Widows' Fund the vacant stipends in every case in which the patron could have right to them—but after considering the opinions of Lord Medwyn and Lord Cunningham, I have come to be of opinion that the Statute 1592 makes the case of the Presbytery refusing to admit any qualified minister presented to them by the patron, a special case in which it is declared to be lawful for the patron to retain the whole fruits of the benefice in his own hands. This is again specially re-enacted by Statute 1612, cap. 1, in case of archbishops or bishops refusing to admit a qualified minister presented by the patron. I view that, as recognised by Statutes, as a separate case from vacancy arising from death, translation or deprivation of an incumbent, and that the words '*or otherwise*' in the Statutes transferring stipends to pious uses which have been referred to, were added to cover that case. Although, therefore, in that, as well as in other cases, the patron must employ the vacant stipend in pious uses, it is not one of the cases in which vacant stipend is transferred to the Widows' Fund. The vacant stipend in this case does not arise from the death of the former incumbent, but from a case specially distinguished by the Legislature, of the refusal of the Presbytery to admit a qualified person; and while one class of Statutes reaches that case, the Statute 54 Geo. III. does not comprehend it.

"I do not go on the ground that the holders of the Widows' Fund are barred by the conduct of the Church in this matter; but in interpreting the Statute, I feel fully convinced, that if the words *or otherwise* had been added, and it had been asked what other vacancies can there be, and it had been answered that the Statute 1592 and the Act 1612, passed in the time of Episcopacy, both gave the patron an express right *vi statuti* to the vacant stipend where the church court refused to admit a qualified minister, and that such an addition would comprehend that case also, the patrons who consented to the Act would naturally have opposed any such addition being made, and the Legislature would not without their consent have passed it."

Lord Jeffrey, concurred in by Lords Cockburn and Ivory :

"We are of opinion that all the stipends of vacant parishes which the patrons were bound to have applied for pious uses previous to the Act of 54 Geo. III. c. 169, were, by virtue of that Act, made over to the Collector of the Widows' Fund, the only comparing defender in this branch of the cause; and that the words importing this transference, or new destination of these stipends, amount to a plain declaration, that the increase

of the said fund should, in all after time, supersede and be preferable to any other pious uses; and that these words are too clear and absolute to admit of construction.

"We are unable, therefore, to see how the patron, who is the only pursuer now insisting in the cause, can possibly prevail in this competition, unless he can make out that stipends which remain or come into his hands in consequence of the illegal refusal of Presbyteries or other Church Courts to supply a vacancy, are in a different situation from other vacant stipends, and were not, before the date of the Act, legally applicable to pious uses. Now, whatever doubts might have been originally raised upon the general words of the Act 1592, c. 117, or on what is assumed to have been the common law anterior to that date, we think it clearly established by the whole course and current of subsequent authorities, that there is now no room for such a distinction; and that nothing is better settled in law and in practice, than that no patron, for at least two hundred years back, has had any right to stipends arising from an actual vacancy in the cure, except as a trustee for their application to pious uses within the parish. Whether the particular case upon which the question has now been raised was *casus improvisus* when the Statute relied on was passed, or whether, from the hazard of its frequent recurrence, it may require some farther remedial provision from the Legislature, are not points, in our apprehension, for the consideration of a court of law. But the Act of 1592, c. 117, undoubtedly contemplates the case of vacant stipend arising from the illegal refusal of church courts to induct: and the cases of Auchtermuchty, Culross and Lanark, appear to us not only to have been, all of them, cases of such illegal refusal, but of refusal aggravated by proceedings which put it totally out of the power of the offending parties to repair the wrong that had been committed. Yet in all these, and in every case, indeed, where the patron has been found entitled to receive or retain the stipend of a vacant parish, he has been held bound to apply it to pious uses; and consequently is now bound, in our view of the Act of Geo. III., to allow it to be applied to that supereminently pious use which has been thereby appointed to supersede and take the place of all other such uses.

"We cannot persuade ourselves that any doubt can be thrown upon this construction, from the circumstance of the Statute speaking only of cases of vacancy occasioned by 'the death, translation, resignation or deprivation of any existing incumbent, and granting specially to the Widows' Fund, 'any vacant stipend that may *thereby* arise.' The object of that clause, we think, was merely to specify *all the possible ways* in which a vacancy in a parish, full at the time, could possibly occur, or vacant stipend arise; as we certainly are not aware that this could ever happen, *except* by the death, translation, resignation or deprivation of the actual incumbent. But if there was any vacancy of which the fund was not to have the benefit in consequence of these (supposed) taxative words, it seems to us clear enough that the present case cannot fall within the supposed exception; since it is certain and fully admitted that the vacancy was occasioned, and the vacant stipend arose, in consequence of the death of Mr Stewart, the former incumbent, in August 1834. That this vacancy has been unduly prolonged by the illegal conduct of the church courts, is a consideration altogether apart from the proper construction of the words specifying the occasions on which it should arise, and is, in our opinion, irrelevant for the reasons already given. It appears to us impossible to suppose that the Statute intended to distinguish between one portion of the stipend, arising during a continued vacancy, and another: and as we hold it fixed that stipends falling due *after* the church courts have illegally refused to supply the vacancy, were applicable to pious uses, as well as those which fell due *before*, and that the Widows' Fund has now been surrogated in the place of all other pious uses, we cannot consistently recognise such a distinction as is here suggested by the pursuer, on a most strained, and, it appears to us, perverted construction of the words to which he refers.

"Something, however, is thrown out by the noble pursuer, though apparently with no great confidence, as to the present defender being barred by a *personal exception*; in respect that the interest which he represents is substantially an interest of

the Church generally, and that the vacancy has been prolonged by the illegal proceedings of the church courts; in consequence of which, it is alleged, that to allow him to take the accruing stipend would be to allow the Church to profit by its own wrong. We cannot think that there is any real weight in this far-fetched and overstrained exception. Its radical fault is the want of any proper *concursus*, privity or identity of person, between the supposed wrong-doers and those whom it is now proposed to forfeit for their offence. The offenders are the Presbytery and the Superior Church Courts: But, in the *first* place, it is neither the church courts nor the Church as a body that has the beneficial interest in the fund in question, but only the existing widows of some of its deceased members, and such other widows as may hereafter be left by any of its other members who may happen to marry, and to predecease their wives. *The burden* of the fund indeed is laid on the Church by a compulsory assessment on *all* its members; but *the benefit* of it is confined to much less than a half of their number; and even as to them it is but derivative, secondary, and contingent—never vesting in their own persons, or emerging till after their decease:—to say nothing of the share even of that indirect benefit which belongs to professors in universities, who have no control over church proceedings, or any responsibility on account of them. In the *second* place, the illegal proceedings complained of in certain church courts were the proceedings of a *majority only* of their constituent members—and not of a very overwhelming majority,—while it is also to be considered that these courts are by no means composed of clergymen exclusively, but have always in their body a very considerable proportion of lay members, who have not the most remote interest to increase the provisions for the widows of ministers. In the *third* place, the only actual interest in the fund which could possibly be affected by prolonging a vacancy in the parish of Auchterarder, was obviously nothing more than that share of the accruing stipend which could be divided among the *existing* widows—whose husbands must almost all have died before any of the exceptionable proceedings of the church courts had begun—and of that small additional number who might be expected to become widows during the continuance of that vacancy, and of whom a still smaller number (probably not six or seven on a large calculation) were likely to be left by any of the contumacious ministers. In the *fourth* place, and finally, it is not alleged by the noble pursuer, and is known indeed not to be the fact, that any part of the illegal proceedings complained of were adopted with a view to obtain the trifling contingent advantage which is now in question. It is matter of notoriety that these proceedings originated in views of a very different description; and which, however erroneous or indefensible in other respects, were so far from partaking of a mercenary character, that they were (and are) maintained at the imminent hazard of far greater temporal benefits to those who embrace them.

"There appears, therefore, to be nothing in this case to which the maxim of preventing a party from profiting by his wrong can possibly be applied. If it were not altogether excluded by the consideration last mentioned, there might perhaps be some plausible (though we think quite untenable) ground for giving effect to it, in so far as to debar the widows of any of these who actually concurred in illegally prolonging the vacancy, from any share of the stipend thence accruing; but beyond this, the proposition is not even intelligible. To say that the previously existing widows, or the future widows of those who were altogether unconnected with, or had strenuously resisted the illegality,

* "If a father murders a childless elder brother, and suffers death for it, the son will still succeed to the property thus brought to him by an atrocious crime: Because it is no wrong of his own by which he profits. But the widow of a contumacious minister is as little chargeable with his contumacy, as such a son would be with the guilt of his parent; and a father has at least as great an interest to secure a provision to an only child, almost sure to survive him, as a husband can have to add to the provision of a wife, who is as likely as not to die before him. Neither the common law of succession, however, nor the general provisions of a Statute, can possibly be affected by the consideration of such an interest."

should also be excluded, because this addition to the fund had been obtained by the improper proceedings of *other persons*, would be as absurd as to say that the claim of the fund generally should be excluded, because the two last incumbents had been murdered by private enemies, and vacant stipend thus created to a far greater extent than would have existed if there had been no violation of the law. That additional vacant stipends have been so created, is a mere matter of fact, which cannot be got rid of by any reprobation of the proceedings to which they may owe their existence. There they are, and they must necessarily be given to somebody. There is no inherent taint or *vitium reale* upon them, to make their appropriation immoral or disgraceful. The noble pursuer at least cannot think so since he now claims them for himself. It may possibly be right to withhold them from the wrong-doers who were in any way instrumental in their production; and if the law is indeed so curiously vindictive, even from those whose claim is in any way derived from or through these wrong-doers: But the innocent parties whose right to them is established by law, and who are no way connected with any but the innocent, surely cannot be so precluded: And the innocent widows of ministers who died before the alleged delinquencies were heard of,—of lay professors who neither did or could participate in them,—or of ministers who strenuously contended against them, are clearly preferable to the (not more innocent) patron, from whom they have been taken away and transferred by the unequivocal Act of the Legislature.

"On the whole, therefore, we are of opinion, that the collector of the fund must be preferred in the multiplepinding; and his defences, as against the claim of the patron, sustained."

Lord Moncreiff:

"I entirely concur in the opinion of Lord Jeffrey, and do not think it necessary to add much to it. But I cannot see any legal or judicial ground for a different result.

"The Statute 54 Geo. III. c. 169, enacts, 'that when any parish in the Church of Scotland becomes vacant by the death, translation, resignation, or deprivation of an incumbent holding the pastoral cure and benefice of such parish, and that vacant stipend thereby arises subsequent to the crop and year 1813, such vacant stipend, so far as it has heretofore been applicable by the patron to pious purposes, shall thenceforth and in all time to come be levied in manner hereinafter mentioned, and paid to the said general collector, who is hereby authorised to levy and discharge the same, by himself, his deputies or factors, and he is also hereby authorised and required to apply the produce thereof to the purposes of this Act, under the directions of the trustees appointed to manage the said fund, any law, statute or custom to the contrary notwithstanding.'

"The last minister of the parish of Auchterarder died on the 31st August 1834. By his death the parish became vacant. The statement of the parties in this cause is, that that vacancy has not been supplied by the ordination and admission of another minister into the cure and benefice. It seems also to be agreed, or, at any rate, is altogether indisputable, that if the Act of the 54th Geo. III. had not been passed, the pursuer would have had right to the stipends accruing as long as the vacancy was not supplied, distinctly as vacant stipends falling by law to him as patron. And it appears to me to be very clear, that he could have had no right to them on any other footing, and that no heritor could have been bound to pay the sum of stipend localised on his lands to the pursuer otherwise than as vacant stipend. Farther, it can admit of no doubt whatever, in my apprehension, that by the Statutes, all sums so drawn by the pursuer must have been applied by him for pious uses, according to the previous law and practice, (1685, c. 18; 1690, c. 23, &c.); and it may not be undeserving of notice, that by the former Statutes establishing the 'Ministers' Widows' Fund,' every patron so entitled to draw vacant stipend, was bound to pay a fixed sum out of it to the collector of that fund.

"That the existence of vacant stipend, to which *eo nomine* the patron had right, to be employed as the Statutes directed, was not held to be altered or impeded by any consideration of the causes which might have prolonged the actual or legal state of vacancy of the benefice, I should have thought to be very clear upon the terms of the Acts 1592, c. 117, and 1690, c. 23,

taken together. But I apprehend that that matter of law stands authoritatively determined by repeated judgments of the Court. In the case of Auchtermuchty, it was found, that 'if a presbytery refuse a presentation duly tendered to them in favour of a qualified minister, against which presentation or presentee there is no legal objection, and admit another person to be minister, the patron has right to retain the stipend AS IN THE CASE OF A VACANCY;' (*Moncrieff v. Manton*, 15th February 1735; M. 9909). The circumstances of the case, when examined, render the application of it still clearer than the above short report of the point decided. And the same was substantially determined in the case of Culross, (*Cochrane v. Officers of State*, 26th June 1751; M. 9951); and in that of Lanark (by the House of Lords), in which last case the remedy of the Statutes, for an illegal refusal of a presentation, was thus again defined:—'That the benefice should remain with the patron as vacant till the Presbytery admit his presentee; and which indeed is saying no more than what is implied in the nature of his right, and *inerat de jure*, without such express provision;' (*Dick v. Carmichael*, 29th July 1752, and 2d March 1753; M. 9954 and 9955, &c.). Yet, in that case, the legal state of vacancy of the benefice did in fact subsist during many years, and it might have continued much longer if Dr Dick had not been translated to Edinburgh. It was precisely an example of a prolonged vacancy arising from a conflict between the civil and the ecclesiastical courts, by what was finally decided to be an illegal refusal of the church courts to admit a qualified presentee. There is no case to the contrary. For, as to the case of the College of Glasgow, it was so manifestly absurd to maintain that a vacancy could be created by the personal violence of a mob to an existing incumbent, that I own I should never have expected such a case to be founded on at all.

"The Statute 54 Geo. III. appears to me to transfer at once to the Ministers' Widows' Fund, as to a defined pious use, all the vacant stipends which the patrons had previously a right to retain or receive to be applied as the Statutes had directed. I consider the collector of that fund as a third party, altogether distinct from any presbytery or other church court, with rights definitely vested in him by positive Statute, to which it is the duty of this Court, as a court of law, to give due effect. I can find no legal ground of distinction between this vacant stipend and any other vacant stipend. The parish became vacant by the death of the incumbent; and whether the continuance of the state of vacancy has been occasioned by the neglect of the patron to present a qualified presentee, or by the judgment of the church courts finding his presentee disqualified on trial, or by the delay of the Presbytery to use the *jus devolutum* when it has fallen to them, or by the refusal of the Presbytery, on grounds found by the civil court to be illegal, to receive and take on trial a presentee assumed to be duly qualified; the effect in all and each of these cases alike is nothing but a prolonged vacancy of the parish, and the stipend emerging nothing but vacant stipend. It does not appear to me, that in this present question of strict law upon the Statute, viz., to whom the heritors are bound to pay that vacant stipend, there is any relevancy in the particular nature and state of the dispute which has occasioned the prolonged vacancy. Popular arguments may indeed be suggested; and if it belonged to this Court as a court of law, by any judgment in this question of special civil right, to interpret the statutory rights with reference to any probable effect on the state of other questions heretofore discussed or still in agitation, I could understand the views pressed on the Court by the pursuer. I cannot adopt such a principle of judgment; and how the pursuer can, in point of law, be entitled, as patron, to demand from the heritors sums of vacant stipend, which are by express Statute declared to belong to the Collector of the Widows' Fund, I am unable to understand. If such a case was not foreseen, that will not alter the law of the Statute as it stands. But it is very plain to me, that though the precise case was of course not contemplated, it must be presumed to have been well understood, that that which had often happened before might happen again,—that in consequence of proceedings by the Presbytery or other church courts which were found to be illegal, a state of vacancy of a parish might be prolonged far beyond the ordinary course of such an occurrence. Yet no exception or qualification is provided.

"With regard to the plea of personal exception, it appears to me to be altogether untenable as a legal ground of judgment, for the reasons which are well explained by Lord Jeffrey. But I may observe, in the first place, that if it had more solidity than it has, it is not obvious how such a personal exception could confer any title on Lord Kinnoull to demand these stipends from the heritors, which, on the very hypothesis of personal exception, are held to be legally allotted to the Widows' Fund; and in the second place, that it would equally apply to the small sum payable to the Widows' Fund from every vacant stipend under the former Acts of Parliament,—a matter, however, which would require a separate discussion."

Lord Justice-Clerk:

"The original consultation among the Judges having taken place before my appointment, I did not return any opinion when the opinions of the other Judges were given in in the course of the winter.

"In obedience to the interlocutor of 9th June, I have now to state my opinion.

"Generally, I concur in the first branch of Lord Cuninghame's opinion, and particularly in the view of the case indicated in the opinion of Lord Murray. I have only to regret that that latter opinion does not explain the grounds upon which the important distinction adverted to in the commencement of the opinion rests: That distinction appears to me to afford the true and solid ground for judgment, and a fuller explanation by his Lordship, would have relieved me from the necessity of stating, much more imperfectly than he would have done, the grounds of my opinion.

"The case of the Collector of the Widows' Fund is founded, in my opinion, on the plea that the patron's right to the fruits of the benefice, provided by the Statute 1592, c. 117, as a remedy to meet the case of the wrong therein contemplated, is in no respect different from the patron's ordinary right to apply to pious purposes what is termed in other Statutes vacant stipend;—and hence, that the Statute 1592, c. 117, though not so expressed, but on the contrary worded in terms peculiar to itself, must yet be so interpreted and restrained in its operation and consequences, and that the subsequent Act giving to the Widow's Fund the vacant stipend to which the patron in other cases had right, must be held to include the patron's right in this special case.

"I hold this plea to be without warrant in the words of the Act 1592, c. 117—to be untenable in respect of the violence which it does to the terms therein employed—and to be wholly inconsistent with the general effect of the statutory provisions in regard to the right of patronage. I hold the provision, annexed by the Act 1592, c. 117, to the power of collation given to presbyteries by the preceding chapter, to be a special remedy introduced—1. To prevent, if possible, a gross violation of statutory duty; 2. To provide (as far as possible) full compensation against the consequences of the individual wrong in each case; and, 3. By giving to the patron, when the wrong is committed, the right to retain the whole fruits of the benefice, to enable him to fulfil and give effect to his valid grant of the benefice and all its fruits to the presentee, whom the Statute supposes to be unjustly deprived of the same, and whose gift from the patron is supposed to be set at nought by the refusal of the presbytery to proceed on the same.

"If, then, it shall appear that the right secured to the patron by the Act 1592, c. 117, is a special remedy or compensation intended to meet the case of a special wrong, and is not, either in origin or by the terms of the Statute, connected with the ordinary common-law right of patrons to vacant stipends, subsequently restricted in use to pious uses, it is plain that it is only a special grant of what was thus given for such an object to the patron, that can ever carry to the collector the patron's right under the Act 1592, c. 117.

"The view which I take of the effect of the enactment in the Statute 1592, c. 117, is this:—

"After the Reformation, and before any statutory provision for securing the appointment of proper persons, the operation and legal effect of a right of patronage of a parish was, that the patron's presentation at once instituted a person into the church and parish. Whether in the first years after the Reformation,

ordination was considered to be ecclesiastically necessary by the reformers, has not been cleared up. But the ministers had no check or control over the qualifications of the person presented by the patron. And, attached to Popery as many of the individual patrons were, as well as the Court of the Queen, and both often alike indifferent as to the character of those presented, this state of things, adverse to the advancement of reformed truth, and to the interests of religion, became the subject of earnest complaint by the reformers. These complaints very probably appeared to be, and might in truth be directed against patronage itself. But the necessity of an adequate check upon its exercise could not be disputed or resisted, and with a view to obviate the objections of the Court, and to remove all doubt as to their *professed*, and all fear as to their *true* object, the following message and explanation was submitted to the Queen on the part of the clergy in 1565:—'Our mind is not that her Majesty, or any other patron, should be deprived of their just patronage; but we mean, whensoever her Majesty, or any other patron, do *present any person into a benefice*, that the person presented should be *tried and examined* by the judgment of learned men of the Church, such as are the present superintendents, and as the presentation into the benefice appertains unto the patron, so the collation by law and reason belongs unto the Church; and the Church should not be defrauded of the collation no more than the patrons of their presentation; for otherwise, if it be *lawful* to the patrons to *present whom they please*, without trial or examination, what can abide in the Church of God but mere ignorance?'

"At the commencement of the next reign, the Act 1567, c. 7, was passed:—'It is statute and ordained by our Sovereign Lord, with advice of his dearest Regent and Three Estates of this present Parliament, that the *examination and admission* of ministers within this realm, be only in the power of the kirk, now openlie and publicly professed within the same. The presentation of laic patronages alwaies reserved to the just and ancient patronage.'

"These and other provisions had been proposed by the Regent Murray in 1560, and the Estates of Parliament, before Queen Mary came over from France, but had never received the sanction of the Queen, nor had they become any part of the law of the land.

"It is necessary to attend to the character of the right of patronage, on the exercise of which this check was imposed. The vacancy is in the church and parish, and the patron *nominates and presents* (as in the present case) the presentee to be minister of the said parish and church, disposing to him the whole profits and rights of the church, while he serves the cure. The nomination of the patron comprehends and covers the right to the benefice, and to the office of minister of the parish. There are not two distinct and separate rights or offices. The minister has right to the benefice, and no one can have right to the benefice who has not been appointed minister—neither can any one be legally minister who has not right to the benefice.

"The patron then *NOMINATES* the minister to his office as minister of the parish, as indeed both the terms of the Statutes and the nature of the right completely prove. The idea of a separation is inconsistent with every legal view of the mode of instituting ministers to parishes; and accordingly, in the cases in which the Court withheld the right to the stipend from clergymen whom the Church had chosen illegally to *induct*, it was distinctly on the ground that such clergymen had not been *validly nominated*, and not been *validly inducted*. The Court, as the judgment in the case of Auchtermuchty expressly bears, has a power to 'cognosce and determine upon the *legality* of the admission of ministers,' to the effect of trying whether the person admitted can legally claim the character. The Court have not held that a person could be legally admitted into the office of minister, and yet not have right to the benefice. The Court went exactly upon the opposite view, and denied the right to the benefice, because the party was not legally admitted to the office of minister, though inducted by the church court.

"Independently then of the provision made for securing a due examination of the persons presented, the patron's presentation *fills up the benefice*—fills up the office of minister. He (the patron) has no other act to perform—his gift passes the full

right to the church and parish during the lifetime or incumbency of the presentee. There remains nothing to be done by, or to emanate from, the patron in order to supply the vacancy. He nominates to the office of minister. No other person has any right of nomination. The right to the benefice is the consequence of his right of nomination. The vacancy then is supplied. And whatever provision may be made to *try the qualification* of the officer, the vacancy cannot in law subsist, so far as the exercise of the right of patronage is regarded, after the patron has completed and issued that gift from him, which nominates to the office, and is the sole foundation of the enjoyment of the office. On the contrary, the function of the patron is exhausted and fulfilled:—So far as he is concerned, and the right discharge of his duty is to be carried through, he has filled up the office, and discharged the duty which the nature of the right and law impose on him. That by special Statute the gifts and qualities of the presentee *are to be tried* by the presbytery, before he shall be allowed to enter on the duties, or personally draw the stipend of the office, or that the *presentee's* title to obtain the *benefits* of the office may not be completed, does not bear on this point. That is a *check* on the patron's due exercise of his right. The office is filled up by the nomination. And if the presentee is not rejected as disqualified on trial,—if the presbytery *refuse to try*,—even the *due exercise* of the patron's right cannot be called in question.

"Now, attending to the first Statute 1567, c. 7, and to the subsequent Statute 1592, c. 116, and the later Statute of Queen Anne, what is truly in point of principle the effect of the introduction of these provisions as to the examination and admission of ministers on the patron's act of nomination?

"The well-known words of the Statute 1592, c. 116 appear to me to place this matter beyond the reach of controversy. That Statute, after repeating previous provisions conceived nearly in similar terms respecting bishops, 'ordains all presentations to Benefices to be direct to the particular Presbyteries in all time cumming, with full power to give collation thereupon, &c.,—providing the foresaid Presbyteries be bound and astricted to receive and admitt *quhatsoever* qualified minister presented be his Majesty or laick patrones.'

"It is thus manifest, that the power given by Statute to the Church, as a check on the exercise of the right of patronage, for the purpose of enabling the Church, by examination, to secure the selection of fit and qualified persons, was not bestowed on the Church as a means of restricting to any extent the legal effect of the act of nomination to the office of minister of the parish, but solely to secure a due trial of the fitness of the presentee,—not in the opinion of the patron alone, but in the opinion of the presbytery. But the power so bestowed on the Church was not created and given as any *concurrent power* in the nomination to the office of minister, but solely enabled and directed a particular body to try the *qualities* of the person *previously and validly* nominated to the office. This is a very special, and peculiar, and limited provision—most effectual, if righteously used for its purpose, but altogether unconnected with the act of nomination to the office; and so the Court and House of Lords held in the case of Gillon, to be afterwards noticed, although the presentee in that case might not have been admitted when he came to be tried. In the meantime the patron nominates to, and fills up the office and benefice. The presentee must pass certain trials, and may be rejected. But the theory and legal view of the case is, that the presentee is nominated to the office by the patron, if not rejected on these trials.

"But further—this power of examination bestowed by the Legislature is given, and is to be exercised, only under a distinct, peremptory, and emphatic statutory condition. No power simply of rejection is given. It is a power of examination. Accordingly the Act of 1592, c. 116, after bestowing the power, goes on—'PROVIDING the presbyteries be bound and astricted to receive and admitt' every qualified minister presented.

"The import of this is—to provide, that if they claim the power, they must exercise it—they must take trial: If they do not—if they illegally, wrongfully, and in defiance of Statute, refuse to take trial, then the result is, that the direction and condition given as a means of checking abuse in the exercise of patronage, can no longer, under the Statute, take effect, so as

to impair the full legal consequences of the patron's act of nomination. The want of examination and admission cannot be pleaded against the act of nomination, if the Presbytery illegally will not exercise its duty, and illegally refuse to try whether the presentee is qualified or not.

"It is very true that the presentee may not, by reason of the illegal refusal to try him, and to receive and admit him (if qualified), be able to perform the duties of the office. His title as the officer appointed may not be perfected so as to enable him (consistently with the provisions introduced as to the trial of his qualifications) at once to enter to or on the office, and to draw its emoluments. But that is a very different and distinct matter altogether from the effect of the patron's nomination in filling up the office, so that it can no longer be held in law to be vacant. A presbytery, by illegally refusing to enter on the trials of the qualities of the person nominated, commits wrong to him and wrong to the parish, by not enabling him to perform the duties if they should think him qualified. But the consequences of their illegal refusal to perform their duties cannot be pleaded against the full effect of the nomination to the office, merely because the wrong may be irremediable to the extent that the person injured cannot perform the duties or obtain the perquisites of the office. When the presbytery illegally refuses to try, I apprehend that the condition of their power of examination ceases, as any limitation on the act of nomination, or even on the selection of the individual—although it is true that he must suffer some injury, and may not be able to enter on the discharge of his duties. But there are many analogous cases where a person may be wronged to the extent of not being able to enter on the discharge of the duties of an office, though his nomination to it is complete, and is sustained by decree. There are many cases of similar wrong; e. g., after decree is pronounced in a declarator of marriage, the woman is to all legal effects the wife of the defender, but may not be received as such, or enabled to perform any of her duties.

"The case of the Duke of Gordon v. Gillon affords a good illustration of these principles—elementary indeed, but of late wholly lost sight of in many of these discussions. When an heritor brings a process of valuation or approbation, the benefice must be represented—else the proceedings are null, and may be subsequently reduced at the instance of the minister. If the parish is vacant, the moderator of the Presbytery, by established form, following on the plain meaning of the Act 1633, c. 19, must be called as a defender, in order to protect the interests of the modified stipend. In the case referred to, a presentation was issued by the patron before Lord Fife executed his summons of approbation, and he executed the summons against the presentee, whose presentation had been laid before the presbytery and sustained, exactly as Mr Young had been: But the presentee was not inducted for more than three months after the execution of the summons. In a subsequent challenge of the decree of approbation obtained in that process, it was contended—'2d, That although the presentation was prior to the date of execution, yet, as the induction was posterior to it, the church was therefore vacant, and the moderator of the presbytery ought to have been called, which was not done.'

"The answer made was—'2d, That the church was not vacant, because the presentation had been sustained prior to the execution, and therefore Mr Gillon was the proper party to be called.'—(See Shaw's Teind Cases.)

"The point was fully discussed in the Court of Teinds, and, as the late Lord President's papers bear, it was decided 'with a full bench.' The point was argued anxiously, and is noticed very fully in the late Lord President's note-book, in his summary of the case, as a prominent point in the cause. The case was again raised very fully on appeal. And both in this Court and in the House of Lords it was found, that there was no vacancy so as to require the moderator to be called, and that the presentee was the proper party to be cited, as having the true interest in the stipend of the benefice by the patron's nomination.

"The application of this case to the view I am now stating is direct and important. If the parish had been vacant the benefice would have been undefended, and the decree subsequently challenged would have been good for nothing. That is a clear point. In the challenge of the decree, this point then

came to be a matter of the greatest importance to the minister, and it appears to me to have brought to trial the very question on which the present case must be decided. If the parish was vacant in the proper and legal sense of the term—if the legal vacancy continued till induction—if the nomination by the patron to the office of minister did not fill up the benefice,—then the presentee was not the proper party to defend the interest of the same:—Whereas the Duke of Gordon contended that the presentee was properly called as a defender in the character of minister of Speymouth.' The plea of the minister was stated in the words of Erskine (B. II. t. 10, § 35), 'that where an action of valuation is brought during a vacancy in a church, the proprietor must cite the moderator of a presbytery as a defender,' and a very anxious and elaborate argument is maintained in the printed pleadings both in this Court and in the House of Lords, to prove that the parish was vacant 'legally and virtually,' notwithstanding the patron's presentation, and that any other view was quite contrary to 'our ecclesiastical constitution.' The pleadings are in fact very full and most anxiously stated on the point.

"On the issue thus raised—directly I think on the very point on which this case must depend—judgment was given to the effect that the parish was not vacant, and that the proper party against whom to execute the summons and to make the defender, as in right of, and entitled and sufficient to protect the interests of the benefice, was—not the moderator of the presbytery (undoubtedly the proper defender in the case of a vacancy) but—the presentee, although he might never have been inducted, but might have been legally and validly rejected after trial as disqualified.

"This decision is a judgment on the effect of the patron's act of nomination under the operation of the Statutes giving to the Church the power of examination and admission.

"Foreseeing the risk—at least in individual cases—that presbyteries, being composed of men liable to err and to commit injustice, might refuse to perform their duty, and refuse to receive and admit those whom they could not pronounce unqualified, the next Statute of the same year, 1592, c. 117, enacted, 'Providing always, in case the presbytery refuses to admit any qualified minister presented to them be the patron, it shall be lawful to the patron to retain the hail fruits of the said benefice in his own hands.' Acts, I., p. 611.

"There is not one word in this enactment which implies that the Legislature held the benefice to be still vacant in the event of the wrong being done against which this remedy is given. I think the enactment manifestly proceeds on the view above stated, that the patron has nominated to the benefice, and that it is not vacant—though the presentee has not been allowed to enter on the performance of its duties.

"In order to secure the benefit arising from the Church's province and duty of examination, and of admission, it necessarily followed that the presentee could not himself receive the right directly to draw the fruits of the benefice. The patron might concur with the Presbytery in thinking the person legally rejected: Plainly there were many reasons why there could not be bestowed on the presentee the right to draw the fruits of the benefice, however gross the wrong done by the presbytery in refusing to do its duty. In order, therefore, to secure the full effect of the patron's grant to him of the whole fruits of the benefice, it became necessary to provide that the patron should have right to retain them—not for pious purposes but in his own hands—so that he might be able to give effect to his own grant to the presentee, and thereby prevent as far as possible the injury done to the latter.

"It appears to me that this provision has no sort of analogy whatever to the ordinary common-law right of patrons to draw vacant stipend, under certain obligations by subsequent Statutes as to its use. The provision is worded in terms quite different from any of the provisions applicable to vacant stipends. It is introduced as a remedy against wrong in favour of the party who has done his duty,—whose right is illegally invaded, and to whose nomination effect has been illegally refused. It is introduced, I think, to remove the obstacle to the rights to the stipend and to other emoluments of the minister, which the non-serving of the cure might have created,—and, in respect of the illegal conduct of the presbytery, to give the patron power to keep the whole fruits of the benefice entire and secure from the Church or any one settled by them.

"I think this remedy cannot be assimilated to the common-law right to vacant stipend. If the parish was vacant, then, in 1592, the patron had by common law the right to the vacant stipend, and the Statute was useless. But to admit the parish to be vacant would have been inconsistent with the view taken of the patron's right of nomination, and with the duty imposed on the presbytery. Accordingly, there is not one expression in either Statute, the c. 116, or c. 117 of 1592, which implies the notion of the parish remaining legally vacant.

"Again, the patron is *expressly* empowered, as a compensation, to retain the whole fruits of the benefice *in his own hands*. Now these being the *express* words of the enactment, giving that right as a special compensation against a special wrong, I am of opinion that subsequent Statutes, directing the use of vacant stipends to pious purposes (which Statutes may be fully satisfied by application to other cases of frequent occurrence), cannot be reasonably construed to take away by implication this remedy against special wrong. I think, that in order to authorise such a construction, the Act 1592, c. 117, must be specially referred to, before its repeal is to be presumed. The deduction in Lord Medwyn's opinion plainly shows that the subsequent Acts could not refer to the Act 1592, c. 117: And I venture to draw an opposite conclusion from that which he states as to these Statutes.

"The first of the subsequent Acts, 1661, c. 52, proceeds on the narrative, that *prior* Statutes had described vacant stipends to be employed to pious purposes. Probably it is only the rescinded Act that is referred to. But at all events this Statute professes only to apply to Statutes which expressly directed the use for pious purposes. Then it plainly does not refer to the Act 1592, c. 117, which imposes no such obligation.

"But taking the rescinded Act 1644, c. 20, as the model of these enactments, and attending to the terms of the whole of them, it appears to me to be plain that they are Statutes regulating the common-law right of patrons to vacant stipends. The cases which they enumerate are all cases of proper vacancies—cases in which the patron had at common law the right to the vacant stipend. They do not profess to bestow any right, but only to regulate an acknowledged right. Their terms appear to me to be wholly inapplicable to the special remedy given to the patron by 1592, c. 117. The Statutes as to pious uses mention and describe the occurrences by which vacant stipend can arise; and none of these occurrences or events can by any force of language include the illegal refusal of the Presbytery to receive the presentee. The examination of these Statutes, and the comparison of their terms with the enactment 1592, c. 117, convince my mind that the Statutes directing the use of vacant stipend to pious purposes, do not include the case specially provided for by the Act 1592, c. 117.

"I am of opinion that there is no *analogy* whatever between this special provision and the common-law right of patrons in other cases, to retain vacant stipends to which a certain proper and reasonable condition was annexed, of applying them to pious purposes. I do not see in the Statute the slightest vestige of authority for the proposition, that the remedy given to the patrons by 1592, c. 117, was given under the obligation, and limited to the object of securing the application of the stipend to pious purposes.

"Other Statutes provide expressly for vacant stipends going to pious purposes. There are many cases in which there is vacant stipend. The Act 1592, c. 117, does not, directly or indirectly, imply that the benefice is vacant: it does not call the stipend *vacant*: It is not limited to *stipend*, which it does not mention. It applies to the whole fruits of the benefice, —manse, glebe, and all other fruits (which at that time might not be limited to a *stipend*, for there were no *modified stipends*;) and then it expressly gives the patron right to retain these *in his own hands*. Contrast these terms with the other Statutes referred to, and the marked peculiarity of phraseology is such as to my mind plainly excludes the notion, that application to pious purposes was intended by 1592, c. 117.

"The argument, therefore, on the effect of the Statutes as to the Widows' Fund, founded on its application to cases of ordinary vacant stipend, and on the substitution of that fund for pious purposes, makes no impression on my mind. It proceeds on a misapprehension of the nature of the enactment in

the Statute 1592, c. 117. It proceeds on an assumption, for which I see no authority, that we must read the provision in that Statute, not in the way and to the effect calculated to prevent the wrong and advance the remedy, but must introduce and interpolate an obligation on the patron as to the use of the fruits of the benefice, which will render the provision ineffectual in order to prevent, and worthless in order to compensate, wrong. Such an interpolation seems to me to be altogether unwarrantable. The Statute had bestowed a great check on the exercise of the patron's right: But it also directed and prescribed the duty of those in whose hands the check was placed. To prevent the wrong that might result from perverse and illegal abuse of that trust—to take away one great temptation to commit the wrong, and to secure to the party injured all the benefits which could be secured to him,—another provision was made, giving to the patron, when the wrong was committed, right to retain in his *own hands* the whole fruits of the benefice.

"The Statute gives no warrant for attaching to that remedy the obligation and limitation for which the collector contends. Such a construction is adverse to every sound principle of interpretation—overlooks the *reason* for the statutory declaration in question—disregards the special terms in which it is provided; and above all, rests on an *interpolation and addition* to the terms of the statutory enactment, attended with this remarkable peculiarity, that it renders unavailing the remedy, and denies effect to the compensation actually and directly given by the words of the Statute.

"When the Court, in one of the cases in the early part of last century, found that the stipend might be retained in the case of similar wrong, *as in the case of a vacancy*, I regard the terms of that interlocutor as denoting (when they came to act for the first time, probably, on an ancient enactment), that they intended to mark that the *retention* was to be *as complete as if there was a vacancy*,—that (there being no question before them as to reducing the induction of the person illegally settled) he could not have right any more than if there was a vacancy; and that, *quoad* him and the presbytery, the fruits of the benefice were to remain with the patron as completely as if he had not been settled, and as if the parish were vacant. But no question then occurred as to what the patron was to do with the fruits. The minister illegally settled by the presbytery wished to get the stipend, and the Court found, as with him, that the patron was entitled to *RETAIN* the stipend as in a vacancy. That was a judgment only as to the *retention*, viz., that it was to be complete and absolute against him. But the terms of the interlocutor implied nothing at all as to any obligation on the patron in respect to the use of the fruits so retained.

"But any reasoning on this incidental expression in the terms of this interlocutor, or any speculation as to the sense in which the Court used (*obiter* certainly) this expression, is of little avail, if the words of the Statute do not authorise any such limitation on the patron's right. The Court is bound to give full effect to the express remedy and compensation provided against a special wrong: And that remedy declares that the patron is to retain the whole fruits of the benefice in his *own hands*. I cannot read this to mean that he is not to be entitled so to retain them in his own hands, but must apply them for pious purposes. If so, then that is no *compensation* for the wrong done—none whatever.

"I observe it is stated in an opinion, signed by some of the Judges, that in the cases of Auchtermuchty, Culross and Lanark; and other cases, the patron 'has been held bound to apply the stipend to pious purposes.' I am not aware to what judgments, or to what opinions of the Court this statement refers, and there must, I think, be some misapprehension. In all these cases the question was with a person illegally settled by the presbytery, who claimed the stipend in virtue of his alleged character as minister of the parish. His claim was rejected, and the patron preferred. But I am not aware that the question was ever discussed as to what the patron was bound to do with the vacant stipend, or that any opinion was ever expressed on the point—decided it could not be, for there were no parties with whom it could arise. The tradition is, that the presentee of the Crown received the stipend in the case of Lanark; and the statements in regard to the Zetland case seemed fully to prove not only that

Lord Dundas's presentee occupied the manse and glebe, but had received from him the stipend.

"Such being the general view I take of the patron's right and act of nomination, and of the various Statutes which the Legislature has passed—dealing with the question, as the collector admits we must do, as a question of law and of statutory enactment—What are the facts in the present case?

"I must shortly recapitulate them, for they are decisive, in my opinion, of the point at issue under the general view above stated.

"This Court and the House of Lords found,

"1. That the Earl of Kinnoull has *legally, validly, and effectually exercised his right* as patron of the church and parish of Auchterarder, by *presenting the pursuer*, the said Robert Young, *to the said church and parish.*

"2. That the Presbytery of Auchterarder did *REFUSE*, and *CONTINUE to REFUSE*, to *take trial* of the qualifications of the said Robert Young, and have rejected him as presentee to the said church and parish, on the sole ground (as they admit on the record) that a majority of the male heads of families, communicants in the said parish, have dissented without any reason assigned, from his admission as minister.

"3. That the said Presbytery in so doing have acted to the *HURT AND PREJUDICE* of the said pursuers, *ILLEGALLY*, and in *violation of their duty*, and contrary to the provisions of the Statute of 10 Anne, c. 12, intituled 'An Act to restore patronage to the ancient rights of presenting ministers to the churches vacant in that part of Great Britain called Scotland.'

"No remarks can add to the force of these emphatic findings.

"By a subsequent and final interlocutor, quoted in the pursuer's case, the Lord Ordinary found, as the legal results from these facts—

"1. 'That the Presbytery are still bound and astricted to *make trial of the qualifications* of the pursuer, the Reverend Robert Young, as presentee to the church and parish of Auchterarder.'

"2. 'And *if in their judgment*, after trial and examination in common form, he is found qualified, to receive and admit him as minister of the said church and parish, according to law.'

"These various findings ascertain the facts of the case.

"The result is, according to the view which I have stated, that,

"1. The patron has nominated to the office.

"2. That the Presbytery has (according to the contingency contemplated and guarded against) refused to perform the duty and discharge the obligation which was made the condition of entrusting the presbyteries with the power of examination and admission, and has committed the wrong against which, by way of remedy and prevention, a compensation was given by Statute.

"Consistently with the above findings—if my view of the nature of the patron's right of nomination be correct, and if it is supported, as it plainly is, by the above decision—How can it be maintained that the parish and church of Auchterarder is now vacant?

"I apply to that notion all the ordinary tests by which a vacancy is characterised.

"Is Lord Kinnoull bound to present another?—which, if there was a vacancy, he would be bound to do. That cannot be pretended. The judgment excludes the notion.

"Is he *entitled* to present another? The judgment fixes that point.

"How is the parish vacant? By what occurrence? or from what date? By the death, or from the death of the late incumbent? That cannot be maintained, for the judgment expressly finds that the patron has effectually and validly nominated to the office.

"Is the Presbytery to call on the patron for another presentee? That cannot be maintained under the judgments.

"Is the Presbytery entitled to hold that the parish is vacant and to present, *tanquam jure devoluto*, in virtue of the Statute made and provided against the patron's default to provide a proper person? That cannot be contended.

"Again—Is there *delay* merely between the presentation and the trials of the presentee—a case in which the law holds no wrong to be done? On the contrary, the judgment finds that

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the Presbytery have refused to act: The judgment no longer leaves matters as if the Presbytery were proceeding to do what is to institute the presentee into the cure and charge of the parish, and so remove, as it were, the continuance of the vacancy. It ascertains a wrong. And the matter is now to be considered in reference to the patron's valid act of nomination, sustained by decree, where effect is illegally denied to that nomination. Delay then is not the case; and if the rejection of the presentee was illegal, as the judgment finds, the parish is not vacant, but validly filled up.

"Try the case by any conceivable test, and in what way can it be held that the church and parish is vacant. True the presentee has not been admitted to serve the cure. But that is the wrong done. The patron was bound to present a person to the church and parish who was to serve the cure. He has done so. The Presbytery exclude him. But that wrong does not make a vacancy. Serving the cure is not a test of the parish and church being vacant.

"After effectual nomination to the office there can be no vacancy. It is true that the presentee cannot *enter on the discharge* of his duties (assuming that ordination is necessary);—But why? The judgments of the House of Lords and of the Court answer that inquiry—by reason of the Presbytery's illegal refusal to take trial of his qualities, and wrongful refusal to perform a clear statutory duty.

"Does that wrong destroy the effect of the patron's nomination—in itself complete and perfect—and in this case declared to be effectual by solemn decree? I apprehend not. As the Presbytery will not—and wrongfully and illegally will not—ascertain whether the presentee is qualified, the result is, that the non-performance of their duty being a wrong, cannot be pleaded against the patron's nomination to any effect whatever, or be allowed in any degree to deny effect to it—though it is true that the individual may not be able, by reason of that wrong, to *serve* the cure. He is presented in order to serve. He is ready and able, and must be presumed to be competent to *serve* the cure. That is the duty of which the patron must afford the performance. He has provided the person, by presenting to the church and parish. But on what legal ground can the exclusion—the wrongful exclusion—of that presentee from serving the cure, cause or continue a vacancy in the church and parish to which he is legally and effectually nominated? It is plain that in the collector's argument there is a confusion both of *terms* and of *things*.

"No difficulty is encountered in consequence of the rules, —some statutory, some equitable—introduced as to vacant stipend, as it is termed, in order to cover and provide for the interval which may elapse—greater or less—between the issuing of the presentation and the date of admission. Delay, more or less, must often occur. The law does not inquire curiously into the causes of such delay. It presumes the church courts are in the course of going through necessary forms, and that there is no *illegal* wrong—and hence the patron is not supposed to be injured—and the stipend, though in the hands of the patron, was appropriated in such cases to pious uses, and after a certain term, to the Widows' Fund by Dr Nicoll's Act. But in this case it has been found that wrong has been done by an illegal act: It has been found—not that there has been wrong from *delay*, even wilful delay, but that effect has altogether been denied to the act of nomination, by a wilful and illegal wrong by the Presbytery—a wrong intended and devised in order to deny effect to the nomination, and to keep out the presentee from serving the cure.

"Although, therefore, in the common case, the stipend, in the event of *delay*, was not to be retained by the patron (for the time necessary to settle was taken to be no improper delay), but to be applied to pious purposes, such obligation had no application to such a case as that established by the judgments pronounced in this cause. The case has occurred for which a compensation was provided by the terms of the provision in 1592, c. 117. I see no warrant for denying effect to that compensation, by converting it into an obligation which destroys it as any compensation.

"Attending to the facts above stated, I am of opinion that the fruits of the benefice, which, by the Statute 1592, c. 117, the patron (in whose right alone the collector can claim) is en-

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titled to retain, cannot be brought within the description of vacant stipend arising from any of the causes and in any of the predicaments mentioned in the recent Statute on which the claim of the collector rests.

"I do not think that it is seriously contended, that *under the words of the Act 1592, c. 117*, there was an obligation to apply the fruits of the benefice to pious purposes. Now it is necessary to settle, in the first instance, what was the import of that enactment. If it did not impose the obligation of applying them to pious purposes, and if the right to retain in his own hands was given as a compensation, then what is the reasonable construction to apply to the subsequent Statutes directing the patrons to apply vacant stipend to pious purposes? If there could be no vacant stipend in any case unless by holding the case specially provided for by the Act 1592, c. 117, to be vacant stipend, then necessity might require the later Statutes to apply to that prior one. But they may all receive effect and their terms be fully satisfied without any such application. Accordingly, these acts refer to *kirks that are vacant and not already disposed of, or which shall vaik by decease, deposition, suspension, translation, or any otherwise*. Now, if the church is not in this case vacant by any of these causes, these Acts as to vacant stipends do not apply. And the very same remark applies to the Widows' Fund Act, which takes effect 'when any parish in the Church of Scotland becomes vacant by the death, translation, resignation or deprivation of an incumbent holding the pastoral cure and benefice of such parish, and that vacant stipend *thereby arises*.' But, secondly, if the Statute 1592, c. 117, of itself contained no obligation to apply the fruits of the benefice to pious purposes, and if it was a direct compensation given for a special wrong, general Statutes not providing for the special case of wrong at all, but dealing with an ordinary and fair case in which a patron had really no justifiable claim to use and employ the fruits of the benefice, cannot be taken to deprive him of the remedy and compensation given him by a previous Statute as a means of preventing a statutory wrong? The subsequent Acts do not mention 1592, c. 117. They do not extend to it by implication. They do not cover it by the reason, and purpose, and intendment of the provision which they introduce. They relate to cases where there was no wrong and no injury. The Act 1592, c. 117, contemplated a wrong and an injury. It provided a preventive, and it gave a compensation. To hold that the subsequent Acts, not applicable to the case of wrong, must take away the compensation and impair the preventive, although that Statute is not mentioned or referred to, seems to me to be inconsistent with sound principles of construction, and adverse to the policy manifest upon the face of all the Statutes.

"I am of opinion that it required a special and express enactment in a subsequent Statute to deprive patrons of the remedy and compensation given to them—1592, c. 119; and that when another party claims from the patron the fruits of the benefice, and claims it, too, as in his right under that very Statute, he must show an express gift, taking the benefit away from the patron, and giving it to him.

"Observe the great peculiarity of this case. No question is raised as to the subsistence and validity of the Statute 1592, c. 117, against the Church, in the event of the wrong being done thereby provided against. It is not said that the remedy is not to take effect, or that the provision is not a remedy introduced to provide compensation for great and flagrant wrong. Dr Gordon joins with Lord Kinnoull in holding the wrong to be flagrant—in contending for the statutory remedy, and for the statutory compensation against the wrong done by the Presbytery. But he says that the compensation has been given to him for the Widows' Fund, and given (he says) by form of a transference to him of vacant stipends, generally speaking, which the patron had no right to enjoy, but could only apply to pious purposes. Can Dr Gordon claim this, which was a patrimonial and direct compensation to patrons, without showing an express and special gift of it in express terms? The reason and object of the Widows' Fund Act does not reach the case. The vacant stipends, specially described as to the cause of their becoming vacant—(transferred to Dr Gordon)—could not be applied individually by the patron for the benefit of himself or any individual. He had them *in trust* for pious pur-

poses. They really were of no use to him;—if not an heritor in the parish, really of no use whatever;—and if an heritor, the relief from any parochial burden, by their application, was too inconsiderable to amount to any personal interest. Hence the transference of them to the Widows' Fund, also a pious and benevolent purpose, in truth only relieved the patrons from a troublesome trust, leading often to disputes. But the Act 1592, c. 117, gave the fruits of the benefice to the patrons as a compensation for injury. The reason of Dr Nicoll's Act does not extend to such a case; and I am of opinion that the collector cannot take away from the patron this compensation or patrimonial benefit given to repair individual wrong, without showing express gift of the fruits of benefice when such wrong is done, by special transference to him of the benefit of the Statute.

"In short, Dr Gordon only claims as in right of the patron under this particular Statute, and he must show express gift to the fund of compensation thereby provided in order to redress individual injury.

"Holding, as the collector does, that the refusal of the Presbytery is an illegal act, he contends that the patrons must have contemplated and intended to give up this remedy and check against such wrong.

"Indeed, when he claims, as in right of the patron, under the Statute 1592, c. 117, he must contend that such was the *intention* with which Dr Nicoll's Act was framed. That view of the intention with which Dr Nicoll's Act was framed and assented to by the patrons, might of itself afford rather a formidable obstacle to the plea of the collector.

"I am of opinion that the defences of the collector in the one process, and his claim in the other, ought to be repelled."

The Court pronounced the following interlocutor:

"In conformity with the opinions of the majority of the whole Court—Repel the defences stated for the Rev. Dr Robert Gordon, as Collector of the Ministers' Widows' Fund, and decern and declare in favour of the pursuer, the Earl of Kinnoull, in terms of the conclusions of the libel, and allow this decree to go out and be extracted *ad interim*: Find the defender, the said Robert Gordon, as collector foresaid, liable to the said Earl in expenses," &c.

Lord Ordinary, Murray.—Act. Whigham; Storie and Baillie, W.S., Agents.—Alt. Solicitor-General (M'Neill), Grant; Inglis and Wedderburn, W.S., Agents.—B. Clerk.—[H.B.]

19th July 1842.

SECOND DIVISION.—(G. D. F.)

No. 268.—*The HERITORS and KIRK-SESSION of the PARISH of CRIEFF, Advocators, v. The HERITORS and KIRK-SESSION of the PARISH of LITTLE DUNKELD and MONZIEVAIRD, Respondents.*

Poor—Settlement—Statutes, 1579, c. 74; 1672, c. 18—Aliment—Bastard—*In a question between several parishes as to which was bound to support a pauper lunatic, it was proved or admitted, as to one of them, that the lunatic had come within the bounds fourteen days after Martinmas 1823, and resided there till Martinmas 1826, being three solar years, less fourteen days—Held (1.) That this did not constitute a settlement in law, so as to subject that particular parish in support of the pauper: (2.) That the parish in which the mother of a bastard had acquired a settlement, was liable in the aliment and support of the bastard, in a question between that parish and the parish of the birth of the child.*

Process—Reclaiming Note—Competency—*Special circumstances in which a party not expressly comprehended in the prayer of a reclaiming note, was nevertheless held to be so, and was accordingly bound to discuss with the reclaiming the question on the merits, involved in the reclaiming note.*

Margaret Duff, a pauper lunatic, committed an assault in the parish church of Monzievaired on the person of one of the parishioners, at the dismissal of the congregation after divine service, in consequence of which

she was apprehended in September 1833, and lodged in jail, at the instance of the Procurator-fiscal of Perthshire, and thereafter consigned to Murray's Royal Asylum for lunatics by orders of Court. The kirk-session and heritors of the parish of Monzievaird having advanced and borne the expense attendant on the apprehension and confinement of the lunatic, brought an action in the Sheriff Court of Perthshire against the heritors and respective kirk-sessions of the parishes of Little Dunkeld and Fowlis-Wester, subsuming,

"That by the laws of this kingdom, the parish where paupers and lunatics requiring to be maintained at the public expense had their last legal settlement are bound to support such paupers and lunatics, and to free and relieve other parishes of that burden: That while it is doubtful whether it is quite certain that she had settlement in one or other of those parishes, the said Margaret Duff had her last legal settlement in the parish of Fowlis-Wester, or in that of Little Dunkeld, but the kirk-session and heritors of those respective parishes have hitherto refused not only to make payment to the pursuers of the sums of money hitherto advanced by them for behoof of the said Margaret Duff, with interest as aftermentioned, but also to free and relieve them of the burden of supporting her in time to come, though repeatedly desired and required so to do: Therefore, the said defenders, the members of the kirk-sessions and heritors of the said parishes of Fowlis-Wester and Little Dunkeld, or the members of the kirk-session and heritors of such of the said parishes as shall be found to be legally liable to have supported and maintained, and to support and maintain the said Margaret Duff, ought and should be decerned and ordained to make payment to the pursuers of the said sum of £38. 10s. 8d. Sterling, advanced by them at sundry times, for and on account of the said Margaret Duff, together with the legal interest of the said sum from the date at which the advances thereof were made, and in time coming during the non-payment, and to free and relieve the pursuers of the expense of maintaining and supporting the said Margaret Duff in time coming, by taking the same upon themselves; and farther, the members of the said kirk-session and heritors of the said respective parishes of Fowlis-Wester and Little Dunkeld, or the members of the kirk-session and heritors of such of the said parishes as shall be found to be legally liable to have supported and maintained, and to support and maintain the said Margaret Duff, ought and should be decerned and ordained to make payment to the pursuers of the expenses of process, and of extracting the decree," &c.

In the condescendence for the pursuers it was stated, "1. That Catherine Duff, the lunatic, was born at Tomnagrew, in the parish of Little Dunkeld, where her father occupied a small farm, on the 9th of September 1804. Her father died before she was born, and her mother removed from Tomnagrew at the following Whitsunday (1805), carrying her child, the said Catherine Duff, with her to Dullater, in the parish of Fowlis-Wester. 2. In the year 1818, she was a servant to James Duff, smith in Chapelhill of Logiealmond, in the parish of Monzie, where she remained till Martinmas that year. 3. From Martinmas 1818 till spring 1819, she resided with an aunt in the parish of Crieff, where she engaged in the service of John Scott of Tulchan, in the parish of Fowlis-Wester. 4. In 1820, Duff was a servant to James, Peddie at Condoloch, in the same parish; and in 1821, she was living as a servant to widow Steel at Laggan-Allachie, in the parish of Little Dunkeld; and in 1822, she was engaged in the service of a farmer at Grandtully. 5. In 1823, the said Catherine Duff was again in the parish of Fowlis-Wester, a servant to M'Ara at Connachan, whose service she left ten days after the term of Martinmas that year, and went to reside in family with her

aunt in Crieff, where she continued till the 5th day of April 1824, when she entered to the service of a Mr M'Culloch, in the neighbourhood and parish of Crieff, and continued there till Martinmas 1824. 6. At the term of Martinmas 1824, she then entered to the service of Mr Kay, Callander, parish of Crieff, and continued therein till Whitsunday 1825, when she went to Mr Clerk at Ferntower, Crieff, where she resided till Martinmas 1825. 7. At Martinmas 1825, she entered to the service of Mr Caw of Millnab, in the parish of Crieff, where she continued till Martinmas 1826. 8. At the term of Martinmas 1826, the said Catherine Duff went into the service of Mr Gardiner at Trowan, in the parish of Monzievaird, where she continued till Martinmas 1827, when she entered to the service of Mungo M'Ewan at Drummondernoch, in the same parish, and continued therein till March 1829. 9. In March 1829, she entered to the service of Mr Barclay at Dachirla, in the parish of Muthil, where she continued till Martinmas that year, when she entered the service of Mr M'Leish at Cultycheldoch, in the parish of Muthil, and continued therein till September 1831, when she became a confirmed lunatic, and took to roaming the country at large, without selecting any fixed residence."

The kirk-session of Fowlis-Wester having investigated the matter, as advised by the Sheriff, admitted the history of the residence of the pauper as given by the pursuers, with the exception of the exact time at which she left the service of M'Ara at Connachan, or the exact period when she left the service of Caw at Millnab, and entered that at Trowan; and they *pleaded* that they were not liable, as the pauper had never resided for three years in the parish of Fowlis-Wester, nor acquired any legal settlement there.

The kirk-session of Little Dunkeld, who also investigated the history of the lunatic, admitted the statement of the pursuers, with the following addition and exceptions:—"1. With the addition to article first, that from the year 1805, when the lunatic went to Dullater in the parish of Fowlis-Wester, to the year 1818, when she became a servant to James Duff, as stated in article second, she and her mother continued to live in Dullater foresaid, in the parish of Fowlis-Wester. 2. With the exception of that part of article fifth, as to the exact time that the lunatic left the service of M'Ara at Connachan. This allegation the defenders deny, and aver that the lunatic left M'Ara's service before the term of Martinmas 1823. 3. With the exception also of that part of articles seventh and eighth, as to the exact period of her leaving Mr Caw's service and entering Mr Gardiner's;"—and they *pleaded*, 1. That the parish in which a person requiring to be supported from the poors' funds had last an industrial residence of three years, is the parish bound to support that pauper. 2. Little Dunkeld parish not being the original parish of the pauper lunatic, or if so, she having obtained an industrial residence in the parish of Fowlis-Wester, or some other parish, such parish was liable for her board.

Thereafter a proof was allowed and adduced by the parties, when, in consequence of certain circumstances which came out in it, the Sheriff suggested that a supplementary action should be directed against the parish of Crieff, which was accordingly done: But that parish

averred that the lunatic never had acquired an industrial residence in the parish of Crieff; that so far from that being the case, it was shown by the proof led by the parties to the original process, that she did not enter the parish of Crieff till at least fourteen days after the old term of Martinmas 1823; that she left it within three years thereafter; and that Duff's industrial residence in the parish of Crieff did not even commence fourteen days after the old term of Martinmas 1823; for it was established by the evidence of Margaret Peddie, her aunt, that she lived with her till the month of April following, when she found employment in the parish, and from the latter date only could her industrial residence, therefore, be said to have commenced;—and they accordingly *pleaded*, 1. That the lunatic not having had three years' industrial residence in the parish, no claim could lie against the parish for her aliment: 2. That the lunatic having been born in the parish of Little Dunkeld, and having lived nearly twenty years with her mother in the parish of Fowlis-Wester, and it not appearing that she ever had three years industrial residence in any other parish, Little Dunkeld, as the parish of her birth, or Fowlis-Wester, as that of her acquired residence, was the parish bound to support her.

The Sheriff-substitute pronounced the following interlocutors:

"*Perth, 12th June 1840.*—Having advised the closed record, finds under the admitted and proved circumstances, in regard to the residence of the pauper lunatic, that the claim for her support rests upon the parish of Crieff: Therefore decerns against that parish, in terms of the conclusions of the supplementary summons; and, under the whole circumstances, finds no expenses due, with the exception of the expense of extract, for which decerns, and assoliszes the parishes called under the original action."

(Signed) "HUGH BARCLAY."

"*Note.*—The parish of parentage and of birth can only be had recourse to failing the pauper having obtained any settlement for herself by the necessary industrial residence. There is no evidence that the father of Margaret Duff had acquired any legal settlement in the parish of Little Dunkeld, and so there is nothing, save the birth, to fix the liability on that parish. The connection between that parish and the child ceased immediately after the birth. The revival of it, by residence in 1820, was too brief to affect the claim.

"Residence during pupilarity cannot be held an industrial residence; and, after the period at which Margaret Duff entered on service in 1818, she does not appear at any one time to have been longer resident in the parish of Fowlis-Wester than one year, or one year and six months; or in all, was she resident in that parish, as a servant, for a period longer than two years, or two years and a-half.

"The last settlement of the pauper, of course, relieves all former parishes where prior settlements may have been obtained. Now, it is admitted that, from Martinmas 1823, or within ten days thereafter, until Martinmas 1826, the now pauper was continually in service within the parish of Crieff. The only objections to this period being reckoned as complete, are, first, the discount of the ten days said to have occurred after the term of Martinmas 1823, before she went to reside with her aunt at Crieff. But this space is so very trivial, in relation to the term of three years, that it cannot be permitted to destroy the legal effect of such residence, any more than the absence for a like number of days would destroy the settlement of any person, occurring such absence during the currency of the term. Duff's industrial connection with the previous parish clearly ceased with the term of her engagement of service. It is next said, that her residence with her aunt in Crieff ought not to count. There is no evidence or admission as to how she was occupied during that period; but the clear presumption, in the absence of

proof, is, that she supported herself. There is also a previous period of several months in 1818–19, when Duff also resided with her aunt in Crieff, which, reckoned with the other space, renders her residence upwards of three years in the same parish.

"Thus it appears that Duff, after being able to support herself, resided for the longest space of time, either as a whole or taken continuously, in the parish of Crieff, and that shortly before her becoming unable longer to earn her sustenance she was three years at least, all but ten days, resident continuously in that parish, and therefore little doubt remains that on that parish rests the burden of her future support."

"*Perth, 29th January 1841.*—Having resumed consideration of the process, with reclaiming petition on the merits and answers thereto, as also petitions for expenses, refuses the prayers of the said petitions; adheres to the judgment reclaimed against, and decerns." (Signed) "HUGH BARCLAY."

"*Note.*—The question is not without difficulty, but further deliberation has only confirmed the Sheriff-substitute in his first opinion. The parish of Crieff cannot arrogate to itself the benefit of alone being in the condition of those struggling to avoid loss. In this all the other parishes in the field are in precise equality, and in whichever way the decision may ultimately be given, to none of them can it bring gain.

"It is now fixed law, that the parish of the pauper's birth is only liable for his support in default of his having obtained for himself a settlement in some other parish. The liability, therefore, rests between the parishes of Fowlis-Wester and Crieff.

"With regard to Fowlis-Wester, there is a legal doubt whether a child's settlement follows that of the widowed mother, and another doubt exists as to a pupil being capacitated to obtain a settlement. The residence in Crieff parish being posterior to that in the parish of Fowlis-Wester, if sustained, cancels any claim which might have otherwise existed against the last-named parish.

"It is not disputed, that if the three years' residence, between 1823 and 1826 in the parish of Crieff be held complete, then the claim against that parish is clear. The escape from liability is founded on the discount of ten or fourteen days at the commencement of that period. The proof is not very clear as to the number of days, or indeed if there were any. And it rather appears that the residence at Fowlis-Wester ceased on the very term day; and there is no proof as to where the servant resided if it were not with her aunt, where she was found immediately after. Indeed, the ten or fourteen days may be accounted for by a discrepancy in reckoning the term day according to the different styles, still too much in observance in rural districts. But supposing that the omission of these few days are proved as awaiting to complete the precise and full space of three times 365 days, the question remains, whether in law, the omission is sufficient to destroy the qualification of a three years' residence? There is not an exact analogy between the Statutes introducing prescription into our law, and those on which is founded legal settlement. In the first place, the lapse of time is alone sufficient to let in the force of the prescriptive Statutes—time admits of no construction or modification, but is absolute and unbending in its character; whereas, what constitutes residence and domicile are questions admitting of much latitude of construction and qualification. But, in the second place, the law of prescription is designed to limit rights and to deprive creditors of important privileges otherwise in accordance with the principles of justice, and so must receive the strictest possible construction, and narrowest application. Whereas the law of settlement is one of privilege, founded on the law of benevolence, and is therefore entitled to a free construction and a liberal application.

"The parish of Crieff does not dispute that, had the interval of days occurred during the currency of the three years' residence, it would have had no effect whatever in preventing that residence being held complete. Now it is not easy to perceive how the same number of days at the beginning, after the connection was loosed with another parish, or at the termination before any bond was created with a new parish, should have the effect totally to destroy the otherwise entire term of residence. In common language, and to all purposes, the person and the public were entitled to say, that his residence had been

for three years in such parish. The parish of Crieff ask if ten or fourteen days destroy not the period of settlement as completed, may not a month, or any other larger portion of time, be disregarded with equal propriety? But the question may have its answer by propounding the opposite question, whether a day short of the legal space, or an hour, nay, even so many minutes, may not, on the same principle, be reckoned as destructive of the full and unyielding requirements of the law?

"But, supposing it possible that the parish of Crieff should be held correct on the first point, the Sheriff-substitute is confirmed in his opinion that they are bound to complete the four months' residence in 1818-19, notwithstanding it occurred more than three years before the principal residence in 1823. It is admitted, that a pauper may be away many months from a parish and yet keep up his settlement therein, unless he meantime acquires a settlement in another. Any single furnishing, if within three years from its precursor, keeps up the continuity of a merchant's account, and prevents the application of prescription, and so carries it on for time indefinite. Something like this may have place in the law of settlement. Suppose a person who, from the nature of his avocations (like that of the party in the case of Dalmellington), goes from parish to parish, and remains in none at any time more than a few months, it is thought that, in the event of the party descending into the ranks of pauperism, his settlement would be ascertained by finding where the reckoning of the fractions of residence gives the last period of three years, however dislocated and long may have been the intervals between. The law does not require, but disclaims continuity. It uses the words, 'common resort,' and 'most haunted during the last three years.' Assuredly the unfortunate lunatic, from the time she was able to support herself, haunted most the parish of Crieff.

"The question was one of difficulty. All the parties are on a par as to interest, and are in the management of public moneys. The case has all along been conducted much in the spirit of an amicable suit, so that the Sheriff-substitute scarcely thinks those parishes who are so fortunate as to escape, are serious in asking their costs."

These judgments having been affirmed by the Sheriff, an advocacy was brought, in which the Lord Ordinary, upon an offer made by the parish of Crieff to prove that the pauper was in the parish of Fowlis-Wester for fourteen days after Martinmas 1823 (old style), allowed the parish to lead additional proof, which was accordingly adduced.

Thereafter the Lord Ordinary pronounced the following interlocutor:

"19th March 1842.—The Lord Ordinary having heard parties, and considered the process, advocates the cause; recalls the interlocutors complained of: Finds that the proof establishes that Fowlis-Wester is the parish of the settlement of the pauper in question: Therefore, on this ground, partly of fact and partly of law, finds that this is the parish that is liable for her maintenance, and decerns accordingly: Finds this parish liable in expenses; appoints an account thereof to be given in, and when lodged, remits the same to the auditor to tax and to report.

"Note.—There are some points of difficulty here, as to which the Lord Ordinary has so little confidence in the view he has taken, that he ventures upon a judgment chiefly as the easiest mode of bringing the case under the notice of the Court.

"He is of opinion that Crieff is not liable, simply because the full period of three years' residence is not made out. It is proved (and, indeed, almost admitted) that about fourteen days are wanting. It is argued, and the Sheriff decided, that the residence (that is, the statutory *haunting and resorting*) for three years need not be so unbroken as that the want of a fortnight will destroy it. The Lord Ordinary agrees in this, if it be applied to any period *during the currency* of the three years; for, though the residence must be continuous, it need not be constant; but, before it can be deemed either the one or the other, it *must have begun*. Here the defective fortnight was at the commencement of the three years. In other words, giving the pauper credit for all occasional absences during the three

years, she was only two years eleven months and a fortnight in the parish. If this is to be counted as three years, the Court will next be asked to disregard the want of three weeks, or of four, or of three or four months. The Lord Ordinary is for adhering firmly to the rule, inasmuch that his decision would have been the same though it had been but a single day that was wanting. It is true that, during this fortnight, the pauper was preparing and intended to go to Crieff; but she did not actually go till the fortnight was done; and, if the want of any portion of the full time is to be overlooked in consideration of the reasons why it was not completed, then a new element of confusion may be introduced into every case.

"If the Lord Ordinary be incorrect in this view, his interlocutor is wrong, and Crieff is clearly the parish that is liable.

"If Crieff be discarded, the competition for escaping the burden is between Fowlis-Wester and Little Dunkeld.

"Dunkeld was the parish of the birth, and this single fact fixes the liability on this parish, provided this liability was not taken off by a subsequent settlement acquired in Fowlis-Wester. The Lord Ordinary rather thinks that such a settlement was acquired.

"But he thinks so solely in consequence of the residence of the pauper's mother in that parish. The facts here are, that the father died in Little Dunkeld when the pauper was an infant, and it is said indeed, but not proved, before she was born, in September 1804: That the widowed mother went to Fowlis-Wester about Whitsunday 1805, taking the child with her; and that she lived there industriously till Martinmas, or at least till Whitsunday 1818.

"If a widowed mother can in law acquire a settlement for her children, this unbroken residence of about thirteen years gave the pauper a settlement in Fowlis-Wester.

"But it is denied that a lawful mother can acquire a settlement for her child; and, if this be law, the Lord Ordinary is wrong again, and the pauper must recur to the parish of her birth. But he does not hold this to be the law. There are decisions which are apparently contradictory, and the most important case is reported different ways. (See case of Coldinghame, as reported by Tait, in Vol. V., p. 539 of Brown's Supplement, and in Morrison, p. 10,582.) But the Lord Ordinary thinks that the weight of authority, and still more of principle, is, that the surviving mother, whose fortunes the children follow, and whose industry benefits the parish she resorts to, procures a settlement not only for herself but for her young offspring. If it do not, then a mother, who had maintained herself and a bed-ridden child by her own industry in one parish for fifty years, would not have a settlement there for her helpless child at her death, but it must have recourse on the parish where it was born, but from which it removed half a century before—a result against which principle seems to revolt. If the residence of the mother cannot confer a settlement in Fowlis-Wester on the daughter, the Lord Ordinary does not think that a settlement was acquired in that parish by the daughter herself, because, putting all her detached hauntings and resortings there together, they do not amount to three years of sufficient continuity. But here another point arises: A pupil cannot acquire a settlement by residence, that is, the years of pupillarity must be deducted. But do these years end in a female at fourteen or at twelve? There is no authority, *quoad hoc*, either way. The Lord Ordinary sees no reason for not adhering to the ordinary period of twelve; and if this be the legal rule, this pauper ceased to be a pupil in September 1816, and a considerable addition is made to the period of her industrial residence in this parish. But even with this help, the three years are not easily made out. If fourteen is to be held the period, these years are certainly not made out."

The parish of Fowlis-Wester reclaimed, praying the Court

"to recal the said interlocutor, to adhere to the interlocutor of the Sheriff complained of, and to find the advocates liable in expenses to the respondents; or to do otherwise in the premises as to your Lordships shall seem proper."

At advising the reclaimers argued—

That if the lapse of the fourteen days had occurred during the

running of the three years, or at the end, it would not have signified, as in the case of Dalmellington, and consequently that it was of no consequence that the lapse was at the commencement; because in either case, it was clear that that parish, where the residence of the three years occurred, less the fourteen days, formed the common haunt and resort of the pauper during that time. All that was wanted was to make out the common haunt and resort for a period corresponding as nearly as possible to the three years. The Statutes 1579, c. 74, 1672, c. 18, Act of Privy Council, 29th August 1693, connected with this branch of the law, were extremely vague and even contradictory as to the amount and quality of residence; and though custom had apparently fixed a settlement after a period of three years' residence, that period did not require to run *de momento in momentum*; for it was sufficient, if continuous, though there might be considerable intervals in the course of it. The principle of settlement was, that that parish was liable where the three years occurred, because it had, more than any other parish, benefited by the residence of the party. Such was the principle of all the authorities.—See Dunlop on Poor-laws. And farther, that that period afforded evidence of the common haunt and resort. In this case these elements conspired; and accordingly, as lapses need not be taken into account where they occurred at the end or during the period, it did not affect the principle that the lapse was at the beginning. The case which was relied on by the respondents (parish of Hatton, M. 10,574), was quite a peculiar one, and not at all applicable, as the lapse was, besides, far greater. Analogies might be taken from prescription.

Lord Justice-Clerk.—The analogous case is not prescription. It should rather be any case of cessation, as in working a coal field.

Lord Moncreiff.—But the analogous case here would be one which had had a beginning.

Rutherford.—In regard to what was said, that the period had not commenced, the circumstances disclosed in the proof should be taken into account, as showing that this party, though in Perth immediately before going to Crieff for these fourteen days, must be understood as being in Perth merely for a temporary purpose, and that she intended going to Crieff after selling her furniture.

Lord Moncreiff.—Have you any other evidence that she intended going to Crieff, than the fact that she did go?

Dundas.—We say that the proof shows that.

Lord Justice-Clerk.—The difficulty which the Court feels is, that supposing she had not sold her furniture in Perth, *quomodo constat* that she would not have remained in Perth?

Dundas.—Had she been unable to sell the furniture then, she might have remained; but having sold it, and then leaving Perth, that shows that she was only there for a temporary purpose, and it was very natural for her to go, and to have intended to have gone, to her aunt's at Crieff, as she had no other place properly to go to.

The Court gave their opinions without calling on the counsel for the respondents.

Lord Medwyn could not take the alleged intention of going to Crieff into account; for the parish of Crieff was entitled to ask—Did she come there? Now the fact was she had not done so in such a way as to complete the three years. Lapses might not be taken into view during the currency of the years of settlement, where the commencement of the time is first settled, but here the commencement of the three years was wanting. As to intention, it is just as natural to suppose that she did not intend to go to Crieff as that she did. His Lordship concurred with the Lord Ordinary.

Lord Moncreiff.—I do not see what else we can do than adhere to the interlocutor. There is here no doubt of the facts. They are admitted; and it is clear that fourteen days are wanting of the years of settlement in the parish of Crieff. Then we see how she was engaged in Perth selling her furniture, and it was said she was there with the intention of going to Crieff. But intention is nothing; and we have nothing to go on for her intention. Prescription was talked of as affording an analogy,—but that affords none to my mind. Domicile is more nearly analogous, and yet scarcely so; for in a question

of domicile you always have some fixed point to start from as commencing the domicile; and it is after that that questions arise as to the domicile being changed or not, from moving about. Here we have no proper beginning to found on, so as to suit the claimer; and the facts indisputably show that there are not the three years requisite to constitute a settlement in the parish of Crieff. I concur with the Lord Ordinary as to Crieff not being liable.

Lord Justice-Clerk.—I concur with your Lordships. There is here no dispute as to the facts, nor as to the rule that three years are required to constitute a settlement. If that be the rule, which is admitted, then if we relax it, we are altering the law, which we cannot do; and the necessary period has not run to fix the liability on Crieff. Intention cannot be taken into view, for we have not sufficient facts to go on; and it is irrelevant, besides, to plead, as against the parish of Crieff, that the intention of the lunatic was to go there at the beginning of November instead of the end of it,—while the fact in evidence is the reverse. The reclaimers are bound to make out the three years in the parish of Crieff. I give no opinion as to what effect might follow if the fourteen days' lapse had occurred at the end of the three years, and not at the beginning.

Lord Meadowbank absent.

The reclaimers then proposed to open their case as against the parish of Little Dunkeld, and to render them liable, now that the parish of Crieff had been assolvized. But it was objected to by

Dean of Faculty, for Little Dunkeld, who contended that the reclaiming note of the parish of Fowllis-Wester was not so worded as to bring them into the discussion. There was no express craving in it as against the parish of Little Dunkeld.

Rutherford and *Dundas* explained, that the two parishes joined issue with the claimer, and were heard before the Lord Ordinary on their respective cases; but his Lordship had separated the discussion into one, and heard parties as to the liability of Crieff. Thereafter he found Fowllis-Wester liable. There was, however, no intention of dropping the question of liability as against Little Dunkeld; and they maintained, that the words in the reclaiming note, "or to do otherwise," sufficiently brought that parish now into the discussion.

Dean of Faculty objected to that, and argued, that there should have been a special craving against them, if it had been intended still to insist against them.

The Court stated that they felt very considerable difficulty on the point. *Lord Medwyn* was of opinion that the parish of Little Dunkeld was not brought into the discussion by the expression "or to do otherwise," in the reclaiming note; while *Lord Moncreiff* rather thought, in the circumstances, that it was enough. The *Lord Justice-Clerk* considered it was a point of difficulty, and that it had better stand over till the authorities were consulted.

Lord Moncreiff.—If it be found that the parish of Little Dunkeld is not here, the decision will be a very extraordinary one.

Lord Justice-Clerk.—But it will appear, in that case, that it was owing to the nature of the reclaiming note for Crieff which had failed to bring the parish of Little Dunkeld into the discussion.

Lord Meadowbank absent.

Of this date, 6th July,

Rutherford, for Fowllis-Wester, argued—

That the parish of Little Dunkeld was sufficiently brought into the discussion by the first part of the reclaiming note, in which the reclaimers prayed their Lordships to recal the interlocutor of the Lord Ordinary; because if that were recalled, which would satisfy Fowllis-Wester in this part of the case, it would open the discussion as against Little Dunkeld. He admitted that they could not bring them into the discussion by the words "or to do otherwise" alone.

Neaves, for Little Dunkeld, maintained—

That the argument now used for the other party was not sound, as if so, a reclaiming note merely praying for the recal of an interlocutor would be sufficient. But that was not enough; and it was necessary that, besides praying for recal, there should be an express craving of some special sort, else there would be no means of practically applying the recal. It was clear from the case of Grainger, 31st May 1833, that his clients could not be brought into the discussion through the words "or to do otherwise," in the reclaiming note.

Lord Medwyn.—The expression "or to do otherwise" is not sufficient. It is in the first part of the prayer the point must lie.

Lord Justice-Clerk assented to this.

Lord Moncreiff.—May you not connect the expression "recal" with "do otherwise," since the other parish is out of Court?

After some further discussion, the Court appeared desirous of hearing what the parish of Monzievairst had to say; but on an intimation from the bar that the parish of Little Dunkeld had no interest now to bring that parish into the field, their Lordships proceeded to dispose of the case.

Lord Justice-Clerk said, I cannot now hold that the expression "or to do otherwise" is sufficient for the question. I had been inclined originally to think differently. But the question, as it now strikes me, is, whether the first part of the reclaiming note is sufficient for the purpose?—viz., the words "to recal the said interlocutor;" and whether the reclaimers have at all limited themselves in the after part of the prayer by any thing they have said in it? It is no doubt said "to adhere," but we have not the words "in so far as," or the word "and" preceding the expression "adhere." Had these expressions occurred, then undoubtedly the reclaimers would have limited themselves in the way and mode as to which they wished the recal to be applied. But these limiting expressions do not occur in the primary and substantive part of the reclaiming note. Now, in this view, I do not think the discussion as to Little Dunkeld is to be stopped; because, since Crieff is out of the question, the liability of Little Dunkeld remains to be disposed of as between it and Fowlis-Wester—if you attend to the interlocutor of the Sheriff. It was said that a reclaiming note merely to recal a judgment would not be competent, as wanting a practical application; but I am not sure of that. I do not know that it would not do. For supposing such a reclaiming note were to occur, might the reclainer not then say, that if the recal were sustained, he intended to move for the practical application, such as should comport with the shape of the case? I see no precedent at present against that, and I give no opinion. In this case I think it is very difficult to say that the discussion as to Little Dunkeld shall be shut out. I felt the difficulty yesterday as to allowing it to proceed under the terms "or to do otherwise," but since then it occurred to me there were no expressions limiting the first part of the prayer; and I am therefore for hearing what little Dunkeld has to say.

Lord Medwyn was afraid that this would lead to loose practice.

Lord Justice-Clerk.—I do not think so.

Lord Moncreiff.—I always thought the discussion open under this reclaiming note; and I am not convinced that, in the special circumstances of the case, the expression "or to do otherwise" would not open up the discussion. But then when they are connected with the first part of the reclaiming note, I am clear the discussion is open. I am satisfied it will lead to no loose practice; and we are not deciding, as it appears to me, any general principle of law or form; for this is a very special case.

Lord Justice-Clerk.—It is on the special circumstances of the case that I go.

Lord Meadowbank absent.

The case was argued to-day (16th July) on the merits, between Fowlis-Wester and Little Dunkeld.

The mother had had a settlement in the former parish; but it was *argued* that an illegitimate child did not follow the settlement of its mother, but that of its father, and that the parish of the father must be liable: Dunlop's Poors' Law. Ersk., Ivory's Edit., p. 212, Note. No case had been decided by which it was held that the settlement of the mother of a bastard ruled that of the child. The case of Coldinghame was not in point, and no distinction was there drawn between the children of the first and second marriage. See case of Coldinghame, M. 10,582. Tait, *voce* Poor, Brown's Supp. It was maintained, that in many of the cases of settlement, no distinction was drawn as to whether the child, when held to have a settlement, drew it from the settlement of the father or of the mother. It might happen, that when a settlement was fixed as apparently derived from the mother, it was in reality attributable to that of the father, who had deceased.

Lord Justice-Clerk.—It was of no consequence how the mother came to have a settlement, if such was the case. If she derived it by marriage from the husband, still it was a settlement, and available for all purposes.

Argued for Little Dunkeld.—That this was a shut point since the case of Coldinghame, in which the question was raised and fully decided. The session papers in the case were founded on as proving this, and that the distinction had been drawn between the children of the first marriage, and the children of the second.

At advising of this date,

Lord Justice-Clerk said, he concurred with the Lord Ordinary as to this point. He held it to be proved, from looking into the session papers, that the present question was raised and decided in the case of Coldinghame. The distinction was taken between the children of the one marriage and of the other, and the papers were drawn by the ablest men of the day; so that it was not likely it had escaped observation. But, even had the point not been settled in the case of Coldinghame, his Lordship could not see how the connection between an illegitimate child and its mother was less strong than the connection of legitimate children and their father. It was a right arising to the child in both cases from the settlement of the parents. In the case of the mother, where she had had an industrial residence, it might have been a very valuable and beneficial one to the parish, and she might have been a contributor to the poors' rates; and in that case it would seem clear, that the child had a right through the mother. And how could it be said, in these circumstances, that the child should go back to the parish of the birth? That might be a most difficult thing for the child, in many cases, to ascertain, and in some cases impossible. Witness the case decided last year, as to whether a certain muir was in one parish or another, which gave rise to a great deal of difficulty;—and just consider the difficulty there might be on the pauper ascertaining the point. This was an illustration of the hardship; and his Lordship stated his concurrence with the views of the Lord Ordinary on this part of the case.

Lord Moncreiff.—I am inclined to hold the same opinion, but chiefly so from the case of Coldinghame, where the point does appear to have been raised and settled. I can scarcely say I hold there is the same reason for cases of settlement between illegitimate and legitimate children. It may be a very expedient rule that there should be no distinction, and that the settlement of both should be ruled in the same way; but according to law, a bastard child has no father; and therefore the principle will not hold in law, however expedient it might be otherwise. I am inclined to think this a very nice question; and had it not been for the case of Coldinghame, I would have required more time for consideration; but I think that that case must rule the present.

Lord Medwyn.—I have long considered this point, which is

attended with difficulty; but I hold the residence and settlement of the mother to be sufficient. It is therefore unnecessary to say more.

Dean of Faculty craved absolutor for Little Dunkeld, and also additional expenses.

This was opposed, so far as expenses were concerned, on the ground that each parish, being litigants *de damno evitando*, should bear its own expenses.

Lord Moncreiff.—If we have traced this point to principle long ago decided, the question should not have been raised, and in that case, Little Dunkeld would have been saved the process. But it has been sought to render that parish liable; and the unsuccessful party ought certainly to pay expenses.

Lord Justice-Clerk.—I believe the rule is, that the unsuccessful parish always pays expenses.

Lord Meadowbank absent.

The Court

"Adhere to the findings in the interlocutor complained of: Assolzie the heritors of Crieff and of Little Dunkeld from the conclusions of the original action, and decern: Of new find the heritors of Fowlis-Wester liable in the expenses incurred by the heritors of the two other parishes, both in the Inferior Court and in this Court; allow the accounts," &c.

Lord Ordinary, Cockburn.—*For Fowlis-Wester*, Rutherford, G. Dundas; Dundas and Wilson, W.S., *Agents*.—*For Little Dunkeld*, Dean of Faculty (Wood), Neaves; A. McNeill, W.S., *Agent*.—*For Crieff*, Solicitor-General (McNeill), Patton; Murray and Logan, W.S., *Agents*.—*T. Clerk*.—[G.D.F.]

19th July 1842.

SECOND DIVISION.—(G. D. F.)

No. 269.—DAVID CREIGHTON, *Advocator*, v. JAMES McINTOSH, *Respondent*.

Proof.—Oath in Reference—Construction—Process.—*It is not competent, in construing an oath on reference, to look beyond its contents for the true import of the oath.*

The respondent had brought an action in the Sheriff Court of Perthshire against Creighton, for payment of certain work on, and furnishings to, a house he had executed for the latter according to contract, and also for certain extra work on the building. The case resulted in a judgment, by which the Sheriff,

"In respect that the defender, by his said minute, declines any inspection by the inspectors formerly named by the parties and the Court, and states that he will not allow them to enter his premises for such a purpose, decerns against the defender as concluded for; finds him liable in expenses, of which allows an account to be lodged and taxed."

(Signed) "HUGH BARCLAY."

The Lord Ordinary (in an advocacy) pronounced the following interlocutor, from which the circumstances of the case are sufficiently apparent:

"3d December 1841.—The Lord Ordinary having heard parties' procurators, and made avizandum, and having since considered the closed record and whole proceedings in the Court below, with the additional notes of pleas respectively lodged for the parties in this Court, *primo*, In so far as objection has been taken to the competency or regularity of the proceedings in respect of their supposed incompatibility with the terms of the original summons, Finds that the advocator is barred, *personali exceptione*, from insisting therein, inasmuch as the course of procedure that has been actually followed was from the first consented to by himself, and he has accordingly been a concurring party throughout to every step in the cause, against the regularity and competency of which the said objection is now directed, and which it would have a tendency to upset, were it to be sustained: Finds, moreover, that in the circumstances of the case, the proceedings to which the advocator was thus a con-

senting party, are, as regards the matter of said objection, substantially equivalent to an amendment of the libel, and that the modification thereby effected on the shape of the action, and on the course of procedure to be followed therein, having received the sanction as well of the Sheriff as of the parties before the closing of the record, and the said record itself having been accordingly framed on this footing, without any reference to said objection, it would still be open, were that necessary in point of form, to allow the amendment which has thus been adopted and given effect to *de facto*, to be set forth and engrafted on the record: But, *separatim*, finds that the summons, so far at least as the original contract between the parties is concerned, and so far also as regards the execution of a considerable quantity of extra or additional work, as constituting generally a ground of claim, is expressly libelled upon the said contract itself, and upon the fact that said extra or additional work had actually been executed, and this without reference, *prima instantia*, to any after award, the said award being introduced merely as regulating the amount of allowance which fell to be made in respect of the said additional work, and not as substantively, still less as exclusively, constituting the defender's obligation to pay for the work really done; so that in fair construction, upon the face of the summons itself, there is substantially, notwithstanding trivial inaccuracies of expression, enough, independently of the award, to support the conclusions for payment, more especially where the parties expressly agreed upon the record, as they did here, that the allowance in respect of the additional work performed, with any relative deduction in respect of work not performed, should be regulated by judicial remit in the process to three persons of skill, two to be mutually named by themselves, and one by the Sheriff, instead of by the award mentioned in the summons, which both expressly agreed to abandon: Therefore, upon the whole matter, repels the said objection. *Secundo*, Upon the merits, finds that by the terms of the original contract, as the same was entered into between the parties under the written missives of 13th April 1825, the respondent, on the one hand, became bound to furnish the carpenter work of the advocator's house agreeably to a certain plan and specifications therein referred to, and the advocator, on the other, to pay therefor the slump sum of £70 Sterling, there being no bargain between the parties as to a particular rate of charge for all or any of the individual items composing the work, which was thus to be paid for *in cumulo*: Finds, that by said contract, in case of any change on the original plan before the respondent's portion of the work came to be executed, it was agreed that 'whatever additions shall be made shall be paid in proportion, and reductions the same: but that in regard to this stipulation also, in the absence of all specification of any particular price or rate of charge for the different items composing the work contracted for *in cumulo*, the only element for estimating the respective additions and reductions in question, was a general comparison of the total amount of work as originally contracted for, with the total amount of work as it was eventually executed, having regard to the original specifications, in so far as these, in connection with the slump price agreed to be paid for the work as at first contracted for, were calculated to throw light on the matter: Finds, that before the respondent came to execute the work contracted for, the advocator had directed, or at all events had sanctioned such changes on the original plan as materially to alter the house to be erected in the whole of its dimensions, and more especially as regards the respondent's department of the work, to alter in a great measure the dimensions of every department, the carpenter work of which he had contracted to execute: Finds, with reference to this state of matters, that after the respondent had completed the said carpenter work, and after the advocator had entered into possession of the finished house, without, so far as appears, having taken any objection to the manner in which the respondent had performed his task, a difference arose between the parties as to the amount of the balance which was due to the respondent, and various attempts, as well extrajudicial as judicial, having been ineffectually made to settle these differences, it was at last mutually agreed upon between them, in the course of this process, that a judicial remit should be made to certain persons of skill to 'inspect the work done by the pursuer (respondent) for the defender (advocator), and to report whether the

same has been executed in terms of contract, and if not so, the deficiencies, and what should be deducted on that account; also, to consider and report the extra work performed by the pursuer, and what would be a fair and proper allowance to him for the same: Finds, accordingly, that the advocator named William M'Laggan, wright in Perth, as inspector on his part, and the respondent, David Wilson, wright in Blairgowrie, as inspector on his, and that there having been added to these John Bell, junior, architect in Perth, as inspector named by the Court, a judicial remit to the above effect was regularly made by interlocutor of Court, of date 11th December 1833: Finds it admitted by the advocator upon the record (answer to statement 7), 'that the defender (advocator) acquiesced in this appointment, and made no objections to the inspectors nominated, and is thereby barred from any farther proof in the matter at issue:' Finds that the inspectors did accordingly visit and inspect the premises in the month of March 1834: And finds it averred by the respondent, and not specially denied by the advocator (statement 8), that upon this occasion 'the inspectors were attended by the defender (advocator) in person, when they made their inspection, and heard him fully on all his averments: Finds that in this state of matters, certain difficulties having been raised by the advocator as to the authenticity of the plan and specifications applicable to the work, as originally contracted for, which, along with the process itself, appear to have been laid before the inspectors, considerable delay was occasioned by an attempt to recover the original documents in the hands of certain arbiters, to whom the parties had at one time referred their differences, but it turning out, on their examination as havers, that the originals, though traced to their custody, had been lost in their hands, it became necessary to proceed upon the documents in process, such as they were, and the diligence having accordingly been reported, the remit to the inspectors was renewed by interlocutor of date 21st November 1834: Finds that the inspectors having thereafter resumed consideration of the matters remitted to them, prepared and gave in their final report, of date 5th March 1835, wherein they report that 'having this day met, and carefully measured and examined the plans and specifications of the carpenter work of the house of Burndales, contracted for and executed by James M'Intosh; also the notes of measurement taken by us in the month of March last year; also the extra work charged by the said James M'Intosh in the account produced,—in our opinion the whole is completed in a workmanlike manner, and that the contractor is entitled to the full amount of his account for extra work, amounting to the sum of £38. 10s. Sterling, over and above any balance that may be due him on his first contract of £70 Sterling: Finds, that in so far as this report states the amount of the respondent's account for extra work as being £38. 10s., 'over and above any balance that may be due him on his first contract of £70 Sterling,' the same is not correct, the fact being that the said sum of £38. 10s. includes the balance referred to; but finds that this, as afterwards explained, proceeded from a mere casual slip of the inspectors in extending the said report, as is indeed apparent from the respondent's account therein referred to itself (No. 66 of process), which expressly sets forth, as one of the items composing the foresaid balance of £36. 10s., the 'balance of original estimate £9. 6s.,' so that the general authority of the report is in this respect not open to any real ground of impeachment: Finds, that neither is there any ground for impeaching the authority of the said report, in so far as it proceeds on the specifications in process, inasmuch as the advocator expressly admits upon the record (cond. art. 4, and answers to respondent's statement, art. 3) 'that the specifications for the carpenter work of said house, produced in process,' (though not themselves the originals) 'are the same as the original specifications drawn by Mr Whyte, also referred to in the pursuer's offer, and on which the work was allowed to proceed:' Finds, in like manner,—in so far as the report proceeds upon the plan in process, which the advocator alleges not to be the original plan mentioned in the contract,—that although the advocator has not, in the absence of the alleged original, made the same admission as to the accuracy of the process plan, still there seems to be no reasonable ground for doubting its accuracy; and at all events, the advocator is distinctly proved to have had access, whether through his possession of the original plan itself, or of

a copy of it, or otherwise, to all necessary information in regard to the measurements of said original plan, so as to be able to compare the same with the measurements of the work actually executed; inasmuch as he has at different times lodged various statements in process,—(see particularly No. 68, and compare therewith No. 28 to 30, inclusive, and also Nos. 33 and 34. See also observations for the advocator, No. 16 of process, p. 4),—in which he gives the whole detail of the 'measurements of original plans of Mr Creighton's house on Burndales,' and contrasts the same, item by item, with a corresponding 'measurement of present house on Burndales;' so that if he did not lay before the inspectors all proper and requisite explanations on this head, the fault was entirely his own: Finds, finally, as regards the said report, that no good objection lies thereto, in respect of its not specifying the several measurements and prices or rates of charge applicable to every separate article of which the work consisted (as has been attempted by the advocator in articles 7 and 9 of his condescendence), inasmuch as the original contract (as has already been shown) was itself not a detailed, but a *slump* contract, and so neither required nor admitted of being split down into such particulars: Finds, however, that all this notwithstanding, the advocator persisted in objecting to the report upon this and other grounds not more substantial, and that after considerable discussion he was in consequence ultimately allowed to examine the inspectors upon oath, in verification of the said report: Finds, accordingly, that on 16th December 1836, the two inspectors who had been respectively named by the advocator and respondent were so examined, but that Mr Bell, the inspector named by the Sheriff, having by this time left the country and gone abroad, no deposition was obtained from him: Finds that though repeated statements were judicially made by the advocator, to the effect that this inspector was to be found in London, and though repeated delays were granted to him for the express purpose of enabling him to get his deposition taken in that city, the advocator at last declined to proceed with his examination, stating that he 'has not thought of taking measures for examining Mr Bell in London, as the examination could not proceed there with any satisfaction to the parties, and would necessarily be attended with very heavy expense:' Finds that in this situation, and looking to the whole circumstances under which the report of the inspectors was prepared and given in, as well as to the additional explanations elicited in the depositions of those two of their number who were examined, as said is, there was good and sufficient ground for at once approving of their report, and for discerning in accordance therewith against the advocator in terms of the libel: Finds, nevertheless, that in respect of certain supposed irregularities and defects in the report, and in the proceedings of the inspectors, as to part of which, at least, the Sheriff appears to have laboured under important misapprehension, the advocator eventually succeeded in having the original report rejected; but finds that even according to the view which the Sheriff took, and in this respect rightly took of the matter, there was nothing in the previous proceedings, of such a nature as to disqualify the original inspectors from having the matter again remitted back for their reconsideration; and accordingly, that it was of new remitted 'to Messrs Wilson and M'Laggan, with the addition of Mr James Ballingall, wright and builder in Perth, named by the Court in room of Mr Bell (who is said to have left this country), with instructions immediately, but after intimation of six days to parties' procurators, to visit and inspect the subjects, and to hear parties or their procurators on all points of difference; and, if absolutely necessary from any change of circumstances, to examine witnesses orally on the ground, and thereon to report specially on the various points of difference embraced within the closed record; and instructs them farther to submit to the parties the draft of their report, and, if desired, to hear them further thereon:' Finds that although the renewed proceeding which was thus directed was greatly more favourable for the advocator, and went further than in the circumstances and according to the justice of the case, and with a due regard to his whole conduct throughout the litigation, he was in any view entitled to, the advocator nevertheless rejected the indulgence which had thus been shown to him, and insisted on being allowed a proof at large upon the whole facts of the case, or at least that the Sheriff should 'recall the re-appointment of Messrs Wilson

and M'Laggan as inspectors or referees in this cause, and allow the parties to name others in their place; and finally, when both these demands were refused, gave in a minute into process, in which he positively 'declined any inspection of these parties, which never can produce any satisfactory result, and stated further, that he will not allow them to enter his premises for such a purpose.' Finds that in these circumstances, the Sheriff had no alternative but to pronounce the judgment now submitted to review; whereby he, 'in respect that the defender (advocator) by his said minute declines any inspection by the inspectors formerly named by the parties and Court, and states that he will not allow them to enter his premises for such a purpose, decerns against the defender as concluded for, and finds him liable in expenses.' And therefore, on the whole matter, and more especially in respect that the advocator still persists in opposing any remit which shall include the former inspectors, Repels the reasons of advocacy, and remits the cause *simpliciter* to the Sheriff: Finds the advocator liable in expenses before this Court, of which appoints an account to be given in, and remits the same when lodged to the auditor to tax and report."

The advocator reclaimed, but the Court (11th June last) *adhered*. Thereafter he gave in a minute referring the whole cause to the oath of the respondent. When the oath was reported, the advocator, at the advising, proposed to construe the oath by reference to the claim and charges originally made by the respondent, and to show that the oath was not borne out by the claim.

The Court, however, interfered to prevent this.

Lord Medwyn.—We can look only at the oath. We have referred the whole matter to the oath of the respondent, and we cannot go beyond it.

Lord Justice Clerk.—If you think the oath is inconsistent with the claim, I am afraid your only remedy is to indict the respondent for perjury, but we cannot look at the previous claims, or go beyond the oath. We now doubt very much if we were right in allowing the reference at all. It was so clear a case of contumacy.

The Court, without hearing the respondent, held the oath negative of the reference, and found the advocator liable in additional expenses.

Lord Ordinary, Ivory.—*Act.* Penney; James Burness, S.S.C., *Agent.*—*Alt.* Dean of Faculty (Wood), Patton; Isaac Anderson, S.S.C., *Agent.*—*T. Clerk.*—[G.D.F.]

20th July 1842.

FIRST DIVISION.—(H.B.)

No. 270.—MISS EUPHEMIA WADDELL, *Pursuer*, v. JAMES WADDELL and CURATORS, *Defenders*.

Trust—Testament—Succession—Parent and Child—Revocation—*Circumstances in which held, that a deed of apportionment of a succession by a father, was not recalled by a subsequent deed, in which he, as a trustee, conveyed the same succession, without reference to the deed of apportionment.*

By trust-disposition and settlement, of date 13th February 1830, Alexander Waddell of Stonefield conveyed his whole estate, heritable and moveable, to trustees, 1st, for payment of his lawful debts and obligations; 2d, in fulfilment of his marriage-contract; 3d, to make over the whole residue to his nephew, James Waddell, in liferent, for his liferent alimentary use only, and his children *nati* or *nascituri* in fee, in such proportions as the said James Waddell should appoint by a writing under his hand, or failing thereof, equally among them. In 1837, during the subsistence of the trust, James Waddell executed a deed, in which, on a narrative of the provisions of his uncle's settlement, "and considering also, that the residue of the trust-estate will,

apparently, amount to between £26,000 and £28,000 Sterling in money, now vested partly in heritable bonds, and partly on personal obligations, besides the heritable properties in Bridgegate and King Street of Glasgow, which I consider worth about £7500 Sterling, exclusive of the entailed estate of Stonefield, to which my son succeeds, in the event of his survivance, which I consider worth upwards of £20,000, and having likewise in view the amount and value of the heritable and moveable estates now belonging to my wife and myself, and the advanced period of our lives, I have resolved on the apportionment of the residue of the said trust-estate in manner underwritten, which I consider to be, under all circumstances, a fair, reasonable and judicious exercise of the power and faculty committed to me by my uncle's said deed of settlement: Therefore, in the *first* place, I do hereby, without prejudice to the said entail of Stonefield, apportion and assign to my son James Waddell, and any other lawful child or children to be hereafter procreated of my body, if any be, equally among them, share and share alike, and to the survivor of them, burdened with my own liferent thereof, the following parts and portions of the residue of the said trust-estate, viz., *first*, The heritable subjects situated in Bridgegate and King Street; and *secondly*, The sum of £5500 of the said money residue, consisting of, and comprehending, *first*, the £2500 lent on the properties of Mrs Allan Wilson; *secondly*, The sum of £1500 lent to the Yoker Turnpike Road Trustees; and *thirdly*, The like sum of £1500 lent to the feuars of Gorbals: And I hereby direct and appoint the trustees of the said Alexander Waddell to convey and make over the said heritable properties situated in Bridgegate and King Street, and the said sum of £5500, consisting and comprehending, as aforesaid, to myself in liferent, and to the said James Waddell, my son, and any other lawful child or children to be hereafter procreated of my body, if any be, equally among them, share and share alike, in fee, in full of the share of the residue of the trust-estate of the said Alexander Waddell, demandable by, or payable to my said son, and any other child or children to be hereafter procreated of my body, if any be: And in the *second* place, I do hereby apportion, allot and assign to my daughter, Euphemia Waddell, the whole of the said residue of the said trust-estate of the said Alexander Waddell, my uncle, in so far as the same is not herein above allotted and assigned by me to my said son James and my future children, if any be, as her proportion and share of the said trust-estate, and that freed and discharged, the said proportion or share so hereby allotted and assigned by me to my daughter, of my liferent thereof, which liferent interest of that proportion or share I hereby convey and make over from me to her, and accordingly renounce and hereby resign, upgive, overgive and discharge the same in her favour, and I accordingly hereby desire and require the said trustees of the said Alexander Waddell to convey and make over to my said daughter, freed and discharged of my liferent thereof, the whole of the residue of the said trust-estate, excepting the proportion or share thereof aforesaid, herein above allotted and assigned by me to my said son James and future children, if any be, all in terms of the said trust-disposition and settlement of the said deceased Alexander Waddell."

In 1841, Alexander Waddell's trustees (now reduced to two, of whom James Waddell himself was one), on the narrative that the purposes of the trust were fulfilled, with the exception of the provision as to the residue, and that they had been called upon to denude with a view to their exoneration, executed a disposition and assignation, conveying the residue to James Waddell, with procuratory of resignation and instrument of sasine, precisely in terms of his uncle's settlement, but without reference to the deed of apportionment of 1837. On this conveyance, and in the same terms, infetment was taken by James Waddell in all the subjects requiring it. Previously to the conveyance by the trustees, but subsequently to the deed of 1837, several of the bonds due to the trust-estate had been paid up,—in particular, the bond of £1500 due by the Yoker

Road Trustees, which, by the deed of 1837, had been apportioned by James Waddell to his son.

On James Waddell's death, questions having arisen as to the effect of the conveyance by the trustees, viewed in connection with the deed of 1837, Euphemia Waddell brought a declarator against her brother, James Waddell (second), and his curators, concluding to have it found and declared,

"that the foresaid infeftments in favour of the said deceased James Waddell, in liferent, for his liferent alimentary use only, and the child or children procreated of his body, in fee, as aforesaid, following on the foresaid disposition and assignation by the said trustees of the said deceased Alexander Waddell, are mere liferent infeftments in favour of the said deceased James Waddell in the various subjects therein contained, and not infeftments either of a fee or of a fiduciary fee in favour either of him, or his child or children: That the procuratories of resignation and precept of seisin contained in the said disposition and assignation by the said trustees of the said deceased James Waddell still remain unexecuted: And the same being so found and declared, it further ought and should be found and declared that the said Euphemia Waddell, pursuer, is now entitled absolutely to the fee of the several subjects, and debts, and sums of money, and others contained in the foresaid disposition and assignation, executed by the trustees of the said deceased Alexander Waddell, under exception as aforesaid, and which several subjects, and debts, and sums of money, and others, which it should be found and declared that the said Euphemia Waddell is entitled absolutely to the fee of, are described in the said disposition and assignation as follows, viz.:—(Here follows the description of the several subjects and others, for the absolute fee to which Miss Euphemia Waddell seeks decree of declarator.) And that the pursuer, Euphemia Waddell, is entitled to be entered and infeft on the said disposition and assignation in the several subjects specially before described, requiring infeftment, and to execute the procuratories of resignation and precept of seisin therein contained, and also to exercise and enjoy every right and benefit under the said disposition and assignation, in so far as regards the whole of said subjects, and debts, and sums of money, and others before described, in the same way and manner as if the said disposition and assignation had been originally granted to her *nominatim*: And further, it ought and should be found and declared that the decree to follow hereon shall, along with the said disposition and assignation, be a good and valid warrant to authorise the pursuer to be infeft on the said disposition and assignation, in so far as regards the subjects specially before described, requiring infeftment, and to execute the procuratories of resignation and precept of seisin contained in said disposition and assignation; and also a good and sufficient warrant to the superiors of said subjects requiring infeftment, to grant charters of resignation, and to a notary-public to pass infeftment in favour of the pursuer on the said disposition and assignation, in so far as regards the said subjects specially before described, requiring infeftment."

The defenders *pleaded*—1. The deed of the late James Waddell, of March 1837, was a mere inchoate distribution and apportionment of the residue of Alexander Waddell's trust-estate, which was subsequently deviated from and abandoned, and which cannot now be held to be the rule for apportioning the said residue betwixt the pursuer and the defender, James Waddell. 2. The said residue, in the circumstances above set forth, falls to be divided equally betwixt the pursuer and the defender, James Waddell, as on a failure by the late James Waddell, their father, to apportion the same by any writing under his hand. 3. Assuming the distribution of the residue in the said deed of 1837 to be valid and effectual, the apportionment of money to the defender, James Waddell, ought to be held to be of the nature of a general legacy to him, payable

from the whole of the residue, and not of a special bequest of certain specific and individual sums.

The Lord Ordinary pronounced the following interlocutor:

"6th July 1842.—The Lord Ordinary having heard the counsel for the parties on the closed record, productions and whole process, and made *avizandum*—Finds, 1mo, That the deed of apportionment executed by the deceased James Waddell (the father of the parties) in March 1837, placed by him upon record, and left uncanceled and unaltered by him at his decease, was a valid and effectual exercise of the powers conferred on him by the trust-deed of his uncle Alexander Waddell, and must now regulate the interests of the said parties in the said trust-estate respectively; but finds, 2do, That in the circumstances of this case, the legacy or apportionment made in favour of the son in the said deed of 1837, of the 'following parts and portions of the residue of the trust-estate, viz., the heritable subjects situated in Bridgegate and King Street, and 2d, the sum of £5500,' consisting of, and comprehending—1st, the £2500 lent on the property of Mrs Wilson; 2d, The sum of £1500 lent to the Yoker Road Trustees; and, 3d, the like sum of £1500 lent to the feuars of Gorbals; and I hereby direct the trustees of the said Alexander Waddell to convey and make over the said heritable properties and the said sum of £5500, consisting of, and comprehending as aforesaid,' must be construed both as to the heritable subjects and the sum of £5500 as a legacy of the special subjects therein enumerated and described, and as such liable to be defeated or annulled, in whole or in part, by the testator subsequently alienating or otherwise disposing of any of these subjects; and therefore finds that the said testator, having afterwards himself called up and discharged the bond for £1500, due in 1837 by the Yoker Trustees, the legacy or share of the son must suffer that defalcation, and that he is now entitled under the said deed only to the heritable subjects and the two remaining bonds therein specified: And before further answer, appoints the cause to be enrolled, that parties may explain what farther findings or decernitures may be necessary to bring the litigation to a close, but finds no expenses hitherto incurred due by or to either of the parties.

"Note.—The first finding requires no explanation, but the second has been made with hesitation, and involves a question of nicety. The Lord Ordinary, indeed, would have had great doubt about it if this had been a separate legacy to a stranger; but considering that it is a partition by a father between his two children, there are several circumstances which seem materially to strengthen the presumption that he only intended the son to get such part of the £5500 originally provided for him as he (the father) might not in the meantime have uplifted from the investments, of which it is expressly said then to consist. The most important of these circumstances is, that the whole bulk of his personal estate appears to have suffered a *proportional diminution* between the date of his deed in 1837 and of his uplifting the Yoker bond in 1840, so that there was as large a rateable defalcation from the sister's residue as from the brother's bonds. Another is, that this last was occasioned by the deliberate act and choice of the father himself, who having at the time twelve or fifteen other bonds due to him, to the amount of at least £16,000, chose to supply his necessities by calling up one of these in the son's allotment, rather than any of those which formed the residue of the daughter; and another is, that though he survived this operation for near two years, he never thought of replacing what he had so taken from the son's share, or in any way making compensation. The Lord Ordinary, in short, considers this as a *questio voluntatis* on a family settlement; and in such a question, he thinks that the construction which best preserves the *original proportion* between the shares of the provided children, where there is a change only in the condition of the property, and none in the probable intention of the testator, is always *in dubio* to be preferred, the basis of the whole being, that there is a radical *ratio dubitandi* from the form of expression which has been employed, which is thought to be eminently the case here."

"* * This is inaccurately quoted. The words 'of the said money residue' are omitted."

The defender reclaimed. The Court pronounced the following interlocutor:

"Adhere to the interlocutor reclaimed against, except in so far as relates to the question between the parties relative to the sum of £1500, as to which question supersede farther consideration; and under reservation of that question, as between the defender and pursuer, allow the decree of the Lord Ordinary to go out and be extracted as an interim decree."

Lord Ordinary, Jeffrey.—*Act.* H. Maxwell; A. and C. Douglas, W.S., *Agents.*—*Alt.* Rutherford, A. Cook; Thomas Sprot, W.S., *Agent.*—*B. Clerk.*—[H.B.]

20th July 1842.

FIRST DIVISION.—(H. B.)

No. 271.—*MESSRS HORNE and ROSE, Objectors, v. DR and MRS BREMNER, Respondents.*

Ranking and Sale—Catholic Creditor—Where a daughter's provision was heritably secured on two subjects, and her husband afterwards became the purchaser of one of them—Held, in a ranking and sale of the other subject, that if the provision were ranked wholly on it, the creditors in that subject were entitled to an assignment of the security held over that which the husband had purchased.

Mr Traill Urquhart acquired by disposition from his mother the property of Elsness, and also a dwelling-house situated in the burgh of Kirkwall. The disposition was burdened with several family provisions, among others, a sum of £600 to the disposer's daughter, Miss Sybella Traill Urquhart, who was afterwards married to Dr Bremner. A ranking and sale having been brought of Mr Traill Urquhart's estates, the above dwelling-house, which was at first included, was ordered to be struck out, as having been purchased several years before by Dr Bremner. In the state of interests afterwards prepared by the common agent, Mrs Bremner, and her husband for his interest, claimed to rank on Elsness for the full amount of her provision of £600. Messrs Horne and Rose, as creditors of Traill Urquhart, objected, that as the dwelling-house in Kirkwall was included in the disposition by Mr Traill Urquhart's mother, and consequently burdened like Elsness with the provision, Dr and Mrs Bremner were bound, in the event of being permitted to draw full payment from Elsness, to convey their claim on the dwelling-house for relief of such of the other heritable creditors as might not draw full payment.

The Lord Ordinary pronounced the following interlocutor:

"18th June 1842.—The Lord Ordinary having heard parties on the objections by Messrs Horne and Rose, to the state of interests prepared by the common agent, finds that Dr and Mrs Bremner must either rank rateably both on Elsness and over the house in Kirkwall; or that if they rank solely on Elsness, they must assign the security which they hold over the house in favour of Messrs Horne and Rose, and the other postponed creditors who have securities over Elsness alone: Finds Messrs Horne and Rose entitled to the expenses of discussing these objections, and appoints an account thereof to be given in, and when lodged, remits to the auditor to tax the same, and to report.

"*Note.*—The house, though struck out of the ranking as being the property of Dr Bremner, was only his, subject to its legal burdens; one of which was a debt due to Miss Sybella Urquhart. This debt was also secured over Elsness. Dr Bremner has an interest in getting the creditor to rank solely on the estate, and thus to save the house; and having married Miss Urquhart, he has the power of stating her claim as he pleases. But his laying it entirely on Elsness plainly injures the creditors who have postponed securities over that estate alone; and

the question is, whether the creditor, with the prior security over both properties, is not bound in equity to abstain from injuring the secondary creditors, by throwing all the debt on the single subject over which they are secured. The Lord Ordinary thinks that she is so bound, and for this there is no want either of principle or of precedent. The case of Moray, 4th June 1836, seems nearly identical with the present."

Dr and Mrs Bremner reclaimed. The Court adhered.

Lord Ordinary, Cockburn.—*For Objectors, Neaves; Party Agent.*—*For Respondents, Robertson; Caninghams and Bell, W.S., Agents.*—*N. Clerk.*—[H.B.]

20th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 272.—*ANN JAFFRAY or M'GOWAN, Pursuer, v. WILLIAM JAFFRAY, Defender.*

Husband and Wife—Parent and Child—Testament—Clause—

Construction—Circumstances in which held, in reference to the whole clauses of a marriage-contract, that the deed formed a general conveyance of the whole heritage of the husband for the purpose of division among the children in a certain way, and was not to be construed as limited to a conveyance merely of certain special heritable subjects which happened to be separately enumerated in one of the clauses.

Obiter by the Lord Ordinary, that the meaning to be put by law on a marriage-contract, cannot be affected by any statement as to its meaning or import by one of the spouses in a subsequent testamentary deed, nor could a declaration, even by them both, impair or alter the previously fixed rights of the children.

By antenuptial marriage-contract, dated 12th June 1818, between the late William Jaffray and Margaret Rob, the former, in contemplation of the marriage, conveyed to his promised spouse, in case of surviving him, a liferent, for her liferent use alienarily, of

"all and whole the upper flat of that house at the top of the close situated about the middle of the Baker's Wynd of Stirling, on the north side, and the fourth part of the lower division of the garden which bounds the said house on the north end thereof, being part of a tenement which the said William Jaffray purchased from the heirs of Dr Gillespie, physician in Stirling, as the said house was formerly possessed by Alexander Smith and Steven, and now occupied by the said Alexander Smith, and bounded as in the rights and infeftments of the same."

William Jaffray also obliged himself to make payment to his promised spouse of an annuity of £11 Sterling, exempted from all burdens, at two terms in the year; and for her further security he bound himself to infest and seise her, in case she should survive him, in

"all and whole the said free liferent annuity of £11 Sterling, to be uplifted and taken at the said two terms in the year." "furth of all and whole the upper flat of the said house, and fourth part of the gardens situated within the close, about the middle of the Baker's Wynd, particularly above described, and here held as repeated? As also, furth of all and whole the two eastmost rooms and kitchen, and a room and garret-room on the north end of the uppermost flat of that tenement which faces the street about the middle of the Baker's Wynd; which flat is part of a lot of subjects which the said William Jaffray purchased from the heirs of the said Dr Gillespie, and which two eastmost rooms and kitchen are presently possessed by Robert Dick, plasterer, and the room and garret-room by Walter Mackillop, weaver, as more particularly described by the rights and infeftments of the same."

The deed then, after setting forth that Jaffray was not infest in the subjects above described, contained an obligation to make up a title in favour of his promised

spouse, to the effect of securing her in the liferent and annuity, and it then conveyed

"his whole subjects, heritable and moveable, generally and particularly before described, pertaining, or that shall pertain or be addebt to him at the time of his death, to and in favour of Janet, Isobel, and Ann and John Jaffray, his present children of a former marriage, and the child or children to be procreated and existing at his death of his marriage with the said Margaret Rob, equally among them, share and share alike, under the burden always of the liferent provisions before conceived in favour of the said Margaret Rob; and all of which are reserved entire to her."

In consideration of these provisions there was a conveyance by Margaret Rob, by which she assigned, conveyed, and made over her moveable goods and gear, debts, and sums of money then belonging to her, to her promised husband. And she farther

"assigns, conveys and disposes to and in favour of the said William Jaffray and herself, and the longest liver of them in conjunct fee and liferent, for their liferent use alienably, and to the said Janet, Isobel, Ann and John Jaffray, and any children to be procreated of her marriage with the said William Jaffray, and existing at the death of the longest liver of them two, equally among them, share and share alike, in fee, heritably and irredeemably, all and sundry heritable subjects which now pertain to her, or shall pertain to her at her death; and particularly, without prejudice to the said generality, all and whole these two northmost enclosures of the lands of Swanhill of Plean, and teinds thereof."

A provision was likewise made, that in the event of the husband predeceasing his wife, a certain portion of the rents of the property conveyed to the children was to be allowed to her for the purpose of clothing and alimentering them, in the following terms:

"And for which purpose she shall be, and is hereby authorised to uplift and receive as much of the rents and interest of the subjects, heritable and moveable, pertaining to them, as will defray the expenses of their maintenance and clothing and education, to the extent of £10 Sterling for each child; but in case the said Margaret Rob shall enter into a second marriage after the said William Jaffray's decease, she shall then cease to have any charge of the said Janet, Isobel and Ann, and John Jaffrays."

The husband died in 1833, survived by his widow, as also by two children of a prior marriage, viz., the pursuer Ann, and Janet Jaffray, and by the defender, the only child of the last marriage. He left a testament, said to have been executed on deathbed, which contained the narrative that the spouses had previously "settled their whole heritable and moveable estate which might be belonging to them at the time of their death by the said antenuptial contract of marriage entered into between them, of date the 12th day of June 1818, which antenuptial contract provides and secures, under the exception and burden therein mentioned, the whole heritable and moveable estates which might pertain and belong to them at the time of their death, to Janet, Ann, Isobel and John Jaffrays, children of him the said deceased William Jaffray by a former marriage, and to the children of the present marriage equally betwixt them, share and share alike."

By this latter deed he left all the moveable property that might belong to him at the time of his death to Janet and Ann Jaffray, the children of his former marriage, and William Jaffray Rob, "agreeably to the destination of the said antenuptial contract of marriage;" and he appointed the pursuer, Ann, to be his sole executrix and administratrix, and intromitter with the whole moveable and personal estates that should belong to him at the time of his death; and after paying all his lawful debts and funeral expenses, together with

the expenses to be laid out in confirming and recovering his effects, and the residue of his means and estate, he ordained the same to be distributed among Janet, Ann, and William Jaffray, agreeably to their respective rights, as ascertained by the said antenuptial contract of marriage, declaring, that

"the said antenuptial contract of marriage shall form the rule of succession and distribution of the whole heritable property which may belong to him or the said Margaret Rob at the time of their death, among the said Janet, Ann and William Jaffray, his children," &c.

Janet having died, a question then arose as to the rights of the two surviving children under the marriage-contract. The defender, as heir-at-law, claimed the whole of his father's heritage exclusively, so far as not settled by the marriage-contract,—that is to say, all the heritage, with the exception of the subjects described in the deed, on the plea that the contract contained no general conveyance of the father's heritage to be divided among the children share and share alike, but only those portions "generally and particularly before described" in the deed, viz., the subjects over which the liferent was constituted.

On the other hand, the pursuer, who raised this action of declarator to have it found that by the death of her sister she was entitled to two-thirds of the heritage of the father, maintained, that on a sound construction of the deed, the father's whole heritage, and not simply the subjects specially enumerated in the contract for a particular object, was conveyed to the children, share and share alike; and in support of this she *pleaded*, that it was competent to refer to the testament, as showing the nature of the obligation in the marriage-contract, and that the testator believed that the whole heritage was conveyed in terms of the prior deed. She also founded on certain acts of the defender (making up titles), as inferring homologation on his part of the rights as contended for by her, as arising out of the contract, but this plea was not anxiously insisted in, as it appeared that the defender was at the time a minor of only fourteen years of age.

The Lord Ordinary pronounced the following interlocutor:

"1st March 1842.—The Lord Ordinary having heard parties and considered the process, repels the defences, and finds, declares, adjudges and decerns in terms of the conclusions of the libel: Finds no expenses due to either party.

"*Note.*—In construing the marriage-contract on which this question depends, the Lord Ordinary leaves the separate testamentary settlement and the alleged homologation by the defender, or rather his alleged acquiescence in the construction put on the marriage-contract by the pursuer, entirely out of view. The meaning to be put by law on a marriage-contract, which is a mutual and onerous deed conferring irrevocable rights on third parties, cannot be affected by any statement as to his or her understanding of its import, made by one of the spouses in a subsequent testamentary settlement. A declaration even by them both could not impair or alter the previously fixed rights of the children. Here the interest of the heir is attempted to be impaired, not merely by a will by one of them, but by a will made on deathbed. The homologation or acquiescence is disposed of by the fact, that the acts on which it is founded occurred while the defender was a minor, and by its not being averred that he was aware of the nature of his legal rights.

"The marriage-contract is so awkwardly expressed that it clearly requires construction. And considering the whole deed, the Lord Ordinary prefers the interpretation of the pursuer, simply because he thinks that the defender's makes the deed very nearly *absurd*.

"It was clearly the object of the contracting parties to mass their whole properties into one stock, which was to be divisible, after their deaths, among all the children of this or of the former marriage equally. The wife's property, accordingly, is clearly all tied up for this purpose, and she is farther bound, in the event of her survivance, to educate and maintain the children, for which purpose she is empowered to take £10 yearly from the share of each. But, after thus fixing the wife, observe the result of the defender's construction *quoad* the husband.

"In the contract he makes mention of only two parts, and these very insignificant parts, of his real property, and he makes no mention of personal property whatever. After this he comes to make an arrangement on his part in favour of the children, corresponding to the arrangement made by the wife. He therefore disposes to them equally 'his whole subjects, heritable and moveable, generally and particularly before described, pertaining, or that shall pertain or be added to him at the time of his death.' The defender's plea is, that this is a conveyance only of what was generally and particularly before described, that is, of the two fragments, and of nothing else; the result of which is, that he, as a donee, first takes his share of these, and then, as heir, all the rest.

"The Lord Ordinary cannot put this construction on the words, because—1st, It implies that *moveables* had been previously described, which is not the fact. 2d, It lays the burden of maintaining the children on the surviving wife, while, by giving the children only the two fragments, it prevents her relieving herself out of their property to the extent of £10 yearly, for these properties are not worth this sum. 3d, It is inconsistent with the whole plan and scope of the arrangement. 4th, It is possible to exhaust all the words more rationally. The meaning is, that he disposes his whole subjects, heritable and moveable—his whole subjects generally and particularly before described—his whole subjects pertaining or that shall pertain to him at his death. There is no necessity (as the defender's construction assumes) for tying the words 'generally and particularly before described,' to the immediately preceding words 'heritable and moveable.' Each may form, and in fair construction ought to form, a separate and independent description of property.

"No expenses are given, because the obscurity of the deed made the action and the defence unavoidable."

The defender reclaimed. At advising,

Lord Medwyn considered, that looking to the whole clauses of the contract, there could be no doubt that the Lord Ordinary's interlocutor was well founded.

Lord Moncreiff was of the same opinion, and that the right way to construe the deed was—not to take an isolated clause on which the defender's whole argument rested, but the whole; and then, in that case, there was no doubt. His Lordship agreed in the views of the Lord Ordinary.

Lord Justice-Clerk concurred. The contract was a general settlement, and fell to be construed as liberally as possible against the father, and was not limited in the way contended for by the defender. The only doubt his Lordship had as to the Lord Ordinary's interlocutor regarded the finding as to expenses. His Lordship thought that the pursuer was entitled to some expenses, though no doubt the deed was obscure and raised a doubt.

Lord Medwyn thought the pursuer should be found entitled to expenses since the date of the Lord Ordinary's interlocutor.

Lord Moncreiff concurred.

Lord Meadowbank absent.

The Court

"Adhere to the interlocutor reclaimed against, and refuse the said reclaiming notes, and repel the defences; and of new, find, declare, adjudge and decern in terms of the conclusions of the libel: Find the pursuers entitled to the expenses incurred by them since the date of the Lord Ordinary's interlocutor reclaimed against; appoint an account," &c.

Lord Ordinary, Cockburn.—Act. A. Anderson, Penney; T. S. Paton, S.S.C., Agent.—Alt. Christison; Renny and Webster, W.S., Agents.—F. Clerk.—[G.D.F.]

20th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 273.—THOMAS COREY and MANDATORY, Advocators, v. WILLIAM ANDERSON, Respondent.

Process—Advocation—Competency—A. S., 1825 and 1828—A party wishing to review the interlocutor of a Sheriff allowing a proof, lodged his note of advocation in the hands of a clerk of the Court of Session; but the Court having held the procedure incompetent, on the ground that the note ought, in the first instance, to have been presented in the Bill-Chamber, a note of advocation was thereafter presented to the Lord Ordinary on the bills. This note was then objected to as incompetent, in respect the fifteen days allowed to advocate by the Act of Sederunt, 1825, had elapsed before presenting the note;—but the Court found the note competent, in respect the subsequent Act of Sederunt, 1828, did not provide that advocations should be presented within a period of fifteen days, as prescribed by the previous Act of Sederunt 1825.

See *supra*, p. 582. The advocates—after the decision of the Court, by which it was found that their note of advocation ought not to have been presented to a clerk of the Court of Session, in the first instance, but to the Lord Ordinary on the bills—now presented a note of advocation in that latter way; but an objection was taken, that the time allowed for so doing by the Act of Sederunt, 1825 (*viz.*, fifteen days after the interlocutor ordering the proof), had now expired, and that the note was consequently incompetent. Answered—That the Act of Sederunt, 1828, did not contain the same imperative requirement as to the time allowed for presenting the advocation as the Act of Sederunt 1825.

Lord Justice-Clerk.—I confess, after looking into the two Acts of Sederunt, I have no doubt as to the competency. The Act of Sederunt, 1825, required that the bill should be presented within fifteen days, and that if it was presented after that period, it fell. But the Act of Sederunt, 1828, does not, to my mind, contain the same sanction; and I think that the period for presenting the bill is not limited by it to the fifteen days required in the other, and that there is nothing in the Act of Sederunt, 1828, to preclude the present advocation. Even had I thought the note not competent, I could not have held that the regulation as to bills of advocation was applicable to notes—which is another reason for thinking the present note competent. But, however, it is not necessary to decide that point here.

Lord Medwyn.—I am of the same opinion, after looking into the two Acts of Sederunt.

Lord Moncreiff.—I agree with your Lordships, and that there is a very material difference between the Act of Sederunt, 1825, and the Act of Sederunt, 1828, and that there is nothing in the latter to preclude the present advocation. I need say no more on the point; and that being a sufficient reason, I think it is unnecessary to go on any other ground.

Lord Meadowbank absent.

The Court accordingly remitted to the Lord Ordinary to receive the note of advocation.

Lord Ordinary, Ivory.—Act. P. Robertson; Greig and Morton, W.S., Agents.—Alt. Rutherford, Cowan; W. Millar, S.S.C., Agent.—[G.D.F.]

20th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 274.—RALPH ERSKINE SCOTT, Advocate, v. The EDINBURGH, LEITH, and NEWHAVEN RAILWAY COMPANY, Respondents.

Contract—Arbitration—Submission—Railway Statute 6 and 7 Gul. IV.—Construction—A proprietor of land through which the Edinburgh, Leith, and Newhaven Railway Company passed.

entered into an agreement and submission with the company, by which they were allowed to take possession of the ground for the purposes of the railway prior to the ascertainment of the value and compensation for the land to be taken, and it also provided, that that point should be ascertained by arbiters, who also had power to name the time from which interest was to run on the price and damage when fixed. The company entered to possession under the agreement, but the submission fell as to the other point from failure to prorogate. A jury having been summoned under the Statute to fix the value and damage, assessed the value or price of the land at a greater sum than what was contained in the company's offer, both for value and damage, but the jury found nothing for damage. By the Statute, where the company's offer falls short of the sum in the verdict, they have to defray the expense of summoning the jury and the costs of witnesses—Found that the claims of the parties fell to be regulated, not by the Statute, which it was pleaded excluded the claim for interest, but by the agreement, which was not superseded by the trial under the Statute, and in respect the company had entered to possession at Martinmas 1837, that they were bound in payment of interest on the sum in the verdict, not from its date, but from the period of actual entry, viz., Martinmas 1837.

By the 6th and 7th Will. IV., a company was incorporated to make and maintain a railway from Edinburgh to Newhaven, passing, *inter alia*, through the lands of Trinity, belonging to Alexander Scot, W.S., and for this purpose they were empowered to enter upon the lands and appropriate such parts as they saw fit for the purposes of the railway. The Statute provided that the value or price of the ground so to be taken, as well as the damages, should be assessed by a jury before the Sheriff of Edinburgh prior to the company entering to possession. According to the averments in the summons, a minute of sale and submission was entered into between Scot and the company, whereby, to facilitate the latter, Scot consented to allow them to enter to possession of his lands prior to the ascertainment of the value and damage, and for that purpose it was agreed that their entry should be at Whitsunday 1837,—Scot becoming bound to free and relieve the company of all public burdens prior thereto falling on the subjects, and the company were to have right to the rents and crops of 1838, and thereafter, and that the price and damage should be settled by arbitration. The submission was limited to 1st January 1838. The arbiters had thereby power to fix the date from which interest should run on the price and damage, and likewise to find either party liable to the other in the expenses of the submission. The company entered to possession of part of the ground in June 1837, and to the remainder in September thereafter. It appeared that various steps of procedure took place in the submission, but nothing definitive was concluded, and it fell in consequence of a failure to prorogate. Thereafter the pursuer, who is Scot's trustee, stated his willingness to treat with the company for the price and damage, in terms of the 25th section of the Act, in consequence of which the company made an offer of £3500 both for price and compensation. But as the offer was refused, a summary application was presented by the company to the Sheriff to summon a jury for the purpose of assessing the amount. The petition of the company was conjoined with a supplementary application at the instance of the pursuer; and a jury having viewed the lands, assessed the price (August 1838) at £4250, less £355 previously paid to account, but nothing was found for damage. As the sum found

by the jury was greater than the company's offer, the Sheriff, in decerning for the price, decerned also against the company for expenses, in terms of the Statute.

Scot's trustee brought this action against the company, concluding for payment of interest on the price found by the jury, as from Whitsunday 1837, the period when the company entered to possession under the agreement, and till payment, and also for the expenses connected with the submission,—the expense of collecting and preparing evidence,—and the expense of counsel and agents at the trial, as well as the costs incurred to witnesses before the jury, but under deduction of whatever sums should be paid by the company in name of expenses under their summary application, in terms of the Statute. The claim for expenses amounted to upwards of £1200.

This claim was resisted. Scot, as explained by the company, was the originator of the scheme, and procured from the company, by pressing solicitation, an advance of £355, long before they entered to the lands. It was a fact, they alleged, beyond dispute, that they only entered to possession in the autumn of 1837; in evidence of which the date (September 1837) of the agreement libelled on was adduced, as proving this conclusively; and it was maintained, that even supposing that the term of Whitsunday 1837 was to be taken, legally speaking, as the entry, contrary to what took place, the advance of £355 more than covered any loss from the company's prior possession. It had been alleged that the submission fell from the fault of the company in refusing to prorogate; but this was denied; and even if it were so, it was argued, that it could not affect the question, because the submission having fallen, the whole subject-matter which was to have been disposed of in that way, fell also; and it was no longer competent to refer to any thing that took place prior to the jury trial, as arising from the agreement after the petition to the Sheriff. The matter came to be under the Statute, so that the validity of the present claim must be considered in reference to the Statute alone, and not to the agreement. The whole question of damage and value was put to the jury, and they found a sum for the price merely, but assessed nothing for damage—nominally so speaking. Virtually they did, it was argued: For as they gave so large a sum as £4250 for four acres of ground, previously renting only £6 per acre, it was clear damage was therein included of every kind;—the more especially so, as the case, as put for the pursuer, was one of prospective damage. It was the pursuer's fault if nothing was given for previous damage arising from the previous entry of the company; and yet the fact of prior possession was before the jury. Then, as nothing was specially assessed for that, the jury must have considered that nothing was due; therefore, to ask interest on the sum assessed by the jury from Whitsunday 1837, was to ask damage for prior possession; but that was what the jury did not give; and consequently, and as the Statute was silent on such matters, the Sheriff had no power to entertain the question. Besides, the advance of £355 more than covered the claim. As to the claim for expenses, it was equally incompetent as including charges not assessable under the Statute. This claim was not to be

judged of as arising, at common law, under the agreement, but as under the Statute, from the submission having fallen; and accordingly, the only charges claimable from the company was the mere expense of summoning the jury, and the costs of witnesses. The words of the Act were quite precise as to this, and the enactment was intended to prevent any extravagant mode of conducting such trials. The Statute provided,

"That in every such case in which the verdict of a jury shall be given for the same, or a greater sum than shall have been previously offered by the said company, for the purchase of any lands, grounds, and heritages, to be used or taken by them for the purposes of this Act, or as compensation or satisfaction for any damage or loss which may happen or arise in the execution of any of the powers hereby granted, all the costs of summoning such jury, and the expenses of witnesses, shall be defrayed by the said company, and such costs, charges, and expenses, shall be settled by the said Sheriff or Sheriff-substitute."

It was plain that the Sheriff could only give expenses under the summary application taken under the Statute. It was there the cause of action originated; and it was only in the cause where the matter of dispute occurred that expenses could be given,—that is to say, under the summary application. Accordingly, the claim now made, as insisted in in a different process, was utterly incompetent.

Scot's trustee *answered*—That it was incompetent to argue the claim as arising simply under the Statute. It was true that the submission had fallen, and that under the Act, the price had been assessed by a jury; but still the agreement under which the company entered to prior possession remained in full force. The company possessed, or were entitled to possess, in virtue of the agreement from Whitsunday 1837; and though the price was not fixed till some time afterwards, interest was nevertheless due on the price, when ascertained, from the period of entry, as part of the condition under which Scot consented to the agreement, and under, and in faith of which it must be held the company were allowed to possess, as much so as the payment of the price itself must be held to have been a condition of the agreement. It was impossible to disconnect the case before the jury from the agreement, as but for it the company would not have been in possession at the trial. The agreement under which possession was had, and was maintained, remained; and though the submission lapsed, and the price was not fixed by arbitration, nevertheless the verdict of the jury came in place of that method of fixing it, and must be held as having performed the office in that particular of the submission. It was quite settled, that from the time when a party cedes the possession and rents of his lands, the surrogate, namely, the interest, should begin to run. When parties agree on a term of entry, they, by necessary implication, agree on the term from which interest is to run; and by leaving this last point to arbiters, they plainly leave them no alternative but either to decide in that way, or to enlarge the price beyond the mere value for the time, so as substantially to make an allowance for interest. As to the sum of £355, it was given, not as an equivalent for prior possession, but merely as an indulgence to Mr Scot for the corresponding indulgence the company obtained of earlier possession than they could have otherwise had. In reference to the claim for expenses, supposing that the

Statute limited the costs exigible under it to the costs of witnesses, and of summoning the jury, it did not take away the right existing at common law, in reference to a valid claim, to apply for the separate and extra expenses which were always unavoidably incurred by way of an ordinary action. By the 25th section of the Statute, either party, in the event of their being unable to agree as to a price, was empowered to apply to the Sheriff. That was a mere power; and any third party having a legal claim of any kind against the company, remained entitled to appeal to the ordinary courts of law. That was the case even with regard to that class of claims to which the statutory proceeding was applicable, and still more so, of course, in regard to claims of any other sort. In the present instance, the company originally acquired a right to the subjects under a special contract, and not in virtue of the powers of taking possession conferred on them by their Statute. Afterwards, no doubt, the statutory proceeding was had recourse to by the company, but only to the special effect of ascertaining the value of the lands as at the date of the verdict. The case before the jury had no reference to the prior possession, or to the agreement. The present claim was in reference entirely to it. It could not have been stated to the jury, as not falling under the Statute or the summary application; and it was incompetent to say that the pursuer's right to claim expenses, connected with a previous state of circumstances not before the jury, and not contained in the summary application, could be taken away by the Statute. It was a valid claim at common law, not arising under the Statute at all, but under a totally different and separate state of circumstances.—(The expenses would appear, from the Lord Ordinary's interlocutor, to have been settled in the summary application in the Sheriff Court).

The Sheriff-substitute pronounced the following interlocutor:

"14th May 1839.—The Sheriff-substitute having considered the closed record, finds, 1st, That the pursuer has no claim for interest on the sum of money awarded to him by the jury as the value of his lands at Trinity, taken by the defenders under the Statutes 6 and 7 Will. IV. ch. 31, previous to the date of the verdict, either in name of damages, over those which were estimated by the jury, or as compensation for occupation of the ground which he had ceded to the defenders under a private agreement, previous to the jury trial: Finds, 2dly, That it is incompetent in this action to entertain the pursuer's claim for the expenses of the jury trial, or any other expenses incurred by him in the summary process referred to in the libel; and in respect thereof sustains the defences and dismisses the action, reserving to the pursuer his claim for interest on the sum awarded to him by the jury, from and after the date of the verdict until payment; and also his claim for the whole or any part of the expenses incurred by him in the jury trial, or in the summary process above referred to, to be recovered by him under the decree in that process, and to the defenders their defences as accords: Finds the pursuer liable in expenses, allows an account to be given in for taxation, and decerns." (Signed) "ADAM URQUHART."

"Note.—The Sheriff-substitute is not prepared to find the action altogether incompetent as to the demand for interest on the sum awarded by the jury; but he is decidedly of opinion that that claim is ill founded on the merits. The pursuer, or his constituent, ought to have stipulated expressly for interest on the sum to be ultimately found due, before he allowed the railway company to take possession of the land, if he meant to insist on such a claim, or else he should have stated the previous occupancy as an element for the consideration of the jury, in estimating the value to be given for the land at the trial.

"As to the demand for the expenses preparatory to the trial, a question may certainly be raised, whether the clause in the Statute about costs is to be so strictly (and indeed harshly) interpreted as is contended for by the defenders, or whether the expenses of summoning the jury must not be held to include all the expenses necessarily incident to the trial, and in preparation thereof; but it appears to the Sheriff-substitute that it is not competent to try that question in this process. It may be raised under the decree in the summary application, in the shape of objections to the auditor's report, or to the taxing of the accounts."

An appeal was dismissed by the Sheriff, who appended the following note to his interlocutor:

"As to the *first* point of this cause, the Sheriff is of opinion, that the submission having been allowed to expire, the pursuer's claim falls to be regulated by the verdict of the jury. It must now be held that the jury have awarded to the pursuer what to them appeared a sufficient sum, not merely for the lands, but also as a recompense to be given for the damages sustained by the pursuer, in terms of the 25th clause of the Statute.

"The Sheriff has no power, either directly or indirectly, to add to the sum awarded by the jury, which must be held to include every claim which the pursuer could have brought forward against the defender.

"As to the *second* point, the expenses can only be determined in the application at the instance of the defenders, when the pursuer's account of his expenses in that action is brought forward in that process for taxation."

In an advocacy, the Lord Ordinary pronounced this judgment:

"31st May 1842.—The Lord Ordinary having heard counsel in this advocacy, and thereafter considered the record, documents produced, and whole process, In respect, 1st, That the Act of Parliament under which the respondents acted, expressly precluded them from entering on Mr Scot's lands till they had settled with him for the price and damages of the portion proposed to be occupied; 2d, That Mr Scot, by a special minute of agreement, dated 7th September 1837, entered into with the respondents, agreed to dispense with the said statutory provision, and to allow them to take possession of the land then required by them, on condition that the term of Whitsunday 1837 should be fixed as their term of entry, and that the value of the lands and the damages should be ascertained by arbiters mutually chosen; 3d, That the said submission lapsed apparently from no fault imputable to Mr Scot, but solely from want of a valid prorogation; 4th, That the subsequent remit to and verdict of the jury must be held merely as a proceeding necessary to supply the want of the valuation by arbiters; 5th, That the sum awarded by the jury consisted of price, and not of damages: Finds that the price awarded by the jury must, in the circumstances of this case, be held to be payable, and to carry interest from the actual and declared term of entry previously fixed by the special agreement of the parties: Therefore advocates the cause, alters the interlocutors of the Sheriff complained of, and decerns, in terms of the libel, against the defenders for payment of interest on the said price from Whitsunday 1837, as libelled: Farther, with respect to the conclusions in this action for the costs of the trial, in respect it is admitted that these have been discussed and settled in the other process or proceeding before the Sheriff under which the jury was summoned, finds it unnecessary now to give any judgment or decree as to these costs: Finds no expenses due to either party, so far as the same were incurred in the Inferior Court in reference to both conclusions of the libel; but finds the advocator entitled to expenses in this Court, as the same may be taxed by the auditor, and decerns."

The company reclaimed, praying the Court

"to alter the interlocutor submitted to review, and find that the advocator, the original pursuer, is only entitled to interest upon the sum awarded by the jury to the late Mr Scot, as the price of that portion of the lands of Trinity occupied by the railway, from and after the date of the trial by which the price of the lands was fixed on the 2d August 1838; or at all events,

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to alter the interlocutor of the Lord Ordinary, in so far as it finds the advocator entitled to the whole expenses incurred by him in this Court, in respect that the interlocutor of the Sheriff assailing the respondents from those conclusions of the libel which were applicable to the expenses of the trial, has been adhered to; or to do otherwise in the premises as to your Lordships shall seem proper."

The Court

"Recal the interlocutor reclaimed against: Find that possession was obtained at Whitsunday 1837, in respect of an agreement and submission in which the referees had power to ascertain from what period, embracing said term of entry, the price to be fixed should bear interest, and on the faith of that reference being acted upon: Find that the possession and the claims of parties must be regulated by said agreement: Find that the trial did not supersede the fulfilment of the agreement, so far as regards the possession obtained under said agreement, and not by virtue of the Act of Parliament: Find that it is competent for the Court to declare whether interest shall be paid for the possession so obtained under this agreement before the statutory proceedings for fixing the price: Find that the fair interest to be paid should be the interest of the sum found by the jury as the price of the lands; and in respect of the term of actual entry, find and declare that interest shall be paid from the term of Martinmas 1837: Find the advocator entitled to the expenses incurred in this Court to the date of the Lord Ordinary's interlocutor, but to no further expenses."

Lord Ordinary, Cuninghame.—Act. Rutherford, Monro; J. R. Stoddart, W.S., Agent.—Alt. Sandford; Renny and Webster, W.S., Agents.—Russell, Clerk.—[G.D.F.]

20th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 275.—*The EDINBURGH and GLASGOW UNION CANAL COMPANY, Petitioners, v. SIB J. G. CARMICHAEL, Bart., Respondent.*

Process—Expenses—Petition to Apply Judgment—Appeal—*The expense of an application to the Court to apply a judgment of the House of Lords reversing an interlocutor of the Court of Session, allowed to the petitioner.*

Sir Thomas Gibson Carmichael, Bart., raised an action against the petitioners, in terms of an agreement libelled on, for payment of such a sum of money as should be ascertained to be the value of the rock on his estate which was covered by the canal. The Lord Ordinary, and subsequently the Court, sustained the claim generally, and the Lord Ordinary thereafter ordered consignation of £3930 to account of the pursuer's claims. Afterwards he brought a supplementary action, concluding for bygone legal interest on the above sum, and the Lord Ordinary and the Court sustained also that claim. The petitioners thereupon granted bond of caution for the amount of bygone interest found due, and then appealed to the House of Lords against the various judgments in the cause, in so far as they had been found liable in bygone interest. The House of Lords reversed the findings of the Court of Session, in so far as appealed against.

The petitioners now presented a petition to the Court to apply the judgment of the House of Lords, and to find them entitled to expenses, including the expense of the present application.

The respondent *objected* to the Court finding the petitioners entitled to the expenses of the application, as unusual.

The petitioners *answered*, that they were entitled to these expenses, as the respondent had never afforded

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them any facilities to get up their bond of caution; and as a precedent, they referred to the case of *Brodie v. Sinclair*, 3d December 1831, 10 S. and D., p. 99. See also *Shaw's New Digest*, *voce* Appeal.

The Court were unanimously of opinion that the case of *Brodie* was a precedent, and that the petitioners were entitled to the expense of the application; and their Lordships accordingly, in the following interlocutor applying the judgment of the House of Lords, decerned for payment of the expense of the application:

"Alter the interlocutors appealed from, in so far as the same find the petitioners liable in payment of interest upon the ascertained value of the stone under the canal; assolvie the petitioners from the whole conclusions of the supplementary summons: Find them entitled to expenses in the proceedings consequent thereupon in this Court, including the expenses of the present application and procedure thereon, and remit the account of expenses, when lodged, to the auditor for taxation: And further, order repetition of the said sum of £2589. 13. 11. paid by the petitioners, with the legal interest thereof since paid: Grant warrant to the clerk of Court to transmit the bond of caution above mentioned to the Register of Deeds, that an extract thereof may be delivered to the petitioners; and authorise all legal execution to proceed thereon at their instance against Sir Thomas Gibson Carmichael, Bart., and the cautioner in the said bond, for repetition of the said sum, and the legal interest thereof: Allow the decree for said sum and interest to be extracted *ad interim*, but supersede the same till the first day of September next, and decern."

Act. J. S. More; W., A. G., and R. Ellis, W.S., *Agents*.—*Alt.* Dean of Faculty (Wood); Gibson-Craigs, Dalziel and Brodie, W.S., *Agents*.—P. Clerk.—[G.D.F.]

20th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 276.—JAMES BEAUMONT NEILSON and OTHERS, *Pursuers*, v. *The HOUSEHILL COAL and IRON COMPANY, Defenders*.

Jury Cause—Damages—Patent, Infringement of—Bill of Exceptions—*Jury question, in an action of damages, as to the infringement of a patent for an improved application of air to produce heat in fires, forges and furnaces, where bellows or other blowing apparatus are required—Verdict for pursuers, and thereafter sustained on a bill of exceptions by the Court.*

Process—Record—Proof—Evidence—Witness—Statute 5 and 6 Gul. IV. c. 83—Patent, Infringement of—Jury Cause—*Circumstances in which, in an action of damages brought for the infringement of a patent, where the defender proposed to call witnesses to prove that the principle of the patent had been in public use prior thereto in Scotland—Held that the proposed line of evidence was inadmissible, as no sufficient notice of such course had been given to the pursuer on the record;—and opinion, (1.) That in regard to an allegation of prior use of the principle of a patent, it is not enough to aver so, generally, but it is necessary that the prior use at particular places, and by particular persons, shall be set forth in such a way that the pursuer may be able distinctly to meet such averment; and, (2.) That the Statute 5 and 6 Gul. IV. c. 83, § 5, in regard to a defender in such an action giving certain notice of what he intended to found on at the trial, did not extend to Scotland, but merely referred to the mode of pleading to be adopted in English actions brought for the infringement of patents.*

See *supra*, p. 174. A warrant for letters-patent was issued on 19th July 1828 in favour of Neilson, for the purpose of securing to him the invention to which he laid claim, and now to be alluded to, for the term of fourteen years thereafter. The warrant for the letters-patent commences in name of the Sovereign, and sets forth that Neilson had

"humbly represented unto his Majesty, that after considerable

application, he hath invented and found out 'an invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required,' which invention the petitioner believes will be of public utility: That he is the first and true inventor thereof, and that the same has not been heretofore used or practised by any other person or persons whomsoever, to his knowledge or belief."

It narrated that the applicant requested that letters-patent should be issued in his favour, and it then proceeded:

"And his Majesty being willing to give encouragement to all arts and inventions which may be for the public good and benefit, therefore his Majesty, of his special grace," &c., "gives and grants to the said James Beaumont Neilson, his executors, administrators, and assigns, his special leave, license, and full power, sole privilege and authority, that he, the said James Beaumont Neilson, his executors, administrators, and assigns, by themselves, or such other person as he or they shall appoint or agree with, and no others, from time to time, and at all times hereafter, during the term herein expressed, shall and lawfully may make, use, exercise, and vend the said invention within that part of his Majesty's United Kingdom of Great Britain and Ireland called Scotland, in such manner as to the said James Beaumont Neilson, his executors, administrators, and assigns, or any of them, in their discretion, shall seem meet, and that he and they shall and may have and enjoy the whole profits, benefits, and advantages from time to time accruing and arising by reason of the said invention." "His Majesty does, by these presents, for himself, his heirs and successors, require and strictly command all and every person or persons, bodies politic or corporate, within the said part of his Majesty's United Kingdom called Scotland, that neither they, nor any of them during the continuance of the said term of fourteen years hereby granted, either directly or indirectly, do make, use, or put in practice the said invention, or any part thereof, so attained unto by the said James Beaumont Neilson as aforesaid, nor in anywise counterfeit, imitate, or resemble the same, nor shall make, or cause to be made, any addition thereto, or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, deviser or devisors thereof, without the license, consent, or agreement of the said James Beaumont Neilson, his executors, administrators, and assigns, in writing under their hands, first had and obtained in that behalf, upon such pains and penalties as can or may be justly inflicted on the said offenders, for the contempt of his Majesty's royal command, to be answerable to the said James Beaumont Neilson, his executors, administrators, or assigns, according to law, for their or either of their damages thereby occasioned." "Provided always, likewise it is expressly provided and declared, that if, at any time during the said term hereby granted, it shall be made appear to his Majesty, his heirs or successors, or to any six or more of his or their Privy Council, that this grant is contrary to law, or prejudicial or inconvenient to his Majesty's subjects in general, or that the said invention is not a new invention, as to the public use and exercise thereof, in that part of his Majesty's said United Kingdom called Scotland, or not invented by the said James Beaumont Neilson as aforesaid; then, upon signification thereof to be made by his Majesty, his heirs or successors, under his or their signet or privy seal, or by the Lords and others of his or their Privy Council, or any six or more of them, under their hands and seals, these letters-patent shall forthwith cease, determine, and be utterly void, to all intents and purposes, any thing herein-before contained to the contrary notwithstanding: Provided also, that these, his Majesty's letters-patent, or any thing herein contained, shall not extend, or be construed to extend, to give privilege to the said James Beaumont Neilson, his executors, administrators, and assigns, or either of them, to use, imitate, or make any invention or work whatsoever, which hath hitherto been found out and invented by any other of his Majesty's subjects whatsoever, publicly used and exercised in that part of his Majesty's said United Kingdom called Scotland, unto whom like letters-patent have been already granted, for the sole use, benefit, and exercise thereof,—it being his Ma-

jesty's will and pleasure that the said James Beaumont Neilson, his executors, administrators, or assigns, and all and every other person or persons unto whom like letters-patent or privileges have been already granted as aforesaid, shall distinctly use and practise their several inventions, by them invented, according to the true intent and meaning of the same respective letters-patent, and of these presents." "And lastly, his Majesty, by these presents, for himself, his heirs and successors, grants unto the said James Beaumont Neilson, his executors, administrators, and assigns, that these letters-patent, under the seal aforesaid, shall be, in and by all things, good, firm, valid, sufficient, and effectual in law, according to the true intent and meaning thereof, and shall be taken, construed, and adjudged in the most favourable and beneficial sense, for the best advantage of the said James Beaumont Neilson, his executors, administrators, and assigns, as well in all his Majesty's Courts as elsewhere, and by all and singular the officers and ministers whatsoever of his Majesty, his heirs and successors, in that part of his said United Kingdom called Scotland, and amongst all and every the subjects of his Majesty, his heirs and successors whatsoever and wheresoever; provided the said James Beaumont Neilson, within the space of four calendar months, to be computed from the date of the said intended letters-patent, do cause a particular description of the nature of his said invention, and in what manner the same is to be performed, by writing under his hand and seal, to be enrolled in his Majesty Court of Chancery in that part of his Majesty's said United Kingdom of Great Britain and Ireland called Scotland, otherwise the said letters-patent to be void. And his Majesty does farther will and command that this charter do pass the Great Seal, *per saltum*, without passing any other Seal. For doing whereof," &c.

After the issue of the letters-patent, 27th January 1829, Neilson lodged his specification, which, after setting forth the purport of the patent, proceeded as follows:

"In which letters-patent there is contained a *proviso*, obliging me the said James Beaumont Neilson, by an instrument in writing under my hand and seal, particularly to describe and ascertain the nature of my said invention." "Now, know ye, that in compliance with the said *proviso*, I, the said James Beaumont Neilson, do hereby declare, that my invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required, consists in introducing into, and applying to the fires, forges, and furnaces, atmospheric air, in the following manner:—A blast or current of air must be produced by bellows, or other blowing apparatus now in use in the ordinary way, to which mode of producing the blast or current of air this patent is not intended to extend. The blast or current of air so produced, is to be passed from the bellows or blowing apparatus into an air vessel or receptacle, made sufficiently strong to endure the blast, and through and from that vessel or receptacle, by means of a tube pipe, or aperture, into the fire, forge, or furnace. The air vessel or receptacle must be air-tight, or nearly so, except the apertures for the admission or emission of the air; and at the commencement, and during the continuance of the blast, it must be kept artificially heated in a considerable temperature. It is better that the temperature be kept to a red heat, or nearly so, but so high a temperature is not absolutely necessary to produce a beneficial effect. The air vessel or receptacle may be conveniently made of iron; but as the effect does not depend upon the nature of the material, other metals or convenient materials may be used. The size of the air vessel must depend upon the blast, and on the heat necessary to be produced. For an ordinary smith's fire or forge, an air vessel or receptacle capable of containing 1200 cubic inches will be of proper dimensions; and for a cupola of the usual size for cast-iron foundries, an air-vessel capable of containing 10,000 cubic inches will be of a proper size. For fires, forges, or furnaces upon a greater scale, such as blast-furnaces for smelting iron, large cast-iron foundries' cupolas, air vessels of proportionably increased dimensions and numbers will be required. The form or shape of the air vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances and situation. The air

vessel may be in general conveniently heated by a fire distinct from the fire to be affected by the blast or current of air; and, generally, it will be better that the fire and the air vessel should be enclosed in brick-work or masonry, through which the pipes or tubes connected with the air vessel should pass. The manner of applying the heat to the air vessel is, however, immaterial to the effect, if it be kept at a proper temperature."

The patentee, and other parties to whom he had assigned the benefit of the patent, brought this action against the defenders for an alleged infringement of it, and therefore to recover reparation by way of damages. The defenders admitted the use of the hot-blast, but they averred that they employed it in a manner substantially different from the mode prescribed by the patent and specification. The mode which they adopted was described as follows:

"A steam-engine is used of from 60 to 70 horses power, and which power is so applied by means of a blowing cylinder, valve, and communicating pipes, as to be capable of impelling above 2000 cubic feet of air per minute into the smelting furnace, under a pressure of from 2 to 3 pounds on each square inch. An air receptacle is next used. This is a large air-tight space or opening, formed by excavating rock and other minerals, and having a sectional area of about 24 square feet, and having a communication with what are called the main conducting air-pipes, of upwards of 5 feet of sectional area, by a mine which is driven through various minerals, and having a sectional area of about 20 square feet, this, with the main conducting air-pipes and receiver-connections, contains about 18 times the quantity of air contained in the blowing cylinder. This receiver is made to communicate directly with the blowing cylinder by means of two large air-ducts, having each a sectional area of about 11 feet, and a pipe having a sectional area of about nine feet, so as to keep up the continuity or uniformity of the stream of air, with a pressure varying from 1 to 3½ lbs. per inch in all the communicating pipes. The main conducting air-pipes, after leaving the air mine, is prolonged to near the heating furnaces, which are again placed near the smelting furnace, and from thence the blast is conducted to each heating furnace by a branch pipe of about 75 square inches of sectional area.

"The heating furnace is an erection which comprehends an arrangement or apparatus, by which the current of air is heated on its way to the smelting furnace. For this purpose the current of air is divided, and made to pass through a series of pipes intensely heated in the furnace in the following manner:—The conducting air-pipe is continued horizontally into the lower part of the brick-work of the heating furnace, and forms what is called a lying pipe. After entering this lying pipe, the current of air is diverted by a partition or stop, and divides into several smaller streams which enter into small branched pipes placed across the fire in the form of the letter A with a circular top, and re-unite in a second lying pipe placed parallel with the first on the opposite side of the fire. The joint areas of the transverse sections of these small pipes, taken together, are of about the same extent as that of the conducting air-pipe as it enters the heating furnace, of which, indeed, they are the continuation, as they transmit the current of air with nearly the same velocity as in the conducting air-pipe, only exposing a much more extensive heating surface to the action of the fire. The current of air being now partially heated, is stopped by a partition in the second lying pipe, and returns back in a similar series of curved branches to a second portion of the first lying pipe, and the current of air is in this way successively diverted by partitions in the lying pipes, and divided into small streams, and made to cross and recross the fire alternately in opposite directions three times in all, and passing each time in several transverse pipes to the extent of 16 in all, until it is again united for the last time near the termination of one of the lying pipes, from which it passes off in a single pipe, forming a continuation of the conducting air-pipe, and leading off from the heating furnace towards the smelting furnace, into which the stream of air is discharged from this hot air-pipe at a temperature of about the heat of melting lead.

" In carrying these arrangements into effect, several important provisions are made for the purpose of rendering the heating apparatus effectual and durable.

" (1.) The form of cross section of the transverse pipes is such as at once to receive a great proportion of radiated heat from the fire, and to expose extensive surface for conducting heat to the enclosed air, so much so that there is only about one cubic inch of air under heat for each superficial inch of heated pipe. For this purpose these pipes are flattened out in an elliptical form, and sufficient space is left to allow the hot air and flame to circulate freely around them.

" (2.) In the next place, these pipes, as they pass from the one lying pipe to the other, are of such a form as to avoid injury from the expansion produced by the heat which is apt to crack them, and so destroy the apparatus. They are therefore made to rise up and form an arch of about ten feet in height, crossing over in the arch of a circle similar to the letter A, with a circular top as already described, and again descending on the opposite side to the second lying pipe. These pipes are about an inch and a quarter in thickness, and about 13 square inches area of internal section. They are fixed into the sockets, where they join the lying pipes, with a luting of burned fire-clay covered by a layer of rust cement. The lying pipes themselves, and the sockets into which the transverse pipes are inserted, are surrounded by fire brick-work to protect them from the destructive action of the intense portion of the heat: and the heat is also distributed more uniformly over the surface of these heating pipes by flues or openings leading through various parts of the furnace, and the whole pipes are surrounded by an exterior brick building, leaving a space of some inches round the pipes in which the flame and hot gases still continue to play upon the pipes, which again give out the heat to the enclosed air. The products of combustion are finally led off into a chimney by flues. The furnace bars are placed about 1 or 1½ feet below the lying pipes over an ash pit of the usual construction. From the heating furnace the hot air-pipe is continued towards the smelting furnace, and is carefully surrounded by non-conducting materials to prevent the loss of heat; the air, on leaving this pipe is again divided into two smaller streams passing through two pipes of a less diameter, and terminating in a conical orifice varying from two to four inches in least diameter, from which the hot air is at once discharged into the smelting furnace through apertures in the hearth or lower part of the furnace. At the apertures where the hot blast is discharged into the smelting furnace, there is placed a very essential and important portion of the hot-blast apparatus, called the water-twyre. Without this apparatus it is impossible to prevent the discharge pipe of the hot blast from being immediately destroyed by the joint action of the hot air, which it discharges into the smelting furnace, and of the intense heat of the furnace itself. The water-twyre effectually prevents this evil, and allows the furnace mouth to be perfectly closed around it, and to retain all the heat and air of the furnace. The water-twyre is a short conical tube, varying from 4 to 4½ inches of internal diameter at the narrower end, 16 inches long, with from 1½ to 2 inches of taper on each side. This is placed in the blowing orifice of the furnace pointing inwards on the hearth, and into it is inserted the taper point of the hot-blast pipe, so as to be protected from the heat to which the twyre is itself exposed.

" The following is the manner in which the twyre is constructed, so as to resist the destructive action of the intense heat to which it is exposed. It is composed not of solid iron, but is formed by a hollow malleable iron pipe which forms the circle of the narrower end of the twyre nearest the fire, and then continues to wind backward in a conical spiral through 1½ to 2½ turns round the blast-pipe. Around these coils of pipe which are from half an inch to three-fourths of an inch of internal diameter, and about one-fourth of an inch in thickness, is then cast the conical tube of iron which forms the external surface of the twyre, and it is by causing a stream of cold water brought in a pipe from a reservoir at a considerable height above the twyre to flow constantly through the spiral pipe in the twyre, entering first at one side of the twyre at the point nearest the fire, and passing out of the twyre at the other side, after receding back to a less intense heat, that the twyre is kept cool and preserved. The water in this short circuit is heated to about

80° to 100° of Fahrenheit, and passed so rapidly as not to rise above this temperature which is regulated by giving the reservoir which supplies the twyre a sufficient elevation. The height of the reservoir at Househill Iron Works above the twyre, is about 36 or 38 feet. The pipes, especially those parts in the heating furnaces, are kept at all points, and especially at all their joints and connections, as perfectly air-tight as possible. They are all made of cast-iron about 1½ to 1¾ inch thick where exposed to the action of the heating furnaces, and about three-fourths of an inch to one inch thick in other parts.

" These improvements included in what is generally called the hot-blast process, and hereinbefore described as now in use at the Househill Iron Works, do not consist in blowing a furnace by means of a steam-engine, and an arrangement of conducting pipes with air at the ordinary temperature, but only in the following improved process and apparatus for carrying the same into effect, viz., the introduction of the pipe or pipes that convey the cold air coming from the blowing engine and the air receiver in manner aforesaid, into a heating furnace or oven, where the current of air is divided into numerous smaller streams, and is exposed to a more extensive heating surface, formed by a series of transverse pipes; and which divided stream of air, after acquiring a temperature about the heat of melting lead, is again united and transmitted in a single pipe, and impelled into the smelting furnace through a pipe or pipes surrounded by the water-twyre as aforesaid.

" Although the peculiar forms of the hot-blast apparatus employed at the Househill Iron Works for carrying the process into effect, vary in some respects from those used at other works, yet the principle is the same in all of them, namely, that of separating the stream of air into a number of smaller streams passing through a heating furnace, in such a manner as to expose a large heating surface to its action, and reuniting these in one hot stream, which, on approaching the furnace, is again divided into several streams, and each passed through a water-twyre into the smelting furnace, and of using two or three of such sets of heating apparatus and their water-twyres, to blow simultaneously air of the temperature of melting lead into the smelting furnace, all as before described."

And they averred that the patent was invalid,

" 1st, Because the title of the patent, and the relative specification, are altogether inconsistent with each other; the former being merely for an improved application of air to produce heat in fires, forges, and furnaces, does not comprehend the process claimed under the specification, which is an alleged improvement, not in the application of air to produce heat, but in the preparation of air, or, in other words, the specification discloses something altogether different from what is set forth in the title of the patent.

" 2d, Because the specification is defective, inasmuch as it does not state explicitly whether Mr Neilson claims, as his invention, the application of heated air generally, or only the particular mode or application of it by means of an air vessel or receptacle.

" 3d, Because the introduction and application of heated air into fires, forges, and furnaces, to produce a more intense heat and combustion for various purposes, was known and publicly practised prior to the date of Mr Neilson's patent. More particularly, heated air was introduced into the process of creating combustion, and consuming smoke, by the invention of Mr George Chapman of Whitby, in 1825, as well as in other processes. See the Glasgow Mechanics Magazine of that period, to which the pursuer, Mr Neilson, was a contributor, and he was also a reader of it.

" 4th, Because the application of atmospheric air, heated beyond its ordinary temperature, to promote combustion in smelting furnaces, fires or forges, or in the smelting of ores and metals, which, without any limitation, is the invention now claimed by Mr Neilson as his, was known and practised prior to the date of his patent, both in England and Scotland. In particular, it was, among others, practised by the late Mr Dawson of the Low Moor Iron Works in Yorkshire, by Mr Wilkinson of the Bradley Iron Works in Staffordshire, and also at the Horsely Iron Works in that county. See also Nicholson's Journal of Natural Philosophy, Chemistry, and the Arts, for

April 1798, in which there is published a Treatise by Mr James Sadler, chemist to the Admiralty, entitled, 'Description of an Apparatus for disengaging Oxygen Gas, and applying it to the best advantage; to which are added, 'Observations on the Blow-pipe by William Nicholson.' Also the patent obtained by the Rev. Robert Stirling, one of the ministers of Kilmarnock, in December 1816, for his invention 'for diminishing the consumption of fuel,' &c., and relative specifications; and the patent obtained on 6th May 1828, by Mr Botfield of Hopton Court, in the county of Salop, for his invention 'for certain improvements in making of iron, or in the method or methods of smelting or making of iron,' and relative specification. Further, in 1825, or about that time, Mr Jeffries, of the Grove Foundry, Southwark, invented a mode or modes of applying heated air in its transit in pipes (two or more) placed in a charcoal fire, for the purpose of producing a more intense degree of heat in the smelting of iron-ores or other minerals, and he practised, and has continued to practise his said invention, and improvements thereon, either by himself or the company carrying on business at the Grove Foundry in Southwark, of which he was a partner.

"5th, Because even if Mr Neilson had discovered the advantage of applying heated air to furnaces for smelting iron ore, the particular mode of applying heated air by means of an air vessel or receptacle, which is vaguely described in his specification, is substantially the mode or apparatus for which Mr Botfield had previously obtained his patent.

"6th, Because the specification, in so far as it can be understood as descriptive of a particular apparatus for forming and applying heated air, describes an apparatus which does not answer the purpose; and as a patent can only be validly obtained for a discovery or improvement which is practically useful, Mr Neilson's patent is on this ground also invalid.

"7th, The specification supposes that there is to be only one air vessel or receptacle which is to be applied on the same principle to the smelting of iron in a blast furnace, as it is to be applied in a common blacksmith's shop,—the air vessel being proportionally increased in size. But the specification does not contemplate more than one vessel, or the air being transmitted from one vessel to another; all that it contemplates, is a single vessel or receptacle in which the air is to be heated, and then conducted from the air vessel in which it has been heated into the blast furnace by means of a tube. The specification expressly excludes the tube or tubes conducting the air to and from the receptacle as any portion of the vessel in which the air is to be heated. Further, it excludes the tubular form or vessel in which the air is to be heated altogether. Whereas it was not till after great labour, and many experiments, that the tubular form of heating air was discovered and found to be practically useful, while the air vessel or receptacle described by Mr Neilson was abandoned as useless.

"8th, Because, by proportionally increasing the air vessel in the ratio pointed out by the specification, in order to produce heat in the vessel in which the air is contained, instead of producing an increased heat, the effect, by following the patentee's description, would be the very reverse; and instead of being practically useful, it would be the very opposite.

"9th, Because the statement in the specification, that the form, size, or shape of the air vessel is immaterial to the effect, is an incorrect and untrue statement, and violates the specification and patent.

"10th, Because the introduction into smelting furnaces, of atmospheric air heated to the temperature now used of 600°, would be utterly impracticable without the application of the water-twyre, which was not in use at smelting furnaces at the date of Mr Neilson's patent, and the application of which is no part of his invention, or of the process described in his specification. Without the application of cold water round the twyre, no pipe passing air, heated to the temperature of 600°, would last many minutes, and consequently the work could not be carried on without it.

"And even if Mr Neilson had discovered the application, or an improved application of atmospheric air to produce heat in furnaces, the highest temperature in which it can be used in the smelting process, requiring for its success the use of the water-twyre, the combination of the water-twyre, with the apparatus

described in the alleged invention (even had it been new), constitutes as substantial an improvement on the application of heated air to produce combustion in smelting furnaces, as the alleged improvement of Mr Neilson was upon the principle and modes of producing combustion by means of heated air previously known and in use.

"11th, Mr Neilson's patent is invalid on account of the general vagueness of the specification, which was not accompanied by any drawings or models, and is of itself insufficient to describe the alleged invention, or to enable workmen of competent skill to construct the necessary apparatus and conduct the process; and when the apparatus was constructed so far as it could be according to the description given of it in the specification, at the sight and under the direction of Mr Neilson himself, and of the deceased Colin Dunlop, and the pursuer John Wilson, it was, after repeated trials by them and others, in various parts of Scotland, found to be altogether useless, and the attempt to use the alleged invention was utterly abandoned.

"12th A specification which is calculated to mislead, and which casts upon the public the expense of labour and experiments, is bad, and invalidates the patent, and that is the case with this specification, which has thrown upon the public the labour and expense of making experiments for years, in order to ascertain, if possible, what it was that the specification was meant to disclose, or what kind of machine could be employed so as to be practically useful in heating the blast furnace."

Before the record was closed, the defenders, by a paper separate from it, intimated to the pursuers, that "besides denying that they have infringed the alleged letters-patent, the defenders intend, at the trial of the issues in this case, to rely on the following objections: That the said James B. Neilson is not the first and true inventor of the said supposed invention: That the said supposed invention was publicly used and put in practice, both in Scotland and England, before the granting of the said letters-patent: That before the date of the said letters-patent, the said invention had been publicly disclosed in divers philosophical and other printed books, and, amongst others, in a treatise or paper published by Mr James Sadler, in Nicholson's Journal of Natural Philosophy for the month of April 1798: That the introduction and application of heated air into furnaces for the purpose of producing a more intense heat, was in 1825, or before the date of the letters-patent, made known by the invention of Mr George Chapman of Whitby's process for creating combustion and consuming smoke: That the application of atmospheric air beyond the ordinary degree of temperature, to promote or facilitate the smelting of iron and other ores, is claimed generally by Mr Neilson's patent; whereas, such application of atmospheric air beyond the ordinary degree of temperature, was known and publicly practised both in Scotland and England prior to the date of the said letters-patent, and in various instances by a process or apparatus similar to, and substantially the same with that described in the said letters-patent, and relative specification: That in particular, the said application of atmospheric air, beyond the ordinary degree of temperature, was known and publicly practised before the date of the said letters-patent at Irvine, Greenock, Glasgow, and at various other places in the counties of Ayr, Renfrew and Lanark, and also at various places in the county of Mid-Lothian; as also at Liverpool, and in or near London, and at the Bradley and the Horsely Iron Works in Staffordshire, and at the Low Moor Iron Work in Yorkshire, by various iron masters and iron-founders, anchor smiths, and other persons engaged in the smelting and manufacturing of iron; and prior to the date of the said letters-patent, the principle of the application of heated atmospheric air to fires, forges and furnaces, where bellows or other blowing apparatus are required, had been disclosed in two several patents."

A discussion ensued as to the form of the issues before the Lord Ordinary (see *supra*, p. 174), and the following, after an advising in the Second Division, were approved of by the Court on 21st January last:

"It being admitted that, on the 1st day of October 1828, the pursuer James Beaumont Neilson, obtained letters-patent under the Great Seal used in Scotland, in place of the Great Seal

thereof, and duly enrolled a specification in terms of the *proviso* contained in said letters-patent, being Nos. 21 and 22 of process:

"It being also admitted that the pursuers, other than the said James Beaumont Neilson, have acquired, by assignment from him, a joint interest with him in the said patent:

"Whether, in the course of the year 1840, and during the currency of the said letters-patent, the defenders did, in or at their iron-works at Househill, by themselves or others, wrongfully, and in contravention of the privileges conferred by the said letters-patent, use machinery or apparatus substantially the same with the machinery or apparatus described in said specification, and to the effect set forth in the said letters-patent and specification, to the loss, injury, and damage of the pursuers? Or,

"1. Whether the invention, as described in the said letters-patent and specification, is not the original invention of the pursuer, the said James Beaumont Neilson?

"2. Whether the description contained in the said specification, is not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in the said letters-patent and specification?

"3. Whether machinery or apparatus, constructed according to the description in the said letters-patent and specification, is not practically useful for the purposes set forth in the said letters-patent?

"The damages are laid as under:—

"Profits claimed, as at the date of the action,	£10,000
"Other damages, as at the same date,	2,000
	£12,000"

The case was tried by the Lord Justice-Clerk and a jury on the 1st, 2d, 4th, 5th, 6th and 7th of April last, when the evidence led for the pursuers was in support of the patent, and generally to this effect:—Experiments had been tried in several places with the view of improving the blast, and for smelting iron, but unsuccessfully; and papers had been published prior to the patent on analogous subjects, such as that by Botfield, Chapman, Sadler and Stirling, but none of them were in the least in anticipation of Neilson's improvement. Some of them referred to totally different objects, and others again were unintelligible, and none of them had any principle in common with the one disclosed by Neilson. According to practice prior to the patent, derived from general impression of its utility, it had been thought that the colder the blast which was applied to furnaces, the effect in smelting iron was the greater and more beneficial; and accordingly, in some case, ice had been applied to the blast; but the reverse of this had been proved by Neilson, according to whose patent principle the temperature of the air now thrown into the furnace was raised to about 600° of Fahrenheit, or a heat sufficient to melt lead, and equally good, if not better metal was thereby obtained than by the cold blast. It had this extraordinary benefit, that it enabled manufacturers to turn out a much greater quantity of material from the furnaces, by from three to four or five times than could be produced formerly by any contrivance known or practised, with the additional benefit of a great saving of fuel and flux; and further, it had the merit of enabling anthracite coal to be brought into use for smelting iron, which could never previously be used beneficially for that purpose. The improvement or principle in the patent consisted in interposing an air receptacle between the blast and the furnace, to which fire was applied so as to raise the temperature within to the required heat, and in that state the heated air was then transmit-

ted to the furnace. The air vessel generally used was a series of arched pipes with lying ones, to which fire was applied so as to heat the air inside to the required degree, but no particular form of pipe was essentially necessary under the specification, and any form might be used, provided it was of a size adapted to the blast, the strength of the materials of the apparatus, the size of furnace, and the work to be executed. There was no difficulty whatever of understanding from the specification what the patentee described. Workmen of ordinary capacity understood it, and could make apparatus to effect the object of the patentee, without any model being submitted to them, simply from the specification; and in several instances such had been done. It was in evidence that the apparatus used by the defenders was substantially the same as what was described in the specification; and evidence was also led to show the benefit derived by the defenders from the use of it—the quantity of iron used by them for a certain period having been recovered under a diligence. The sum in the verdict corresponded, or very nearly so, with the amount, in evidence, of the benefit supposed to have accrued to the defenders.

The defenders adduced evidence in support of the pleas in defence set up by them, and to the effect above alluded to. In the *first* place, several witnesses were adduced to prove that Neilson's principle was known and in use in England, at Thorneycroft Smelting Iron-works, so far back as 1800. The proprietor there was wont to employ small model furnaces which were served by a blowing apparatus, the cylinder of which was heated, and the air thence sent by the blast into the forge. The cylinder was first heated by coals, and afterwards by a flue of brick work. The effect, it was said, was to make the iron thereby smelted too rich or too grey, and was in consequence not readily workable, and sold at a smaller price than iron otherwise manufactured. This apparatus was also applied at the same works to fineries, but in both cases the plan was given up as useless—parties being satisfied it would not do. The defenders then proceeded to lead evidence that a contrivance of the same description as Neilson's had been in use at Irvine twenty years ago; but the Judge, on objection by the pursuer, ruled that the line of evidence was inadmissible, on the grounds stated below. The defender then brought evidence to show that the specification was worthless, as not explaining the advantage of increasing the heat of the air, and that it was otherwise so vague and indefinite that it was unintelligible. It had been taken by some at first as an improvement to dry air, by expelling the moisture, and thereby to improve the quality of iron in furnaces, but not as connected with improving or supporting the combustion in the furnace: That no workman of ordinary skill could construct apparatus from it: That the series of pipes now used by the patentee was not within the specification, as not answering the description of an air vessel; and that no person could fall on that contrivance except by accident, and certainly not from reading the specification.

In the course of the defenders' evidence the following point occurred, which forms the ground of the first exception in the bill of exceptions which was tendered:—

The pursuers, in their evidence, had examined a

witness, George Paterson, Neilson's brother-in-law, who spoke to the experiments Neilson and he made in Glasgow on the subject of improving the blast of furnaces prior to obtaining the patent; and these experiments the witness described. Another witness (Sutherland) was also examined as to the same experiments; and in the course of describing them, he stated that the experimental apparatus had been tried with a smith's forge. The defenders proposed, in conducting their case, to show that there had been a use of the same principle in the town of Irvine, about twenty years previously, at an anchor's smith's forge, where a pipe was interposed between a pair of hand bellows and the forge, and which was heated with the view of raising the temperature of the air of the blast, to be transmitted in that state to the forge. But this was objected to by the pursuers; and the presiding Judge ruled that the line of evidence was inadmissible on these grounds, which were the reasons urged by the pursuers:

Lord Justice-Clerk. 1. Ruled, that a paper of objections lodged in process, No. 24, with notice thereof before the record was closed, cannot supply defects in the averments in the record, on which parties agreed to close the record, in terms of the Statute, on the 22d February, supposing that in such paper of objections there had been any such averment as in this case would be necessary in the record: 2. On the ground that no proper notice is given on the record of the proposed line of inquiry generally, and no notice whatever of prior use of the invention at a smith's at Irvine, by the application of hot blast to a smith's fire: and, 3. On the ground, that on an inquiry as to the anticipation and prior use of an invention, by instances of the practices of individuals, going back to twenty years, it is essentially necessary for the interests of the patentees, and ends of justice, that the record should contain such information as shall enable the patentee to be able to meet by inquiry these cases, and to investigate the character, purposes and objects of the practices to be proved against him, in which the prior use of his discovery and invention is said to be found.

Same objection held to apply to any other evidence of same character.

The defenders excepted to this rule of his Lordship generally, because there was sufficient notice on the record itself of what they were to prove, and consequently that there could be no surprise. But besides, it was argued that the note of objection which they had served on the pursuers before the record was closed, was enough, and was a compliance with the Act 5 and 6 Gul. IV. c. 83, in regard to patents, which required notice to be sent to the pursuers of the objections which the defenders were to rely on at the trial. The record itself was pleaded as being sufficient; but even supposing it were not so, it was said that this Act extended to Scotland, and must be held to support the line of evidence proposed by the defenders.

The following is the charge delivered to the jury:

Lord Justice-Clerk.—You are now to enter upon the discharge of your duty of deliberating and deciding on this case. It is, as you see, of great importance to the parties, and of great interest in all parts of the kingdom, both from the direct interests which are here involved, and probably in consequence of rights or expectations which I need not explain to you, arising under a recent Statute, but which may make the subject of the trial matter of the deepest importance to both the parties in the present issues, and to many others. It has already occupied a great deal of your time, and must have made a very great demand on your other avocations; but you have bestowed much attention on the case, and you bring to the decision of it, the intelligence, the ability, the good sense, and the knowledge of

life, and the peculiar qualifications for judging of evidence, on account of which the law has selected you for this important duty.

But, gentlemen, while it will lie peculiarly with you to deliberate upon, and to decide this case, I am sure you know, and will probably see more fully afterwards, the great importance of the assistance and of the directions which you may in such a case receive from the Court in point of law. The responsibility of such directions is the greater, because the more I have considered it, the more I am satisfied that, according to the views, in point of law, which I may state to you as matter of direction, your opinion on the questions which you are to decide, will be much more affected than at first sight might appear. For instance, if I should hold, in point of law, that the patent is defective unless it sets forth and claims one particular mode and construction of apparatus for heating air—I say, if you should be directed, in point of law, to take that view of this patent, you will see how easy, comparatively, and how short would be the view of the issues you have to try; and how necessary it therefore is, that you should attend to the legal bearings of this case, as laid down by the Court. If, on the other hand, you should be directed that it is not necessary that this patent should contain any one particular description, or claim any particular apparatus for heating air to be introduced into a blast-furnace, and that it is a good patent in point of law, although it comprehends every and all modes of applying the blast, provided it is the air, under the influence of the blast, that is to be heated, then you will see, on the other hand, how directly and materially that view, in point of law, must influence the light in which you are to consider the bearings of the evidence, and the questions that are truly involved in those issues.

I feel therefore, and I feel deeply, on account of the responsibility of those directions—that is, in the directions which you are to receive in point of law, and which it is my duty to give for your assistance, and, as far as possible, for your guidance,—it is on those directions that you must find the light under which you are to understand the patent and consider the case. That you should err in such a case is hardly possible, except from misdirection on the part of the Judge; but any such misdirection the parties will afterwards have an opportunity of discussing; and my object will be to put everything that I consider to be material in law so fully before you and them, that whoever is dissatisfied with the charge, or discovers any point of law that may be afterwards raised, will have an opportunity of doing so, as I am anxious that this trial should have all the results that the parties are entitled to expect, and not prove in any respect abortive.

I may state that I have put my views into writing, and therefore the parties may afterwards have the same, and take time for deliberation, excepting if they wish to the charge generally. Some points are doubtful as to whether they are matters of law or of fact; some there also are which I consider matters of fact, but which the parties may consider matters of law; and as to which I would wish the particular attention of the counsel, and their assistance before the jury retire.

You will observe that there are two sets of issues in this case—one set is alternative, as to which the onus is wholly on the defenders. As to the issue for the pursuers, a *prima facie* case is sufficient. They have chosen, in the conduct of the cause, to anticipate the defenders' case, by leading their own evidence on those issues in the first instance: but the result is the same—that, as to the second set of issues, the defenders are pursuers. But when a party complains of the infringement of a patent, he exposes it to challenge at the instance of the defenders.

The first issue assumes the validity of the patent, as a point which may, in the first instance, be easily proved, or may be taken on the simplest evidence; and then asks, "Whether, in the course of the year 1840, and during the currency of the said letters-patent, the defenders did, in or at their iron-works at Househill, by themselves or others, wrongfully, and in contravention of the privileges conferred by the said letters-patent, use machinery or apparatus substantially the same with the machinery or apparatus described in said specification, and to the effect set forth in the said letters-patent and specification, to the loss, injury and damage of the pursuers?" Perhaps it might be

better, in many such cases in the charge, to take the defenders' issues first. But in this case, I do not think that that course would present the case in a fair aspect to you. I think it necessary to explain the full bearing of the law on this first issue as to *this* particular patent.

My first duty, then, is to call your attention to *this* patent—chiefly in reference to the first issue. I may have to allude, in anticipation, to the defenders' three issues; but I shall afterwards speak to them separately. On the patent, my remarks will be partly law, partly observations for your assistance.

The first point is, *What does the patent claim?* To what does it apply? Does it apply to the *heating of air*? to the mode and way in which *that* effect shall be accomplished? Or to the use and application of air to be heated at a particular stage of the process—to the use and application of hot air, as the blast which is to enter the furnace, so as to increase heat in the furnace?

The importance of this point you must see.

If the mode and way of heating the air is claimed, then the defenders argue the patent would claim,—

1. What is not new, unless there is some particular contrivance in the mode of heating.

2. What is not described in such terms as truly to form any particular process at all; or,

3. (For the defenders not very consistently state *also* this objection); it describes *one* mode of heating the air, viz., in one large vessel to be increased in bulk in all its diameters or sides proportionally; so that for a large blast, there must be a huge vessel of vast dimensions in all its sections—as one witness said, a large room or a small room.

These points are both singularly raised by the defenders.

I have much doubt whether this objection, as to the patent claiming too much, is within the issues. The pursuers do not profess to claim an invention for heating air. If the defenders intended to contend that the patent did, however, contain such a claim, and on that account was void, they might have stated this plea to the Court, before and in bar of trial. I think they were bound to do so, or they might have made it the ground of substantive issue. The way they get at the point now, is by saying, we insist that this is the reading of the patent, and *if so*, then my objections apply; for on that view of the patent, viz., that it applies to the mode or process of heating air, it is not a good patent. My own opinion is, that this point is not raised—competently raised—under these issues; and holding that opinion, it is right that I should give the pursuers the benefit of it. *But*, at the same time, it is expedient that no point in this case should not be embraced in any bill of exceptions which either party may wish to present. And on that account, and partly also because the defenders may have some countenance from some uncertainty of proceeding in a prior case—*Russell v. Crichton*, 8th June 1839—I shall assume at present the competency of this objection. If this matter ought not to be taken as included in the issues, the pursuers can also take an exception to my entertaining this point at all; and my opinion is distinctly, that the point should not be entertained under the present issues. But taking this matter as open to the defenders, then the question, what the patent truly claims, is a point for the Court. The construction of the patent to that extent, and on that question, is matter of law for the Court. The *intelligibility* of the patent, to use an expression of Lord Eldon's, is for the jury. But the inquiry, what is the subject-matter of the patent, is a question of law, and for the Court. It depends upon a great variety of matters, settled by previous decisions, on the style and form of specifications, their title, structure, and the *legal* import of their phraseology. It is not a question fitted for each jury in each case, else there would be no fixed law on the subject. But the meaning and intelligibility of the actual description in the particular specification is for the jury in each case, taking the specification with the evidence of practical and scientific men in that department of arts and manufactures; and the issues here assume that the intelligibility of the specification is for you.

Let me now explain the patent and specification to you.

In the patent—I take the warrant, though the English is also repeated in the Latin, record, p. 65. The object is thus set forth in the words of the petition; but before I read the same, let me say—you are aware there is first letters-patent, and then

the party must carefully and particularly describe that which falls within the object of his patent; and in the patent the invention is set forth—and observe this is the whole description or title of the patent—"an invention for the improved application of air to produce heat in fires, forges, or furnaces, where bellows or other blowing apparatus are required." That is the *object* of the patent—that is what the law calls its *title*—the parties are entitled to maintain that the specification ought not to go beyond it. On the other hand, the patentee is justly entitled to say that the presumption is, that he did not mean to go beyond it. Observe those terms,—*an improved application of air to produce heat in the furnaces or fires*. The effect here stated and claimed is the *effect on the fire or furnace—not on the air itself*—though heated by air. There is no object stated in reference to the state or quality of the air, except as to the result of producing heat in the furnace. This is most material for you to keep in view, in considering what meaning is to be put on the practical directions in the specification. If the specification clearly means throughout to claim, as the improvement—*increase of heat in the furnace*,—then of course it will be for you to consider whether you can so construe particular expressions respecting the "effect," as to interpret them to allude to a different effect than that which is the object of the patent. It is not an improved mode of *heating air* that is claimed, but an improved *APPLICATION of air* to produce heat in fires. The air was previously *applied cold* in order to produce heat—to produce that *same* result in a better and more effectual way, Neilson's invention is an *improved* application of air. How the air is to be applied in an *improved* manner, the specification is afterwards to tell us. Hence I have to state to you in point of law, that the *object* and *summary* of the invention is *this*—I think *correct*—*title* does not profess to include the mode of heating the air—that any mode of heating the air under blast is within the *professed* OBJECT and TITLE of the patent—provided that subsequent words of practical direction in the specification do not restrict the claim to one particular mode of heating the air. But the specification, although such is the object and the only object of the patent, might have gone too far, and been liable to another objection taken by the defenders—if it should turn out to be a patent only for an abstract philosophical principle.

Turn now to the specification. The specification and patent are to be taken together as one instrument—and I give you this as a suggestion in common sense—though it is, nevertheless, a direction in point of law, viz., the terms are to be understood in the *plain, ordinary and popular sense* of the terms used, unless the usage of the trade in question has fixed a peculiar meaning on the terms, or the context necessarily gives another sense than the *plain, ordinary and popular sense*.

The general title is the same as in the patent. Then there is the statement of the object; it quotes, you will observe, the words in the patent; the letters-patent are for "my invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required." Then there is the condition under which he gets the patent,—"*In which letters-patent there is contained a proviso, obliging me, the said James Beaumont Neilson, by an instrument in writing under my hand and seal, particularly to describe the nature of my said invention, and in what manner the same is to be performed.*"

Then at the commencement of the specification, it goes on—"*Now know ye, that in compliance with the said proviso, I, the said James Beaumont Neilson, do hereby declare.*" He must comply with it in order to satisfy the law—then he repeats the terms of his title—he says "that my invention for the improved application of air to produce heat in fires, forges and furnaces, where bellows or other blowing apparatus are required, consists." So here he repeats in the general terms of the patent the object of his invention. Then he says, "*consists in introducing into, and applying to the fires, forges and furnaces, atmospheric air in the following manner.*" I think it is of great importance, in telling you what the patent does not claim, as this is to be considered by the Court, to mention that it does not here say it is *heated air*, but it is introducing atmospheric air in the following manner:—The air is to be heated as you will see presently; but you will observe it consists in introducing

and applying "atmospheric air in the following manner." Now, these terms I hold to be important; they relate distinctly to the introduction into, and application of air to the fires. This marks very plainly the coherence with the patent of the specification.

Then (4.) The blast is material to that. It is admitted that the patent is not meant to be applied to that.

Then he begins (5.) with the following particulars:—

1. The air in blast is to be passed into an air vessel or receptacle before it goes to the fire.

2. That vessel (of sufficient strength) is to be heated. You would observe that some of the defenders' witnesses always interposed,—nothing is said of heating the air. I must say plainly, that whatever else is thought of the patent, it would be an outrage on common sense to pretend that the contrivance is not to heat the blast, and so they admitted this was a necessary inference—a distinction to the practical man without a difference—if red hot, it is said, so much the better, but that is not essential.

3. The materials of the air vessel are said to be not important—iron best.

4. Size is not fixed—though some proportions are given, and increase in size and numbers pointed at as necessary. I am going over some particulars at present which must be for your consideration; but I must state them, in order to explain to you what the patent does claim—I am not prejudging the points to be left to you.

5. Then he says, the form and shape of air vessel is immaterial to effect.

6. He says, the manner of applying heat is immaterial, if you keep up the air to a proper temperature. He says, the form and shape is immaterial, and he says the manner of applying the heat is immaterial. This is of great importance in regard to the defenders' evidence.

On all these passages the question arises,—immaterial to what? important to what? This is a point on the intelligibility of the patent. Some of the witnesses of the defenders say this means effect in heating air during the blast. On that view, the specification is not only untrue, but absurd and ludicrously so—framed in utter ignorance. One witness says, this means immaterial to economy, and in that sense of the term the sentence is still more absurd. Now, these are singular illustrations of ignorance and absurdity—if such should be your view—to find in a patent under which such a host of witnesses conceive there is contained the discovery of a physical principle of great novelty, and of unspeakable importance in point of utility.

Whether in saying these things, he has given wrong directions, which will mislead practical men, is another matter, on which I shall take your opinion. But I am at present only considering what he says, and in the question of what he claims or does not claim in the specification, it is important and necessary to see what he says, and what he professes to claim. It may be, that a specification truly claims more than a party says and professes to do. But the legal presumption is, that he does not claim that which he says he gives no directions about, as immaterial to his object, i. e., the effect he has in view to produce, provided you obtain the agent by which he means to work, viz., heated air.

I have stated the grounds of my opinion on this first point, because the observations I have made may be of use to you when you deliberate on the specification, in regard to the questions which belong to your functions on it. I am of opinion that Neilson does not claim as any part of his invention the mode or manner, or profess to describe any mode or manner of heating the air under blast, which is to be passed into an air vessel interposed between the blowing apparatus and the fire. I hold, in point of law, that this is no part of his claim under the patent or specification. Whether the specification is bad on this account, as resulting in a patent for an abstract principle, without any mechanical contrivance or mode of reducing it to practice, is a different matter, and is also a question of law to which I shall immediately advert. But at present, what I wish to state to you is, that the manner of heating the air—the particular contrivance or shape of vessel, or of constructing the surface and shape so as to secure heat, is no part of the claim of invention contained in the specification.

This direction, in point of law, on a point which all must admit to be law for the Court, you will see to be of great importance for you in considering the meaning of the patent. Indeed, I do not conceal from you, that while the intelligibility of the patent is for you, yet when the previous question—what the patent claims, occurs in any case and is raised, and must be decided by the Court—that question of law must very much guide you as to the intelligibility of the patent on the matters to which it does lay claim.

The defenders say it claims either one thing or another. It is my duty to tell you what it does not claim. That direction, in point of law, does not leave it open to you to take any other view than one of the claim under the patent, viz., that the mode of heating air is no part of the claim patented, nor is intended to be set forth as any part of the patent invention. If that is so, then you will see that my direction in point of law gives you only one other sense, between which you can decide, and an interpretation which makes nonsense of the specification.

His invention then consists, according to the fair meaning of the specification, taken as a whole, and candidly considered, in passing the blast into an air vessel or receptacle, in order to be heated, in order at that stage of the process of application of air to fires, to acquire the agent which he intends to act—heat in the blast instead of a cold blast.

The mode in which you are to heat—the form and shape—dimensions and numbers of the vessels—he does not claim or intend to prescribe—he does not claim or intend to describe,—he does not claim. If in that stage, by so intercepting the air and heating it, you pass the blast into the furnace,—that he, he says, my improved application of air,—that is the agent I mean to use, in order to produce heat in the furnace. How you heat—in what mode, or in what vessel, provided the vessel be strong enough to endure the blast, and of cubical contents of air sufficient for the blast, I neither care nor direct you,—for if you so get the hot blast into the furnace, by heating the air in a vessel between the blowing engine and the fire, you attain my object; you will get my improved application of air.

I am therefore of opinion, and must give you, in point of law, the direction that the specification does not claim any thing as to the form, nature, shape, materials, numbers or mathematical character of the vessel or vessels in which the air is to be heated, or as to the mode of heating such vessels, provided the blast is heated, between the blowing apparatus and the furnace in an air vessel or receptacle,—as to the size, dimensions, and numbers of which you must suit yourself.

It is for the Judge to say what is law, and what is for the jury. If I am wrong in holding this matter to be for the Court, the defenders can have it put right.

Holding it to be matter of law, you are aware that in civil cases, whatever direction I give as to law, must fix in this trial the law of the case, and that the law you must receive from me.

I state that plainly to you, because neither you nor I can wish to trespass on our respective functions, and you will find that I shall leave quite enough to you in this case,—to claim the exercise of all your attention, and of all your observation and judgment.

But within this objection, which is one of law, the defenders urge, that even if Neilson does not claim the air vessel as part of his invention, he has so described it as to make one particular sort of vessel a part of his apparatus, and has limited himself to one sort of air vessel, viz., one large vessel to be increased in size according to the extent of blast—that is, of air to be heated. They say that is the meaning of the specification,—that practical men would so understand it,—that this is so clearly the only vessel that Neilson contemplated, that his invention does not apply to any vessels in the shape of tubes, pipes, &c. In short, on this view of the specification they say, not very consistently with a great part of their case, that the specification contains really a very special, limited, and restricted description, by which the inventor so described one sort of apparatus, that he cannot claim any other, or maintain that his patent is one which applies to all varieties in the mode of heating air. This is a question for you—the jury,—it is a question on the meaning and intelligibility of the specification,—it is embraced under the issues,—for you to answer. It is involved in the 2d and 3d

issues. But I also propose to ask you to answer a special question on *that* point which I shall afterwards state to you. If either party holds this to be a question for the Court, I shall also state my opinion, if required, so that the verdict, if according to the evidence, would stand, if it is a point for the jury:—if for the Court, the point would be fairly raised. But at the same time that this view is pressed by the defenders, and much evidence adduced to convince you that such is the only practical view which can be taken of the specification,—there is another view taken of a totally opposite description, which is a question of law for the Court. The defenders say, the specification seizes hold of an abstract principle, viz., that hot air produces more heat than cold, and of that abstract principle alone,—that the patentee purposely avoids any mode of stating how the principle should be applied:—Hence that the patent is bad, as being one for a principle alone.

The defenders, you will recollect, were very reluctant to state whether they actually raised that point or not. I think it is at the foundation of their whole case, and sure I am, that to enable you to discharge your duty, it is very necessary that I should not in any way avoid that question of law, or turn my remarks on it, which I easily could, into observations in point of fact, which the defenders could not except to; I think it will be more useful to you for me to explain the law to you fully on this point, and the defenders have thus the benefit of being able to except to any thing I say, and so obtain the judgment of the Court on the point, in case I am wrong.

It is quite true that a patent cannot be taken out solely for an abstract philosophical principle, for instance,—for any law of nature, or any property of matter, apart from any mode of turning it to account in the practical operations of manufacture, or the business and arts, and utilities of life.

The mere discovery of such a principle is not an *invention* in the patent-law sense of the term. Stating such a principle in a patent may be a promulgation of the principle, but it is no application of the principle to any practical purpose. And without that application of the principle to a practical object and end, and without the application of it to human industry, or to the purposes of human enjoyment—a person cannot, in the abstract, appropriate a principle to himself. But a patent will be good though the subject of the patent consists in the discovery of a great, general, and most comprehensive principle in science or law of nature, if that principle is by the specification *applied to any special purpose*, so as thereby to effectuate a practical result and benefit not previously attained.

The main merit—the most important part of the invention, may consist in the conception of the original idea—in the discovery of the principle in science, or of the law of nature stated in the patent, and little or no pains may have been taken in *working out the best manner and mode* of the application of the principle to the purpose set forth in the patent. But still, if the principle is stated to be applicable to any special purpose, so as to produce any result previously unknown, in the way and for the objects described, the patent is good. It is no longer an abstract principle. It comes to be a principle turned to account—to a practical object, and applied to a special result. It becomes then not an abstract principle, which means a principle considered *apart* from any special purpose or practical operation, but the discovery and statement of a principle for a special purpose—that is, a practical invention—a mode of carrying a principle into effect. That such is the law—if a *well-known* principle is applied for the first time to produce a practical result for a special purpose—has never been disputed. It would be very strange and unjust to refuse the same legal effect, when the inventor has the additional merit of discovering the principle as well as its application to a practical object. The instant that the principle, although discovered for the first time, is stated, in actual application to, and as the agent of producing a certain specified effect, it is no longer an abstract principle—it is then clothed with the language of practical application, and receives the impress of tangible direction to the actual business of human life. Is it any objection then, in the next place, to such a patent, that terms descriptive of the application to a certain specified result, include *every* mode of applying the principle or agent so as to produce that specified result, although one mode may not be described more than another—although one mode

may be infinitely better than another—although much greater benefit would result from the application of the principle by one method than by another—although one method may be much less expensive than another? Is it, I next inquire, an objection to the patent that in its application of a new principle to a certain *specified result*—observe the words—it includes every variety of mode of applying the principle according to the general statement of the object and benefit to be attained?

You will observe that the greater part of the defenders' case is truly directed to this objection.

This is a question of law, and I must tell you distinctly that this generality of claim—that is for all modes of applying the principle to the purpose specified according to, or within a general statement of the object to be attained, and of the use to be made of the agent to be so applied—is no objection whatever to the patent. That the application or use of the agent for the purpose specified, may be carried out in a great variety of ways, only shows the beauty and simplicity, and comprehensiveness of the invention. But the scientific and general utility of the proposed application of the principle, if directed to a *specified purpose*, is not an objection to its becoming the subject of a patent.

That the proposed application may be very generally adopted in a great variety of ways, is the merit of the invention, not a legal objection to the patent.

The defenders say—You announce a principle that hot air will produce heat in the furnace—You direct us to take the blast—without interrupting or rather without stopping it—to take the current in blast—to heat it after it leaves the blast, and to throw it in hot into the furnace. But you tell us no more—You do not tell us how we are to heat it—You say you may heat it in any way—in any sort of form of vessel. You say I leave you to do it how you best can. But my application of the discovered principle is, that if you heat the air—and heat it after it leaves the blowing-engine (for it is plain that you can't do it before),—you attain the result I state,—that is the purpose to which I apply the principle. The benefit will be greater or less—I only say, benefit you will get: I have disclosed the principle—I so apply it to a specified purpose, by a mechanical contrivance, viz., by getting the heat when in blast after it leaves the furnace—but the mode and manner, and extent of heating, I leave to you,—and the degree of benefit on that very account I do not state.

The defenders say the patent, on this account, is bad in law. I must tell you that taking the patent to be of this general character, it is good in law. I state to you the law to be, that you may obtain a patent for a mode of carrying a principle into effect, and if you suggest and discover, not only the principle, but suggest and invent how it may be applied to a practical result by mechanical contrivance and apparatus, and show that you are aware that no particular sort or modification or form of the apparatus is essential in order to obtain *benefit* from the principle, then you may take your patent for the mode of carrying it into effect, and are not under the necessity of describing, and confining yourself to one *form* of apparatus.

If that were necessary, you see what would be the result? Why, that a patent could hardly ever be obtained for any mode of carrying a newly discovered principle into practical results—though the most valuable of all discoveries. For the best form and shape or modification of apparatus cannot, in matters of such vast range, and requiring observation on such a great scale, be attained at once, and so the thing would become known—and so the right lost, long before all the various kinds of apparatus could be tried. Hence, you may generally claim the *mode* of carrying the principle into effect by mechanical contrivance, so that any sort of apparatus, applied in the way stated, will, more or less, produce the benefit, and you are not tied down to any *form*.

The best illustration I can give you, and I think it right to give you this illustration, is from a case as to the application of that familiar principle the lever, to the construction of chairs, or what is called the self-adjusting lever. *Minter v. Wells*, 1 Crompton, Mason, and Roscoe, 505.

This case, which afterwards came under the consideration of the whole Court, was tried in the Court of Exchequer during the presidency of Lord Lyndhurst, who, as you may happen

to know, is one of the greatest patent lawyers in the kingdom, uniting extensive scientific knowledge with all his legal attainments. The case was as to the patent reclining chair, the luxury of which some of you may have tried; it had a self-adjusting lever, so that a person sitting or reclining—and I need not tell you what variety of postures can be assumed by a person reclining in a chair—in whatever situation he placed his back, there was sufficient resistance offered, through means of the lever, to preserve the equilibrium. Now any thing more general than that, I cannot conceive—it was the application of a well-known principle, but for the first time applied to a chair. He made no claim to any particular parts of the chair, nor did he prescribe any precise mode in which they should be made; but what he claimed, was a self-adjusting lever to be applied to the back of a chair, where the weight of the seat acts as a counterpoise to the back, in whatever posture the party might be sitting or reclining. Nothing could be more general. Well, a verdict passed for the patentee, with liberty to apply to have it set aside. Lord Lyndhurst said, every application for a patent must include some principle, and here the principle is the application of the lever to the chair, whereby the weight of the seat acts as a counterpoise to the pressure against the back of the chair. He does not confine the chair to any particular form, but he claims the chair constructed on this principle, in whatever shape or form it may be constructed. Baron Parke was of the same opinion, and the rest of the Court concurred.

The principle of the lever was not new, of course.

Just so as to the hot blast,—only the principle is also new. The patentee says, I find hot air will increase the heat in the furnace—that a blast of hot air is beneficial for that end. Here is the way to attain it,—heat the air under blast, between the blowing apparatus and furnace; if you do that, I care not how you may propose to do it,—I neither propose to you, nor claim any special mode of doing it. You may give the air more or less degrees of heat; but if you so heat it you will get by that contrivance the benefit I have invented and disclosed, more or less according to the degree of heat. This is very simple—very general: But its simplicity is its beauty and its practical value,—not an objection in law.

But it will be more satisfactory to you to be informed, that the validity of *this* patent, to the general effect I am now stating, is adjudged law—adjudged on this particular patent. The question, Whether this patent was not bad in law, in respect that the specification claimed only a principle, and could not be taken to give a mode of carrying the principle into effect, was argued at great length, and with infinite anxiety, in one of the Supreme Courts in England, in the case of Neilson against Harford and others, decided 26th June 1841, and the judgment of the Court, delivered by one of the Judges, Mr Baron Parke, who had also tried the case, bears,—“Then, taking the construction of the specification on ourselves, as we are bound to do, it becomes necessary to examine what the nature of the invention, which the plaintiff has disclosed by this instrument. It is very difficult to distinguish it from the specification of a patent for a principle. And this at first created in the minds of some of the Court much difficulty; but after full consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered, as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention then consists in this, by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle;—and thus he accomplishes the object of applying the blast, which before was of cold air, in a heated state to the furnace.” The difficulty which occurred in that case to one of the Judges, the same who gave the judgment, and who tried the case, was on the words “form and shape of the vessel is immaterial to the effect, and may be adapted to local circumstances.” The Court held him to be wrong—and he himself acquiesced in the view of the other Judges. Then this judgment came under the review of the present Lord Chancellor, Lord Lyndhurst, in application for an interdict to restrain Mr Harford from working by hot-blast. His Lordship had no difficulty whatever in holding the patent to be good, and scouted

the idea of attempting to attach to the term *effect* the meaning of *heating the air*. (Chancery, p. 15.) The Lord Chancellor said, “Obviously that is not the meaning; it must be the ultimate effect in the furnace.” No doubt the common law court in England (the Jury Court) held that the construction of the patent, as to the meaning of the term *effect*, was matter for the Court. I do not distinctly know how either of the parties mean to treat this point in this trial. They seem both to have made the meaning of the specification in this respect matter of evidence; and although it is awkward that what should be taken as matter of law in one end of the island, should be held as matter of fact in the other, thus giving the party two strings for their bow, I hold it to be a question for the jury—I mean the sense of the term *effect*, in working on this specification; and I further hold it to be so under the present issues. I would refer the bar, among many other authorities, to *Crossley v. Beverley*; 3d Carrington and Payne, at the foot of page 515 and top of 516, before Lord Tenterden. Judgment of House of Lords, *Astley v. Taylor*, 25th June 1821; 1 Shaw's Appeals, p. 58. Hill and Thomson, 3d Merivale, 630.

But I shall also, if required by either party, state my own opinion upon it, in case the Court should hold it to be matter of law; and I will also put a special question to you on this point; so that if it is matter of evidence for you the jury, the point may be closed by this trial, unless, indeed, the Court should think your answer against the evidence. My object will be to prepare the result of the trial for every contingency which can be guarded against (except that of Judge or jury being wrong, as to which we can only do our best respectively) so that whatever view the Court or House of Lords may take on matters of law, this trial may not be thrown away. I understand, so far as I have hitherto been able to collect their views, that the defenders, however, concur in holding the point, to be afterwards noticed, as to the meaning of the term *effect* in the specification, to be a point on the evidence for the jury. But I am quite prepared to find that, notwithstanding the evidence led on that view of the point, the defenders will except, on the ground that I leave the point to you as a question for your consideration, with the aid of that evidence.

Having now stated the general law to you, there are some further practical directions, in point of law, which may very usefully aid you in considering the case, and the issues under which it is tried.

1. The first practical direction I have to give you is, as to the meaning of the pursuer's issue,—“Whether, in the course of the year 1840, and during the currency of the said letters-patent, the defenders did, in or at their iron-works at Househill, by themselves or others, wrongfully, and in contravention of the privileges conferred by the said letters-patent, use machinery or apparatus substantially the same with the machinery or apparatus described in said specification, and to the effect set forth in the said letters-patent and specification, to the loss, injury and damage of the pursuers.” Now, I have to observe to you, that the specification is to be read as addressed to artists, or persons of competent skill in the branch of manufactures or process to which it is applicable. Hence, *known machinery* need not be described when the use of them is to be made in carrying out the object of patent.—Tenterden in *Bloxam v. Elsee*. If, for instance, in an apparatus for improving the making of gas, a patentee should not mention or allude to a condenser—never notice it, yet in practice, if that is a part of all apparatus required for the making of gas, it is held that every one must know that a condenser must be used. In short, you are speaking to people who know the subject, and must be understood to know those things which are only the incidents in the particular process to which your patent applies.—Since you are not going over all the parts of the process, say of heating air, but only mean to direct generally that air is to be heated for a general result. I will show you how this arose in one case, for it is the particular *application of the principle* I am asking you to attend to. If a person is taking out a patent, and if it involves machinery that was perfectly well known before—his object not being to heat air—it is not necessary to go over the whole process of heating the air, any more than it is necessary to go over the whole process of making gas. I may give you an illustration of this from *Crossley v. Beverley*, 3 Car. and P. 513–5. In that

case this point occurred. At the trial Lord Brougham, who was then counsel, argued that the things comprised in the specification would not make a gas apparatus—that the specification was incomplete for want of a condenser. Lord Tenterden said,—“A workman would know that it was to be included.” Lord Brougham answered,—but the specification does not direct it to be put in. Lord Tenterden replied,—“But it does not tell you to leave it out.” Then the object here being to throw air hot into a furnace; and to do so, vessels are to be heated in order to *heat air*, you observe it is a specification addressing itself to persons who are to use hot air, and are to heat the air in order to get the hot blast; it refers to vessels intended to *heat air*—vessels in which air is to be heated. Now, if the patent need not, in order to be valid, describe any mode of heating air, but may include every form, then the specification is correctly framed to effectuate its object, if *legal*, for it then consistently omits any description of any sort or form of vessel in which air is to be heated. It assumes properly that persons constructing apparatus for heating air are to know the best form and shape of vessels in which air is to be heated—just as persons employed in gas apparatus are held to know that they must resort to a condenser in the course of the improved structure, though nothing is said of it. Now, then, if the object is to throw hot blast into the furnace, and to heat air, but not to describe vessels, then the specification properly assumes, that persons who are to construct heating apparatus know the ordinary rules and common conditions to be attended to in heating air. It leaves everybody to do it in the way they choose. It does not profess to be a patent for any particular mode of heating air. It simply says that the use, in particular processes of the air heated for fires, forges and furnaces, where blowing apparatus is required, and at a particular stage of the process, will do benefit to the furnace; and that is all. Gentlemen, I fairly tell you, that this is not an observation in point of fact—I might so treat it, but I think I am bound to tell you it is an observation in point of law. Whether that is a good patent in law is a different point, on which I have given my opinion.

The second direction I have to give on the first issue is what you must have already seen—that the sense in which the issue is to be understood, is much affected by the law as to the character of the patent. If I hold, in point of law, that he does not claim any particular apparatus, then there is no standard of apparatus in the specification with which to compare the Househill apparatus, and I shall immediately show you the importance of this on the patent. If the patent is good, in the general sense in which I have explained its legal import, and to which extent I hold it to be a good patent, then you will see that variances in the modes or kinds of apparatus are of no moment, provided that, in the processes referred to (the use of fires, forges and furnaces), the object of the particular contrivance or apparatus is to heat the air under blast, at the same stage of the process, viz., between the blowing apparatus and the furnace, and to throw it so heated into the furnace, to the effect of this improved application of air for that purpose. If the patentee has not tied himself down to any particular sort of apparatus or heating vessels—if the use of hot air, heated when under blast, is claimed, and legally claimed, in whatever sort of vessel the air is heated, then see the effect of this view of the patent on the pursuers' issue. By the direction I have given you, in point of law, I take on myself the responsibility of deciding the point you are to look to in considering this issue. The question of infringement comes to be this,—Does the party heat the air *in the same stage of the process* by mechanical contrivance, and to the effect set forth in the specification, of producing heat in the furnace? If so, then no variety of improvement in the apparatus is of any importance. On my view of the patent in point of law, and if you are satisfied in point of fact, that the description does not describe any particular apparatus—or if that also is a point of law—then in truth the use of the hot blast—that is, the use of the air heated in blast between the blowing machine and the furnace—is the use of the patent machinery, and is not substantially different but to the effect set forth. The light, then, in which the issue is to be viewed, must be received from the Court in a great measure. And on the view I take, and have stated on my own responsibility, I apprehend the question under the pursuers' issue is a very short—a very plain

question, not requiring much evidence to solve, and on which, though you must form your opinion, it is truly to be formed in a great measure in reliance on the law stated to you by the Court. The point was so stated and treated by Baron Parke in the English case. You recollect, *Ries Lewis*, No. 10 of defender's witnesses, was the manager of Hartford's and other works in Wales; and he stated, that while they used the hot blast, they used the pipes, model No. 7, the same as the Househill. This Hartford was the defendant in the English case, so that the question as to infringement was the same in both. No doubt you have plenty of opinions in this case; but in the light in which I have stated the issue to you, these opinions are of little consequence on either side, if the patentee has not tied himself down to one particular form of apparatus. Baron Parke, who is not in favour of the patentee on the law, yet says (page 138),—“Now the best way of disposing of this case, I think, will be to take those questions in order upon which you are to pronounce your opinion; and the first is, Whether the defendants have been guilty of infringing the patent? And I apprehend that there is no doubt they have, if the patent be a good patent, and if the specification be free from the objections that are raised to it, and if the specification is to be understood in the sense which I shall afterwards give to it. If the specification is to be understood in the sense claimed by the plaintiffs, the invention of heating the air between the time it leaves the blowing apparatus, and is introduced into the furnace in any way, in any close vessel which is exposed to the action of heat, there is no doubt that the defendant's machinery is an infringement of that patent, because it is the use of air which is heated much more beneficially, and a great improvement upon what would probably be the machine to be constructed by looking at the specification alone; but still it is the application of heated air, heated in one or more vessels between the blowing apparatus and the furnace; and therefore, if it should turn out that the patent is good, and the specification is good, though unquestionably what the defendants have done is a great improvement upon what would be the species of machinery or apparatus constructed under this patent, it appears to me that it would be an infringement of it, therefore your verdict upon that issue would be for the plaintiff, provided it is for the plaintiff on the other issues.”

Now, gentlemen, I don't take upon myself quite so much as is done there, by telling you what your verdict must be; but I say to you, that if the patent is what I have stated, then the use of heated air in any vessel heating the air under current, and applying it to the furnace, is the use of the agent mentioned in the patent. I have only to add farther, that on the view which I have stated of the patent, and if you are satisfied that no particular form of vessel is described and claimed by the specification, then there is no particular standard with which you are to compare the Househill apparatus, which the model No. 7 represents. (To the counsel.)—I suppose I need not trouble the jury with the description in the record of the defenders' apparatus. I suppose the model No. 7 adequately and sufficiently comprehends and exhibits their apparatus.

Solicitor-General.—Certainly.

The Lord Justice-Clerk.—The question is not, then, a comparison between No. 7 and any particular vessel, but an inquiry whether No. 7 is not a contrivance to heat the air under blast at the stage proposed, and for the purpose stated in the specification, and thereby substantially the patent apparatus. If that is in your opinion its character, then I state to you in law that the infringement is proved, as there is no standard or form of apparatus, on this view of the case, with which you are to compare the defenders' apparatus.

The next directions I have to give you relate to the counter issues. And first, as to the first counter issue,—“Whether the invention, as described in the said letters-patent and specification, is not the original invention of the pursuer, the said James Beaumont Neilson?” Mr Rutherford here drew a distinction between the first inventor and the public use by others of the invention, and maintained that the attempt to prove prior use is not comprehended under the first issue. The distinction in the abstract is sound; and certainly, in ordinary cases, this issue is not the one taken, or properly applicable to public use and exercise thereof in the kingdom. But a short recollection of the

way this issue was put, will satisfy my learned friends at the bar, that in this case I could not put that legal construction on it, and in this case I am of opinion that the inquiry cannot be excluded under this issue. I am quite aware that the issue is not, generally speaking, to be explained by any of the previous proceedings in the cause. But here I must remind the pursuers' counsel of the course taken as to the preparation of the issues. These issues first came before the Court as framed by the issue clerks. There were two versions of the issues, which as to this one were quite the same; because, whether the invention was used in Great Britain previously or not, both were agreed that the originality of the invention was involved. I then suggested that the first part of the pursuers' issue, as proposed by the issue clerks, should be taken as the defenders' counter issue. To this the Solicitor-General consented at once, and the issue was altered in Court, without any one perceiving that the one I so proposed to be transposed was open to the criticism stated by Mr Rutherford, viz., that it did not include prior public use, which the defenders' issue had distinctly included. Under this issue I could not hold that the defenders were excluded from proving the public use of the invention previous to the patent. I must hold that, according to the way those issues were framed, —though I admit not the best,—it was an oversight on the part of the Court in suggesting to the defender that this would try his case.—I say, as those issues were framed, I cannot, consistently with the course of procedure to which the Court were parties, exclude the defenders from proving the public use. I know in general that you cannot explain the issues by reference to the previous procedure; but in this instance I feel that I would be running counter to the justice of the case if I was to exclude that proof.

Certainly I would in the abstract agree with Mr Rutherford, that an issue as to a person being the first inventor, is not an issue as to public use.

Taking the offer of prior use to be competent to be made out in this case, if the defenders can prove it, I must now give you two directions in point of law on this issue:—

1. It is not sufficient to show that others, in experiments or incidental trials, had hit upon the same idea, not having made public the principle and the application of it to the same processes.

Even if the principle had been a known principle, still, if it is for the first time applied by mechanical contrivance and apparatus to certain processes in which it had not been previously used as an agent, the patent would be good, and still more when the principle and the mode of carrying it into a practical beneficial result are claimed, I have to repeat that the originality of the invention is not destroyed by proof, that in the history of the arts and trades of this country, some one or two, or even more persons may have apparently had some glimpse of the same conception in occasional and insulated experiments, which were not prosecuted nor made known, and from which, so far as the rest of the world were concerned, no result or change followed on former practice.

The second direction, in point of law, which I have to give you on this issue, respects what is *prior use*, so as to destroy the invention.

Now, this is well expressed in the words of the patent in this and other cases, p. 65. This is what the defenders must prove—that it was not new, in respect of the *public use and exercise* thereof in this kingdom. These emphatic and plain words hardly require explanation; they convey the meaning to you in a way that it is impossible to mistake; the question in each case is a matter of fact for the jury, but this is, in point of law, the sort and kind of use the existence of which a jury must find to be proved, in order to warrant them to find against the patentee. I may state to you, that great utility is one important element in the question of novelty. For if the process is of great, manifest, striking, and immediate *utility*, that is of the utmost importance to the point.—Could this have been previously in public use and exercise, without clear and abundant proof? The cases referred to at the bar have settled that the use must be *public use*; that the existence and trial of regular machines of the very same sort, if abandoned, if not used and introduced into practice, is not public use and exercise thereof in the kingdom.

Again, in the case of the suspension principle for wheels, it

was well stated by Mr Justice Pattison to the jury who tried that case.—“If, on the whole of this evidence, either on the one side or the other, it appeared that this wheel, constructed by Mr Strutt's order in 1814, was a wheel on the same principles, and in substance the same wheel as the other for which the plaintiff has taken out his patent, and that it was *used openly and in public*, so that everybody might see it, and had continued to use the same thing up to the time of taking out the patent, undoubtedly then that would be a ground to say that the plaintiff's invention is not new, and if it is not new, of course his patent is bad, and he cannot recover in this action; but if, on the other hand, you are of opinion that Mr Strutt's is an experiment, and that he found it did not answer, and ceased to use it altogether, and *abandoned it as useless*, and nobody else followed it up, and that the plaintiff's invention, which came afterwards, was his own invention, and *remedied the defect* (if I may so say), although he knew nothing of Mr Strutt's wheel, he *remedied the defects of Mr Strutt's wheel*, then there is no reason for saying the plaintiff's patent is not good.” Again I close what I have to say to you here, by the well-considered language of Chief-Justice Tindal, whose opinion I am always glad to quote, as he unites the character of the accomplished scholar with the most profound knowledge of law:—“It will be for the jury to say whether the invention was or was not in public use and operation at the time the patent was granted. There are certain limits to this question. A man may make experiments in his own closet; if he never communicates these experiments to the world, and lays them by, and another person has made the same experiments, and, being satisfied, takes a patent, it would be no answer to say that another person had made the same experiments. There may be several rivals starting at the same time; the first who comes and takes a patent, it not being generally known to the public—that man has a right to clothe himself with the authority of the patent, and enjoys the benefit of it, if the evidence, when properly considered, classes itself under the description of experiment only, that would be no answer. On the other hand, the use of an article might be so general as to be almost universal; then you can hardly suppose anybody would take a patent. Between these two limits most cases will arrange themselves, and it must be for the jury to say whether the evidence convinces their understanding, that the subject of the patent was in public use and operation at the time when the patent was granted.”

You will observe that it is settled, that the trials founded on as a proof of prior use—

1. Must have been *public*.

2. Must have been *CONTINUED*, not *ABANDONED*.

3. Must have continued to the time when the patent was granted,—I don't say to the very exact period, but it must have been known and used as a useful thing at the time.

The abandonment of trials as not successful or satisfactory, is a decided proof that the invention was not *turned to account for public utility*, and was not in public use and operation. With these directions as to the law of this first of the counter issues, you will probably be able easily to dispose of this part of the case on the evidence,—keeping in view that the defender must prove that issue. I have now to call your attention to the next two issues which the defender seeks, and is bound to establish.

2d, “Whether the description contained in the said specification is not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in the said letters-patent and specification?”

3d, “Whether machinery or apparatus constructed according to the description in the said letters-patent and specification, is not practically useful for the purposes set forth in the said letters-patent.”

Now, gentlemen, observe it is the *effect set forth* in the letters-patent—it is *not* to produce the same effect with No. 7,—which I take as a short description generally.

On these issues there are matters for me to state to you in point of law.

“Workmen of ordinary skill,” means those competent in the ordinary business and conducting of the particular trade—to furnish and construct apparatus for the purpose required. Certainly the pursuer does not satisfy the condition of the law, if he says that men of the greatest science—first rate engineers, could un-

derstand him, and would know what to do, or what directions to give. That is not enough. The specification must be for the benefit of the trade when the patent is out—it is addressed to those engaged in particular departments of trade, and who are to be employed in order to make apparatus for the purpose, those who are competent to make similar apparatus for similar purposes. But the terms in the issue do not denote common labourers or workmen employed under those who do furnish and construct such apparatus. We know that in many trades the most skilful workmen in the subdivision of labour, are conversant only with parts and portions of machines, and could not put together the whole. The workmen referred to by the law are those conversant with the construction, and principles, and rules of apparatus for heating air—and with the *object* of the blowing apparatus, so that the heating of the air shall impede the blast as little as possible. The apparatus, to attain the end, is to heat vessels in order to heat the blast. Then you are to apply to persons conversant with the rules, purposes, and conditions to be observed, and usually acted upon in heating air, and who construct and furnish such apparatus. Another important direction I have to give to you in point of law is this—when you are asked in the words of the second issue, “capable of producing the effect set forth”—or of the third, “practically useful for the purpose set forth,” &c.,—the point is not, whether, in first acting on the specification, persons would have furnished either Mr Condie’s pipes, or any contrivance at all so good, or giving so much benefit from the invention. You will see now the great importance of the *general directions* I formerly gave you as to the object of the patent, and the extent of the claim. The patentee does not profess to state any particular form of pipes for getting either a certain degree, or the greatest degree of benefit from the hot blast, and this shows you the fallacy in a great part of the evidence for the defender. The patentee says, the hot blast will produce heat in the furnace. Heat the blast in any way, you will get benefit; and then the question is, can apparatus be constructed by those competent to construct the heating apparatus, so as to have some decided benefit, more or less. If that shall be proved, then we have no question under this issue, whether the greatest benefit would at first have been attained in acting on the specification. Here I prefer putting this point to you in the words of my brother Judge in England, who tried this case last May, in London. Mr Baron Parke, in commenting on the opinion of a scientific witness, examined as to whether workmen could, from the specification, construct an apparatus which would be *most efficaciously used*—says, (143), “That, however, I do not think is the exact point. The point is, whether it can be used beneficially, taking it in the simplest form. If, in order to use it beneficially at all, experiments were necessary, about which a good deal was said by the Attorney-General, then the specification would be void. If it were necessary to use experiments in order to have the benefit of the invention, in which it is claimed by the specification, in that case it would be void; but if in this case, it is only necessary to have recourse to experiments, in order to have the full benefit that the subject is capable of,—it appears to me that it would not void the patent; because though it is a subject beneficial in its simplest form of application, it is a vast deal more useful when the improvement takes place; and in order to make the greatest improvement, unquestionably many experiments are necessary, and even, at this very moment, notwithstanding the great improvements that have taken place, there is no doubt that the matter is not in that state of improvement which, in all probability, it will be in the course of a few years. It does not appear to me, therefore, that what the Attorney-General has dwelt upon, with reference to the evidence—all the evidence in the case—that affects the patent. If experiments were necessary to produce any degree of benefit under the patent, then, in that case, I think the specification is void, for it does not give the requisite degree of temperature; but if the simplest form would be productive of benefit, it appears to me that the specification is good.” And again, Baron Parke says, (page 147):—“I have already told you, that if experiments are necessary in order to construct a machine to produce some beneficial effect, no doubt this specification is defective. If experiments are only necessary in order to produce the greatest beneficial effect, in that case I

think the patent is not void.” Then (at page 149) Baron Parke says:—“However, I think one may very well collect from the evidence as to Mr Neilson’s own acts, that he really was not fully aware either of the great value of his patent, and still more was not fully aware of the beneficial mode of carrying it into effect. That was discovered by persons more acquainted than he himself was with the science of heating air. Still, however, I think, if you are of opinion that the specification does disclose such an apparatus as to enable an ordinary workman acquainted with the subject of making blowing apparatus, and fitting up apparatus for forges,” (I put it rather differently, I should say workmen acquainted with the construction of apparatus for heating air, and so I observe Baron Parke ultimately put it,) “to construct an apparatus of some value, so as to make it worth while, it seems to me, that so far as this objection goes, the specification would not be insufficient.”

I take these passages, the more because that learned Judge adopted a view of the specification in which the Court held he was wrong, and had throughout a decided impression at the trial, that the specification was defective, thinking that it told those who were to work on it to disregard the rules as to heating air. But even with that view, you see how he puts this point. I have only to add, that I think he states this not so favourably as I can now do, and feel bound to do, guided by the judgment of the English Court of Exchequer and of Lord Lyndhurst. I have to tell you, in point of law, that under this patent not claiming any, or the best contrivance for heating the air, and at the least expense and trouble, the result which actually followed, viz., that persons in the trade, and in acting on the patent, contrived from time to time a great variety of contrivances, more or less valuable or costly, and at last came to settle generally into one form as better than others, was exactly the result which might be expected to follow under a patent of this general character, and that if the patent is good in law, then it gave no form of apparatus for heating air, but claimed the contrivance generally of heating the blast for the effect and end of producing heat in the furnace. The only point for you is,—will any contrivance which heats the blast produce that beneficial effect and end? If so, then the defender has failed to prove these two issues. I shall explain to you, that on this point I think the defender has, in the evidence of some of his own witnesses, given you the most decided and valuable evidence in the whole cause in support of the pursuer’s answer to these two issues.

But then the defender contends that there are directions in the specification as to heating vessels, and as to the form of the vessels, that these directions are at variance with all the rules as to heating air, and would mislead all persons conversant with heating apparatus, by directing them to act against all the known rules for heating air, *in order* to make blast hot, and *in order* to attain the end of this patent on the furnace. I am under considerable doubt whether others may view this as matter of law. In case it should be so considered elsewhere, I will, if either party requires it, state my opinion in point of law, so that they may not be cut out of the opportunity of making it matter of record. But individually I hold, under these issues settled to try this cause, that this is a question wholly for you, the jury—keeping in view the principles for construing the specification which I have stated to you, and proceeding as you will upon the view I have stated of the patent in point of law, as a general patent for the application of hot blast to fires, forges and furnaces, the air under blast being heated at a particular stage of the process, and not being a patent for any particular mode of heating air, so that directions to workmen on that subject are not to be presumed. Then another point is raised by the defenders, viz., that the heat of the blast, obtained even by the original forms of the apparatus, and before Condie’s pipes were introduced, was such as to burn the old dry twyres; that even the old water-twyres used at the great heat of refineries would not stand the heat obtained by the hot blast, even before the pipes represented by 5 and 7 were introduced—that the patentee did not tell how the mouth of the aperture into the furnace at which the hot blast was introduced was to be guarded, and that on this account, either the specification is defective in point of law, or does not enable benefit to be derived from the hot blast by Neilson’s invention alone. I am not sure exactly which view the defender stands on—whether it is defective in law, because it does not guard the furnace from the effect of the hot blast—or

whether objectionable in fact, because it is shown, as they allege, that without that invention, the benefit would not be derived at all. On the evidence, you will consider whether there can be, in point of fact, any circumstance of real evidence more conclusive as to the great heat obtained in practice with all the older contrivances than that, not only the dry, but even the old water-twyre would not stand—and whether the continuance of the use of the hot blast, notwithstanding these interruptions, is not decided real evidence also of the practical advantages to the trade. But on this point I must state to you, in point of law, that for the object and purpose of the patent, the specification is not defective, so far as it does no state how, or in what manner the mouth of the furnace was to be guarded, and that the patentee was not bound to do so. But I cannot say that this objection, in point of fact, is to be excluded from your consideration under the second and third issues—attending, however, to the rules I have given you in construing the specification, and also to the general nature of the patent, as I have stated it. The alleged difficulty of acting on, and using the hot blast before the new water-twyre was invented, may be used as evidence to show that the invention was of no practical utility until a new water-twyre was invented; for it is said by the defenders, that even the old water-twyre was of no use, although in many of the English works Condie's twyre is not yet used. But as a legal objection to his patent, I apprehend that it cannot be maintained, in point of law, that the patentee was bound to state how the sides of the furnace, where the hot-blast was to enter, should be protected.

To the bar.—Is there any other point of law to which either party wishes to direct my attention? Mr Rutherford and the Solicitor-General both said—No.

Now this brings to a close the directions which I have to give you in point of law. They have been certainly fuller, and perhaps more anxious than necessary. But knowing that one of the parties thought that the benefit of trying the point of law was lost to them in England, I have thought it my duty to state the case most fully, so that every point may be before the parties as far as it occurred; and I have also thought it my duty not to withhold any points of law, so far as their tendency and meaning might bear directly on the light in which you are to consider the evidence. You must, with your intelligence, perceive that the decision of the questions in the cause depends very little on the details of the evidence, but mainly on the general views you must take of the case in point of law, or on the general views you have as to the meaning of the specification. But still the details of the evidence must be anxiously attended to, in order to secure certain and safe judgment.

If your opinion on the whole cause shall be for the defenders, it will be sufficient that you find generally for the defenders on the first pursuers' issue, and for the defenders on the other three.

If your opinion shall be for the pursuers, then I have mentioned, that for various reasons I shall ask you to answer certain additional questions, and I am persuaded that by doing so, I shall save great uncertainty and embarrassment, especially as in England some points were held to be law for the Court, which I humbly think are points for you, and at all events, are made by these issues points for the jury trying the same. I have now to read to you these questions, and beg you will keep them in view in going over the evidence. I shall give you the paper afterwards. Of course, these questions are put on the supposition that you are in favour of the pursuers; for on the other supposition, you have only to find for the defenders on all the issues. The questions are,—

Whether, by the description in the said specification, the patentee did, or did not, refer to any particular form or shape, or mode of construction, of the air vessel or vessels, or receptacle or receptacles, in which the air under blast is to be heated?

Whether, by the use of the term effect in the specification, the patentee did, or did not, state that the form and shape of the air vessel or vessels were immaterial for the purpose of heating the air in such air vessel or vessels?

Whether the terms of the specification respecting the air vessels or receptacles, and the size and numbers thereof, are, or are not, such as to mislead persons acquainted with the process of heating air, so as to direct, and cause them to construct the vessels in a form or manner contrary to the ordinary and necessary rules to be attended to in heating air passed into vessels, for the purpose of being heated under the progress of the blast?

To the Bar.—If, before I have done, any objection shall occur to either of you, either as to the wording of those questions, or as to the propriety or competency of their being put, I should like to hear it."

The jury returned the following verdict:

"At Edinburgh, the 1st, 2d, 4th, 5th, 6th, and 7th days of April 1842 years. Before the Right Honourable the Lord Justice-Clerk, compared the said pursuers and the said defenders by their respective counsel and agents, and a jury having been empanelled and sworn to try the said issues between the said parties, say upon their oaths, that in respect of the matters proven before them, they find for the pursuers on all the issues; and farther, find that, by the description in the said specification, the patentee did not refer to any particular form or shape, or mode of constructing the air vessel or vessels, or receptacle or receptacles in which the air under blast is to be heated; and farther, find that, by the use of the term "effect" in the specification, the patentee did not state that the form and shape of the air vessel or vessels were immaterial for the purpose of heating the air in such vessel or vessels; and farther, find that the terms of the specification respecting the air vessels or receptacles, and the size and numbers thereof, are not such as to mislead persons acquainted with the process of heating air, so as to direct and cause them to construct the vessels in a form or manner contrary to the ordinary and necessary rules to be attended to in heating air passed into vessels for the purpose of being heated under the progress of the blast; and they assess the damages at £3060."

The defenders tendered the following exceptions,—the exception to the rule against the defenders leading evidence as to use at Irvine, as above, forms the first exception:

1st Exception—above.—Cases cited, *Russel v. Crichton*, 19th June 1838. *Neilson v. Harford*; Eng. Rep.

"2d Exception.—In so far as his Lordship did direct the jury that the patentee did not claim as any part of his invention, or profess to describe any mode of heating the air under blast in a vessel; or any particular form or dimensions of the vessel or vessels to be employed for that purpose."—Cases cited, *Neilson v. Harford*, pp. 222, 226, 228, 264.

"3d Exception.—In so far as, upon such view of the extent and nature of the patentee's claim, the said Lord Justice-Clerk did direct the jury, in point of law, that the said patent was valid, and did not direct the jury, in point of law, that the patent was invalid."—Cases cited, *Russel v. Crichton*, *ut sup.* Statute James I. c. 3, § 6. *Godson on Patents*, p. 36. *Jupe v. Pratt*, in *Webster on Patents*, p. 136. *Henry Blaestone for Bolton v. Bull*, p. 463. *Godson on Patents*, p. 93, Note p. 503. *Hornblower v. Bolton*; 8 Termly Report, p. 98. *Hullet v. Hague*; 2 Barn. and Adol., p. 370. *Godson*, p. 76. *Russel v. Cowley*; 1 Crompton, p. 39. *Jones v. Pearce*, *Webster on Patents*, p. 134, and *Minter v. Wells*, *Webster on Patents*, p. 114; also in *Tyrwhite's Reports*, and in *Crompton and Meeson*.

"4th Exception.—In so far as the said Lord Justice-Clerk did not direct the jury, in point of law, that the specification, by not giving a particular description of the nature of the said invention, and in what manner the same was to be performed, was insufficient, and did not comply with the condition on which the patent was granted.

"5th Exception.—In so far as the said Lord Justice-Clerk directed the jury that it was a question on the intelligibility of the patent and for them—whether the specification contains a special, limited, and restricted description, by which the inventor so described one sort of apparatus, that he cannot maintain that his patent is one which applies to all varieties in the apparatus which may be employed in the heating of air while under blast, and did leave that question on the evidence to the jury; and did not direct that the meaning of the specification, on a matter not involving words of art, is matter of law for direction by the Court."—Cases cited by defender, *Hullet v. Hague*, *ut sup.* *Gordon v. Graham*, 3d May 1841; *Robinson's H. of L. Rep.*

"6th Exception.—In so far as the said Lord Justice-Clerk did not direct the jury, that on the construction of the patent and specification, the patentee cannot claim or maintain that his patent is one which applies to all varieties in the apparatus

which may be employed in heating air while under blast, but was limited to a particular apparatus described in the specification."—Cases cited by defenders, *Crossley v. Beverley*; *Car. and Payne*, p. 515. *Ashley v. Taylor*; 1 Shaw's Appeal Cases, 158. *Hill v. Thomson*; 3 Merivale, p. 629.

"7th Exception.—In so far as the said Lord Justice-Clerk directed the jury that the sense of the term *effect*, in working on this specification, was a question upon the evidence for them, and not matter of law for direction by the Court.

"8th Exception.—In so far as the said Lord Justice-Clerk did not direct the jury that the term *effect*, as employed in the specification, meant heating the air while under blast and increase of heat in the furnace.

"9th Exception.—In so far as the said Lord Justice-Clerk directed the jury that if they were of opinion that the patentee had not limited himself in his specification to any particular description of vessel or apparatus, variances in the modes or kinds of apparatus are of no moment, provided that, in the processes referred to (the use of fires, forges and furnaces), the object of the particular contrivance or apparatus is to heat the air under blast, at the same stage of the process, viz., between the blowing apparatus and the furnace, and to throw it so heated into the furnace, to the effect of this improved application of air for that purpose.

"10th Exception.—In so far as the said Lord Justice-Clerk directed the jury, in point of law, that it was no objection to the validity of such a patent that it included every mode of applying the principle or agent so as to produce the specified result, although one mode may not be described more than another—although one mode may be infinitely better than another—although much greater benefit would result from the application of the principle by one method than by another—although one method may be much less expensive than another; and that this generality of claim—that is, for all modes of applying the principle to the purpose specified according to, or within a general statement of the object to be obtained, and of the use to be made of the agent to be so applied—was no objection whatever to the patent."—Cases cited by defenders, *Hullet v. Hague*, and *Russel v. Cowley*, *ut sup.*

"11th Exception.—In so far as the said Lord Justice-Clerk directed the jury, in point of law, that the proof of prior use of the patent invention must not only be

"(1.) Public, but

"(2.) Must have been continued, not abandoned; and

"(3.) Must have continued to the time when the patent was granted, not to the very exact period, but that it must have been known and used as a useful thing at the time."—Cases cited by defenders, *Strutt*, as cited in the charge.

"12th Exception.—In so far as the said Lord Justice-Clerk directed the jury, in point of law, that for the object and purpose of the patent the specification is not defective, so far as it does not state how, or in what manner, the mouth of the furnace was to be guarded, and that the patentee was not bound to do so.

"13th Exception.—In so far as the said Lord Justice-Clerk did not direct the jury, in point of law, that for the object and purpose of the patent, the specification was defective, in so far as it did not state how or in what manner the end of the pipe conducting the heated air into the furnace was to be protected against the effects of the intensity of the heat, and that the patentee was bound to do so."

Cases cited by Pursuers.—*Jupe v. Pratt*, p. 136 of Webster. 2 Henry Blaestone, p. 496. *Wheeler*, 2 Barn. and Adol., pp. 349, &c. *Hullet v. Hague*, *ut sup.* 2 Barn. and Adol., p. 370. *Russel v. Cowley*, *ut sup.* *Daniel*, in Godson on Patents, 274. *Minter v. Wells*, 1 Mason, Crompton and Roscoe's Rep., 506. Statute James I., c. 3, § 6. *Jones v. Pearce*, in Godson, p. 46. *Cornish v. Keane*, 3 Brougham's New Cases, p. 570. *Bloxam*, 1 Carr. and Payne, 567. *Walton v. Potter*, 14th Nov. 1841, Common Pleas, Law Journal. *Gibson v. Brand*, 4th and 5th May 1842. *Meadley*, Law Journal.

The discussion which took place on the bill of exceptions is sufficiently indicated in the opinions of the Judges at the advising of this date.

Lord Medwyn.—When this case was set down for argument,

I did not expect to occupy the place I now do, at your Lordship's right hand, and lament the absence of my learned brother from indisposition, as his intimate acquaintance with Jury Court practice would have enabled him to bring to the examination of this bill of exceptions the benefit of his practical experience on the subject, and as following him in the discussion, I would probably have been relieved from the necessity of going at any length into the case. I have, however, given the question all the attention in my power, and am now to submit the result of my opinion.

Before proceeding to consider the numerous exceptions taken to the charge in this case, I think it right to attend, in the first place, to what are the objections to this patent, which fall within these issues on which the case was sent to the jury, and in terms of which it was competent or necessary for the Judge to give directions to them in point of law, or to say that he left the point in their hands. Now, I do not see any issue which involved the validity of the patent, on account of the subject matter of it; whether it be for a manufacture within the meaning of the Statute; whether, in fact, the invention is such for which, in point of law, a patent could be granted and supported; whether it be a mere abstract principle, not embodied, or not involving a process to carry it into effect. Neither do I see that the question can competently be raised, that the patent is invalid because of vagueness—not sufficiently describing the subject matter of it. These unquestionably are good grounds of objection to a patent. But in the present discussion, which is on exceptions arising out of the trial of these issues, we must confine ourselves strictly to what falls within the issues. That is the only matter before us. Now, the first issue assumes the validity of the patent, and of the privileges conferred in it, and asks the jury to consider if these have been wrongfully infringed. Had the defender been satisfied that his case might be tried by a denial of, and defence against, this issue, on the ground that under the term *wrongfully*, he might have pleaded all his objections to the patent, showing that it could not support the privileges claimed under it, in respect that he could show that the pursuer was not the inventor, or that it did not fulfil the other provisions in the letters-patent, or that it was for a mere abstract principle, or that the specification was too vague, so that it was not wrongful in him to use apparatus to the same effect as the pursuers, he would have rested his case on that issue alone. But according to the course of pleading in such case, I presume he would not have been let in to such pleas against the validity of the patent under this issue, and would have been confined to the defence, that he had not used machinery or apparatus substantially the same, and to the same effect. But, at all events, here the defender has taken counter issues, and I conceive that all the objections to the patent which could be submitted to the jury, and relative to which the Judge was called upon to say anything to them, must be found in and restricted to these issues. Now, these counter issues are three in number, involving four defences, viz.—that the pursuer was not the inventor,—that it was in previous use—that the description could not enable a workman to make the apparatus,—and that the invention is not practically useful. But these are objections distinct altogether from invalidity or any other ground, and particularly, that it is for a principle merely, or that it is too vague in setting forth what he claims as his invention. Moreover, if the defender had any well-grounded objection to the validity of the invention, as not being the proper subject of a patent, or improperly set forth in the specification, arising out of the construction of these instruments, I think his proper course should have been—before going before a jury on such an issue as infringement, which, in fact, admits the validity of the patent, unless any of the provisions in the grant can be established against it, and which, according to practice, must be the subject of counter issues,—to raise the question of invalidity on the record, and to have pleaded it to the Court. It is raised on the record here, and if it be a question for the Court, as I think it clearly is, it would have been idle to have submitted the questions of fact involved in the matter of infringement to a jury, if the patent was such as the pursuer had no right in law to protect. It was said, that it did not arise till a certain construction was given to it by the Judge at the trial, and it was then only to be raised as an exception to the charge. But I rather think the construction contended for, should have been pleaded before-hand to the Court, as the true meaning of the letters-patent and specification, and that either this could not

be the subject-matter of a patent, or that it was too vaguely described to support this patent. I will not say that this point may not be raised yet. The record and pleas are broad enough to embrace it. Only I think it does not come within the scope of these issues, and consequently cannot be the subject of discussion in this stage of the procedure.

If I am right in this view, it will enable us to dispose of a good deal of matter which was pleaded to us. It will also be of use, as a prelude to the examination of these exceptions, to attend to what is the invention claimed by the patent. Its title is "an invention for the improved application of air to produce heat in fires, forges and furnaces, where bellows or other blowing apparatus are required." It is not an improved mode of heating air—it is not even an improved mode of applying air, but it is an improvement in the application of air,—that having succeeded in heating air between the bellows or blowing apparatus, and before it is propelled into the furnace, the effect will be produced which is intended, of greatly increasing the efficacy of the blast in the furnace. Looking to the whole description of the invention as given in the specification, I think this clear. A blast or current of air is to be produced in the ordinary way, and the patent disclaims being extended to this: the blast is to be passed into an air vessel, and it (the air vessel) must be kept heated at a considerable temperature—better red heat or nearly so, but so high a temperature not necessary for a beneficial effect, the effect of the invention, i. e., to produce heat in furnaces; hence the specification says, the form or shape of the air vessel is immaterial, and the manner of applying heat to it is immaterial; the materials of which it is made is immaterial, provided it be kept at a proper temperature. The size, however, must depend upon the blast, and on the heat necessary to be produced. All this seems quite clear, when it is considered that the patent is not for heating air in the air vessel, where form would be of the utmost consequence, but that the invention and the beneficial effect intended, is for producing heat, increased heat in furnaces, by heating the air between the furnace and the blowing apparatus. It is very clear, I think, that it is for the Court to construe the patent and specification to the effect of defining what is the claim made by the patentee. It is so laid down in the judgment of the English Court on this patent in Harford's case; and it is very material that this construction should be given to it, because there cannot be a doubt that towards the heating of air the shape and materials of the vessel in which it is heated are most material, so that such a statement as that they are immaterial, would be a false statement in a material part, and would void the patent. This adds to the certainty that the right construction has been put upon the patent, as to the subject-matter, as no mode of heating air is given, and if it had, I think it must have been disclaimed, just as the blowing apparatus is. Hence, then, the subject-matter of the patent plainly is to throw hot air instead of cold air into a furnace,—heating the air between its passage from the blowing apparatus to the furnace in an air vessel.

Now let us attend to the exceptions, and I shall begin with the 2d, and dispose of that before considering the 1st, as they are of a class and description quite different from the 1st, involving questions under patent law, and applicable to it alone,—the other being as to the form of process, admitting more of illustration from our system of pleading generally in ordinary cases before the Court, although, no doubt, there is a point in it applicable to patent-law practice also.

The 2d and 3d exceptions are connected together. In directing the jury, in point of law, that the patentee did not claim as his invention, any mode of heating the air under blast in a vessel, or describe any particular form or dimension of the vessel to be employed, I have already indicated my opinion very clearly; and had your Lordship directed the jury in the manner it is said you should have done, I think it would have been most plainly a misdirection—that you would have misconstrued the patent and ascribed an invention to the pursuer which he did not claim, and which probably would have been bad if he had claimed. I need say no more on this 2d exception. According to this view, it is very clear also, that I cannot sustain the 3d exception. It is founded on the direction which it is said should have been given under the preceding exception. If part of the invention had been heating the air under a blast in a vessel, and no mode

of doing this is described, nor any particular form or dimensions of the vessel given, the jury should not have been directed, in point of law, that the patent was valid—the direction should have been, that it is invalid.

Now, I have already observed, that under the issues in the present case, I do not think the question of the invalidity of the patent on this ground of law can be competently raised. It may be doubted, even whether as being a question of law, and on the construction of the patent, if the discussion involve no words of art which require explanation by parole evidence, an issue could be competently sent to a jury on this ground of invalidity. If it could, I think it would not be difficult to find an issue to try the point, whether it was sufficiently described. But be this as it may, I think it is not raised by the first issue, the only one under which it could be brought; and, at all events, as I am of opinion that no part of the invention claimed is for heating air in an air vessel, it would have been a misdirection to the jury to say, that the failure to describe the mode of doing so, or form or dimension of the vessel, rendered the patent invalid.

The 4th exception admits of an easy answer, after the discussion on the two preceding issues, that by not giving a particular description of the nature of the said invention, and in what manner it was to be performed, the specification was insufficient. If the invention claimed had been for heating air under blast in a vessel, the description of the mode of doing so would have been insufficient, and the patent invalid on this ground; but if this be not the nature of the invention, and the mode of heating air required no description, then the Judge could not have given the direction in point of law, which is here said he should have done.

The 5th exception bears, that the charge is wrong, in holding that it was a question on the intelligibility of the patent, and for the jury, whether the specification describes one kind of apparatus only, so that the patentee cannot maintain that it applies to all varieties of the apparatus for heating the air under blast, and that that question was left on the evidence to the jury. One observation very strongly strikes my mind here, that both parties seem to have considered this point as a matter for the jury, as I observe that much evidence is adduced on this very matter on both sides; and your Lordship seems only to have followed the course according to which both parties conceived the case should be disposed of; at the same time, with all deference to your Lordship, I have had difficulties on this point. The intelligibility of a patent, that is, whether the specification is such that a practical man of competent knowledge can, from the description alone, and his previous acquaintance with the subject, execute a machine with the effect intended, is unquestionably a matter for the jury,—it is a question of fact cognisable by them alone. But I think that the construction of the letters-patent and of the specification, to ascertain from them not merely what is the subject-matter of the patent, as whether it be a principle, or a principle carried into effect by a mode or manner of doing so, but whether the specification describes one specific mode of doing so, or embraces all modes, is not properly a question on the intelligibility, but as to the subject-matter of the patent, the nature of the invention, or rather the mode by which it is to be made practical,—the principle clothed with practical application, by which the effect intended is produced. The mode may be quite intelligible, so intelligible as to show what precise mode is claimed, and so described as to require no jury to say that a workman could copy it; and the whole question might be, if the patent covered every mode of producing the same effect, as in the case alluded to in the pleadings as to the evaporating process. I scarcely think the point is for the jury, but for the Court, whether this intelligible mode is exclusive of all others, or whether, though a step in the process, the mode—the peculiar mode of obtaining it—is not the subject of the patent. Thus, for instance, in the present case, the invention is construed by the Court to be not for heating air, but for blowing heated air into the furnace, and the description of the air vessel giving no particular mode of heating air in it, necessarily leaves every mode of producing such heated air, when used for this purpose, protected by the patent,—a question, I incline to think, rather for the Court, as depending on the construction of the patent and specification.

But the pursuer says, that be it so, and that this should not have been left to the jury, the defender cannot take benefit from it, unless he can show that the Court ought to have come to a different opinion on the point from what the jury did; and that as the 8th exception, which contains the direction which it is said should have been given on this point, that the patentee cannot claim all varieties for heating air while under blast, but was limited to a particular apparatus described in the specification, is not such as your Lordship should not have laid down, but the contrary, the result would have been the same had it not been left to the jury, but kept in the hands of the Court.

The defender, on his part, argues, that although he may be wrong in the law which he says should have been given to the jury, still if he be right in his plea, that it was a point for the Court and not for the jury, he is entitled to have the 5th exception sustained.

On this point, also, I feel a great deal of difficulty. I believe it to be a rule of practice, in the application for a new trial on the ground that the verdict is contrary to evidence, to refuse the trial if the evidence admitted or rejected could not affect the result, or if the party could take no benefit on other grounds, by setting aside the verdict; but I do not know that the same rule applies as to a question of law such as I think the question is,—whether a point is to be sent to the jury, or reserved for the decision of the Court? No case in our practice of jury trial was referred to, and I do not recollect any English case on this point, which it was said could assist in guiding us to the determination of this matter. At the same time, I freely own I was much moved by the argument, from principles so well explained by the senior counsel for the pursuer, more especially when I cannot shut my eyes to the extreme hardship of holding the whole expensive proceedings in a case such as this, which occupied so much time, and occasioned such anxiety, to go for nothing, on a ground which could not affect the justice of the case, or make any difference in the result. For on the principle assumed, that the conclusion of the jury was right as to their opinion on the point, if a new trial were granted, the same verdict would be returned, provided the same evidence was laid before the jury (for the verdict here is not to be impeached as being against evidence—that point, we were told from the bar, has been given up), and your Lordship carefully, and with particular attention to the interests of the parties, took care that the opinion of the jury should be expressed on the point, that the patentee did not refer to any particular form or shape of the air vessel.

Now the argument was, that if a party excepts on the ground of law omitted, he must state what is the law omitted which he says should have been laid down; and this exception will not be sustained unless the suggested law be good law, such as the case required. But if the Court leaves the issue to the jury, involving law as well as fact, and the jury answer the issue, is there any difference as to this point, between leaving it to the jury expressly, and saying nothing about it? In both cases, the direction is withheld—in the one, by saying nothing about it; in the other, by saying it is for the jury. If in the case of omitted law, the law which should have been laid down must be stated, and that must be sound law in the case,—must not also the law be stated which the Court ought to have taken to themselves, which they should have told the jury they must take from the Court, and this law must be such as would not support the verdict, but would lead to an opposite result? If the exceptor cannot ask such law—law different from what the jury followed,—ought his exception to be sustained, unless he can say that the Court reserving it to themselves, would have produced an opposite verdict? There is certainly much good sense in this view, and I am inclined to adopt it as a sufficient answer to the difficulty I have under the 5th exception.

Now the same observations apply to the 7th and 8th exceptions. Supposing that the defender was right in maintaining that the meaning of the term *effect* in the specification was to be settled by the Court, and was not a question on the evidence for the jury, I am very clearly of opinion, that *effect*, as employed in the specification no less than four times, does not mean heating the air while under blast, but the ultimate effect in the furnace by blowing heated air into it; and the view taken

of this by the jury, is the direction that the Court should have given on this point.

The 9th exception cannot occupy much time, after the points which have already been disposed of. It was laid down, and as I think, most correctly, that the patent does not claim any particular sort of apparatus or heating vessels,—that there is no standard of apparatus in the specification with which to compare the defender's apparatus—and that this does not affect the validity of the patent; on the contrary, it affords a better protection to the invention, as it applies to every process or mechanical arrangement by which the air is heated in an air vessel between its passage from the blowing apparatus into the furnace, and variances in the modes or kinds of apparatus are in this view of no moment.

It cannot therefore affect the validity of the patent, if this point could be raised under these issues, as I think it cannot—that it includes every mode of raising the temperature of the air in the air vessel, producing the increased effect in the furnace by propelling heated air into it; all modes of doing this in the same stage of the process being protected by the patent, and not rendering it invalid.

The 11th exception was only considered as to the third condition implied in the prior use; and I cannot help thinking that if it was objectionable at all, it is because it laid this down, that the use need not come down to the exact time of obtaining the letters-patent. But I do not object to the direction here. It must be a new invention—it must not be known and used as a useful thing at the time; and a previous invention may have ceased to be used for a week or two, not implying its abandonment from want of beneficial effect, say from unskilfulness, or from some trifling defect in the machinery, but from want of funds, or some such cause, leading to a temporary interruption.

The 12th and 13th exceptions may be taken together—that the jury were not directed, in point of law, that the specification is defective, by not stating how the mouth of the furnace, and also the end of the pipe conducting the heated air into the furnace, were to be protected against the intensity of the heat, and that the patentee was bound to do so. Now, this question might fall under the consideration of the jury under the 2d and 3d issues, but if the jury were of opinion, that without any such description, a workman of ordinary skill could make apparatus to produce the effect set forth in the letters-patent, it was for the Court to say whether the omission to state what it is maintained the patentee should have stated, vitiates the patent. It is admitted that this is a question of law; and as it did not raise any difficulty as to the intelligibility of the patent falling within the scope of the 2d and 3d issues, if it goes to the validity of the patent, on the ground that the specification does not describe what it ought to have done, it cannot come within the present discussion. But I think it was not necessary to describe how these parts of the machinery should be guarded. It was a known process before. Any workman of competent skill knows how to do it, and I presume if the *twyre* had been described, it must have immediately been disclaimed as part of the invention. Therefore those exceptions must also be disallowed.

There only now remains the 1st exception to consider; and I am ready to admit that I feel more at home in the discussion of this objection than in those I have been hitherto considering.

The exception regards the *time* of inquiry which the defender proposed entering into, in order to show that the invention was not new, but had been in prior use; and the grounds on which that line of inquiry, and the witnesses who were to instruct such prior use, were excluded, are stated at page 66.

It is said that the averment is made generally on the record, that this invention was known and practised prior to the date of this patent, both in England and Scotland; and farther, that before closing the record, a note of objections was given in under Lord Brougham's Act, which stated that it was known and publicly practised at Irvine, Greenock, Glasgow, and various other places in the counties of Ayr, Renfrew, and Lanark, and at various places in Mid-Lothian by various iron-masters, and iron-founders, anchor smiths, and others; and it is said that this particularity sufficiently supplements the generality in the record, and ought to have let in the evidence and line of inquiry which was rejected.

Now, before going farther, I must own that I have great hesitation in thinking that the section of the Act founded on, (the 5th) applies to Scotland at all. The 1st section and the 4th, as to the prolongation of the term for a patent, certainly apply to Scotch patents, as being an amendment on the law of patents generally, and reference is made in the first directly to Scotland. But this 5th section applies to the system of pleading in the English Courts, and is intended to obviate what was held there to be a defect in trying such cases as this of patent, but which could not be objected to against our system of pleading, which requires no aid from such a regulation as this, nor can derive any assistance from it in securing such a statement of facts and circumstances, as to prevent any thing like surprise at a trial. I cannot conceive that it was intended to interfere with our system of a closed record on a revised condensation and answers, so as either to make the exclusion of unexpected evidence either more stringent or less so; and when I look at the terms of this section of the Act, I cannot help thinking, that besides the object of it, to correct the want of specificness in English pleading, the terms which it uses sufficiently exclude the idea that it was intended for our practice, or is adapted to it. It bears, that in any action brought for an infringement of a patent, the defendant on pleading thereto, shall give to the plaintiff, and in any *scire facias* to repeal such letters-patent, the plaintiff shall file with his declaration a notice of any objections on which he means to rely at the trial. Now, all this may be very necessary under the English form of pleading, while it is already most fully accomplished by our form of process. Although the enactment, so far as the subject-matter of a patent is conceived, may extend to Scotland, I think it would require something very imperative, and not the mere applicability of the other portions of the Statute to this country, to make us also import from it a form of pleading plainly adapted to England alone, into our practice, so recently amended by the Legislature, and when our pleadings, according to this statutory description, ought to embrace everything which the notice of objections in England is required to set forth.

I think, therefore, that we must look to the closed record, the foundation of these issues, and on the averments in which the parties agreed to close, and of course to foreclose themselves as to all other averments in fact, and we must consider whether the defender made such statements as to entitle him to go into this line of inquiry. Now, I say that the pursuer would have been misled by the record, for that he never could have expected any proof against his invention from the examination of an anchor smith using a common smith's forge in the town of Irvine, or any similar evidence. The record led him to expect quite a different state of facts to be proved against his being the inventor of this improvement. The defender specifies Chapman's invention. He next states the prior use of Neilson's invention, both in England and Scotland, particularly at two iron-works in Yorkshire, and one in Staffordshire, mentioning them by name, referring also to the patent of Botfield and Mr Stirling, and the mode invented by Mr Jeffries. Now, I hold it was quite incompetent, after exhausting the line of evidence here pointed out, or using as much of it as the defender thought available to him, to resort to an inquiry as to the use of heated air in a smith's forge at Irvine, about six years before the date of this patent, which does not seem to have been followed in other smiths' forges, nor described in any of the philosophical journals of the day as an important improvement. The record assuredly gave no information which called upon the pursuer to expect such a line of inquiry and evidence, or would have enabled him to meet it. If this line of inquiry had been allowed, and the verdict had been against him on the ground of prior use, I think he must have been allowed a new trial on the ground of surprise, and therefore that this evidence was properly refused.

I perceive that in a recent English case, where the note of objections had specified the prior use by certain persons named, and by others, the Judge at Chambers made the party strike out this general expression, and confine the proof to the persons named. In the case of *Russel* with us, it was specified on the record that there was prior use of making gas pipes by various persons both in Glasgow and Edinburgh; this generality was not objected to, nor brought before the Court, for the practice was

recent, and in the hands of few. Those who manufactured them were well known, and no further particularizing was required by the party. This is no proof that greater explicitness would not have been required, if it had been necessary and insisted in; it is only proof that in that case the party did not wish for further notice in order to defend himself. Here I think it was different, more especially when the references to such works as could have used the hot blast in furnaces were so precise and numerous.

I am, therefore, upon the whole, for disallowing the bill of exceptions.

Lord Justice-Clerk.—This bill of exceptions raises many important questions in patent law. It also raises several important points as to our system of pleading, and as to the principles on which bills of exceptions are to be disposed of. In giving my opinion, I shall not go over the law stated at the trial. The directions, in point of law, then stated were the result of much consideration,—although purposely stated in a variety of forms, and with (perhaps) unusual fulness, in order that I might be sure that the jury were able to follow and apply these directions. To that law, after attending to the arguments of the defenders, I now adhere. I shall confine my opinion, therefore, chiefly to the other questions which occur on this bill of exceptions.

In reference to the objections stated to the charge, I think it is necessary to classify them, in order to give a consistent opinion.

One very important question on this bill of exceptions is, whether some of the points are open under the issues which are in the course of trial? Now, to bring out that point clearly, and to show the importance of fixing the meaning of the issues, I have to notice, in the first place, that the line of objection urged against this patent was inconsistent with itself. One broad ground taken was, that this patent claimed too much,—that it claimed the process of heating air in a vessel without any particular directions as to that process, so as to make any new invention in what is universally practised,—and that it also claimed the introduction of hot blast, in the abstract, into fires, forges, and furnaces, without giving in the specification any directions as to the application of that principle, and without the specification of any mechanical contrivance, being in truth a patent for an abstract principle:—And hence that the patent was void,—1st, for claiming too much, and claiming what was not new; and, 2d, as a patent which, when the specification was considered, was merely for a general philosophical principle. But at the same time the defenders contended that the patent and specification applied only to one particular sort of apparatus,—was, in the description of the application of the principle, so limited to one particular kind of apparatus, that all other contrivances for effecting the same object, and in which there was not an adoption of the particular forms and shapes of vessels and apparatus described in the specification, were not, and could not, fall within the operation of the patent, but were necessarily open to the use of all the world, inasmuch as the patentee had limited himself wholly to one form of apparatus as the only mode in which he knew that his principle could be applied, or at least the only mode which he had described. And hence he contended that the series of pipes used by the defenders were substantially different from the apparatus which alone was described in the specification, viz., large vessels very ill adapted to attain a great heat in the air.

These two views of the patent and specification are fundamentally different; they adopt respectively totally opposite constructions, and are necessarily at variance the one with the other.

Now, before trial, and in a discussion on the validity of the patent on any legal pleas which could be started, it is true a party may argue alternatively; contending, 1st, that the patent is bad on account of vagueness and generality, or, 2dly, if that ground fails, on any other.

But of the two views urged in this case, the second could only be entertained at the trial; for whether the machinery was substantially different from that described in the specification, and whether the description in the specification was so worded as to cover it, depended wholly on evidence by which each was to be explained.

In the present case, these two views could not have been decided before trial, but one might.

But, further, though a party may, to the Court before trial, urge objections in point of law which are inconsistent, and the one of which only arises when the other is overruled, or on the supposition that it shall not be entertained—yet this I apprehend to be a clear point, viz., that issues for the trial of a cause by a jury cannot be framed on any alternative or inconsistent view. A general issue may admit of every variety of line of argument or of plea open on the record. But the case was not tried on a general issue. There is one issue given to the pursuer, and three issues given to the defenders, on certain special pleas or grounds of objection against the validity of this patent.

These are in truth all special issues, or rather, I should say, *specific* issues.

I am aware of no authority for holding that issues of this character can be framed on alternative views so as to be applicable equally to totally opposite views of the whole case. Such a notion is utterly inconsistent with the theory and object of framing issues. The theory is, that you have ascertained and specified the point to be tried under the issue; the object is to exclude any other, and to attain certainty by that result.

The defenders did not contend that *their* counter issues could admit of this alternative course of pleading, or indeed of the general objections stated as to the invalidity of the patent in point of law. They contended that it was the pursuer's issue which opened up to them these objections, however contradictory the view on which they are severally founded.

To recommend their line of argument the more to the Court, the motion for the new trial was abandoned, and very little even explained as to the particular kind of apparatus to which it was said the specification was exclusively restricted. In this respect the argument took a turn quite different from that urged in the Exchequer in England. Indeed the Solicitor-General seemed to make this limitation consist in the description in the specification being applicable merely to the *process of heating*, while the real ground of defence was, that the patentee had led those, to whom the specification was addressed, to understand that *large vessels, cubical vessels* increasing in size with the extent of the blast, not only without attention to the extent of the heating surface, but to the diminution of the heating surface as you required increase in the capacity of the blast, were the only forms to be employed in order to produce the effect intended.

But the pursuer could not have intended to take an issue which was adapted to the alternative pleas of the defenders.

Nay, when the defenders can only bring in these general objections in law to the validity of the patent as *included* under the pursuer's issue, their course of pleading must be unsound; for the pursuer's issue in a patent case is not intended, in our practice, to embrace the grounds of objection stated in law against the patent. The defender cannot enter into these without counter issues. The pursuer's issue is framed on the very opposite view, viz., that there is a *prima facie* case for the patent to entitle him to an issue of infringement—holding the patent to be good, until the defender makes out in defence that it is bad under any of his issues. By bringing the action, the pursuer puts the validity of his patent in issue in the cause,—that is, he exposes it to any objections which the defender can state against it. But if no ground of invalidity is urged to the Court in bar of trial, or if such is overruled, he is entitled to an issue of infringement, which issue assumes the validity of his patent, provided the defender cannot make out any of his counter issues; and if the defender takes none, then the only question at the trial is infringement or not.

This point, which clearly is the result of the law as to patents under our system of pleading, was fully discussed and finally decided in *Russel v. Crichton*, June 19, 1838, 16 S., 1155. The rubric of this case, as there reported, is,—“In an action by the holder of letters-patent, concluding for interdict and damages on account of alleged infringement of the patent—Held that the patent afforded *prima facie* evidence of the originality of the alleged invention, but that the defender was entitled to take an issue of denial of the invention.” The Court, after full argument, gave the pursuer, in that case, an issue of infringement, as the proper issue.

This matter did not pass in *this* case without observation. In the draft of the issues reported by the Lord Ordinary for the consideration of the Court, as to other points, the pursuer's issue

included an inquiry into the validity of the patent on one point, viz., originality of invention, laying the *onus* on the pursuer, but only on that one point. The issue, even as framed by the pursuer, included that point. In the course of the discussion, I pointed out, with the concurrence of the rest of the Court, that this was a mistake under the decision in *Russel v. Crichton*, and the issue was altered accordingly, leaving it only an issue of infringement. The issues were, after discussion, settled in this case to the satisfaction of all parties,—so much so, that the Solicitor-General did not desire to be heard in reply upon them, after the proposed alterations were stated in the course of Mr Rutherford's speech—the defenders having the right of reply in that discussion.

Supposing the pursuer's issue had stood as originally framed, is it not clear that one point only would have arisen under it as to the validity of the patent, viz.,—Whether Neilson was the inventor? If he had made out that (probably the *onus* would have been easily satisfied), then there remained only the question of infringement.

But this first question was, as I have mentioned, struck out *ex proposito*, on the ground distinctly, that the pursuer was entitled to have an issue of infringement, holding that he had a *prima facie* case under the patent to claim damages for infringement, until the defender, by his counter issues, could show the patent to be bad—no plea in law against the patent being stated to the Court in bar of trial, or to be decided before trial. This issue of infringement, I apprehend, assumes the patent to be valid, so that if the defender's counter issues fail, and if the apparatus is, in point of fact, substantially the same in the opinion of the jury, the pursuer's issue is proved and exhausted, and he is entitled to a verdict.

It would throw our proceedings into utter uncertainty, and, indeed, render the form of issues not only an useless but a mischievous farce, if, although the defender failed in all his counter issues, embracing each a distinct ground of objection to the patent, he could still say, that under the pursuer's issue it was open to him to contend at the trial that the patent was invalid on any other ground which happened to be mentioned in the record. If so, why was the defender to take any counter issues at all on some grounds of objection. These, on the hypothesis of the argument we are considering, would have been equally open to him at the trial, without any issues. Yet, while he takes issues on three (I may say four) grounds of objection, each one of which would entitle him to a verdict, he says he has behind and in reserve, under the pursuer's issue of infringement, as many grounds of objection as the general plea on record, of vagueness and generality, and as to the patent being for a principle alone, will enable him to raise on the construction of the specification.

I am very clearly then of opinion, that the principle on which the pursuer's issue proceeds, excludes all general objections to the invalidity of the patent in point of law.

It was contended that the word *wrongfully* raised these objections. If so, then no counter issues *need ever be taken*. But that word is necessary to show that the pursuers aver that the same machinery was used without a license, or sanction, or permission of any sort, so as to make the infringement not only in law, but in fact, a ground of *damage*—that it was continued to be used after challenge—that it was used in knowledge of the patent, deliberately, systematically used,—in short, to meet every plea of mitigation or extension.

I must here observe, that there is one practical distinction to be attended to, as to our issues in patent cases. In England, the actions seem to be intended only to try the question of right or infringement, and the damages are obtained in Chancery, as I understand, by insisting for an account of the extent to which the business was carried on by means of the patent machinery. Our issue necessarily is to try the claim for damages also, and hence the word *wrongfully* is of great importance to include all the averments which may exclude pleas in mitigation.

Some attempts were made to endeavour to include the general points raised by the exceptions, under the words, “in contravention of the *privileges* conferred by the *letters-patent*.” This is plainly frivolous. The term “*privileges*” refers to the monopoly or protection of the patentee, and the issue is confined to the *privileges* conferred by the *letters-patent*. Now,

the *letters-patent* do not contain the *specification*, on which alone these pleas can be raised. The *letters-patent* bestow the privilege—the grant of monopoly—the protection, under a proviso not originally required by Statute, but introduced by the Crown,—that the invention shall be fully described, and that in a separate instrument, which time is given to prepare. The reference, then, in the issue to the privileges conferred by the *letters-patent*, cannot raise any question as to the validity of the specification, when the rest of the issue itself does not.

My opinion then is, after very full consideration, that the question as to the validity of the patent on either of these three grounds—for they are in truth three separate grounds,—1. In respect of the extent of the claim: 2. Of the generality and vagueness of the specification, so far as that is pleaded to the Court as matter of law for a definite direction to the jury, that the patent is invalid on that ground, as in the fourth exception, so as to leave the jury no question under the issues at all for consideration; and, 3. In respect of the subject of the patent not being within the law of patent inventions, but being an attempt to appropriate merely an abstract principle, without any application to mechanical contrivances or tangible means:—My opinion, I say, is, that the question as to the invalidity of the patent, on any of these three grounds, is not comprehended under any of the issues in this cause sent to trial.

I have considerable doubt whether the *last* of these grounds of objection is raised even by any of the exceptions, unless it is under the 4th, and yet the 4th might be sustained on grounds wholly different. The 3d exception does not raise it; I do not think the 4th does;—For the 3d only states, that, on the view which I took of the nature of the patentee's *claim*, I ought to have held that the patent was invalid; and the 4th is confined to the vagueness of the specification;—And the 9th and 10th cannot, I think, be fairly so taken.

The question as to whether the validity of the patent on these grounds is raised either by the pursuer's issue, or by such counter issues as the defenders have here taken, is one of great practical importance to the successful conduct of trials. I complained at the trial of the uncertainty in which I was left by the defenders as to the grounds on which they stood. The main objection, in point of law, on which they now rely, they did not specifically state, until I called on the Solicitor-General at the close of his speech to say, seeing that it pervaded his whole case, whether he required a direction from the Court on that point, so as to take the whole cause from the jury. That course was very inconsistent with the line of evidence which the defender intended to lead, and was meant, naturally enough, to be reserved as an exception to be stated to me after my charge was closed. But the whole matter for the Court and jury was thrown into a most embarrassing shape, for one-half of the defenders' pleas are inconsistent with the other set, and arise only on hypothetical conjectures as to the construction of the patent being taken the one way or the other. He took neither view. He takes neither in the exceptions. He states two views quite irreconcilable, and asks for opposite and contradictory directions in point of law. Certainly issues could not have been framed with the intention of introducing such uncertainty and embarrassment. And I am confirmed, by reflection, in the opinion I stated at the trial, that the three grounds of objection which I have referred to are not comprehended in, or raised by any of the issues sent to trial. On that ground alone, I would disallow several of the exceptions—the 2d, 3d and 4th.

I do not say that the grounds of objection to the validity of the patent now adverted to ought to have been raised before trial, or could only have been raised before trial. To be sure, as the defenders have argued the case, they have shown us that they might all have been so raised. But the party may take issues so as to embrace them: And it may happen that none of them can be brought out clearly, even as points of law for the Court, except at a trial. Further, all the three points may in some cases—certainly the 2d and 3d—the vagueness of the specification, and the subject-matter of the patent, may involve matters on which the opinion of a jury may be required, and I can very well understand that the Court in many cases may refuse to decide any of these points before the case is fully developed and explained by the practical evidence as to the object of the patent, and the mode of working on the specification.

But if the points are not decided before trial, they must be specially comprehended under the issues which are framed.

The defenders say that issues could not be framed so as to embrace these grounds of objection. That is a singular line of argument, when it is contended that the issues in this case do comprehend all these questions. But there could be no difficulty whatever in framing issues on any of these grounds of objection. In the course of the discussion I stated the terms of such an issue, to which no objection was made. It was further urged, that such issues would be only contrivances to send questions of law to the jury. The observation of Lord Moncreiff was conclusive—that it is very strange, then, that the existing issues should do that without contrivance at all. But it does not follow that the issues would embrace only matter of law.

The consideration of this point is the more important, for it is right to explain that we have no proceeding of the same character, as I understand it, as a motion to arrest judgment. It is competent to a party, after verdict, to show that the verdict cannot be applied at all, or cannot lead to judgment wholly or at all in favour of the other party, or that a verdict only embraced a part of a cause, and did not exhaust it, and that he has still pleas conclusive in his favour remaining on the record, and undisposed of and not abandoned.

How far, according to our system, after issues are taken as the only grounds of defence against an issue by the pursuer, *leading to and claiming damage*, and requiring a sum to be assessed as damages actually due by the one party to the other, it is competent and open to the defender to maintain that he did not abandon any pleas which were on the record, and which might either have been discussed before trial, or made the subject of issues, will be matter for very serious consideration, if ever raised.

That all the grounds of objection to this patent should not have been embraced in these issues may now be subject of regret. I own, at the time the issues were brought before us, I was surprised, having the full report of the English case in view, that the defenders contented themselves with the issues they proposed. But the Court could not ask, whether they did not take other issues on different grounds.

The defect is not one with which the Court is chargeable, nor could the Judge at the trial aid the defenders further than he did, viz., by stating his opinion on all the points they raised, although he thought them not under the issues.

In the general view which I have taken of the true import and character of these issues, viewed without special reference (if it is possible so to view them) to matters purely of technical form, and to our peculiar system of pleading, I have been very much confirmed by the two cases in the Common Pleas, *Walton v. Potter*, and *Gibson and Campbell v. Brand*, to which I called the attention of parties in the course of the argument. The examination of these cases, in which the points come out very clearly to my mind, has been to confirm me in the opinion I expressed at the trial, not only on this, but other points in the cause. I think the issues in these cases were very analogous to those we have here; and the Court in both held these general grounds of objection to be excluded. Comparing the issues in these two cases with the issues under which this cause went to trial, and with the issue raised by the fourth plea in the cause, on this patent in the English Exchequer, I think the point comes out very clearly as to the construction to be put on our issues.

The fourth plea for the pursuer in that case (*Neilson, &c. v. Harford, &c.*) is as follows:—"That the said instrument in writing, in the declaration mentioned, and whereby the plaintiffs, in their said declaration, allege that the said James Beaumont Neilson did particularly describe and ascertain the nature of the said supposed invention, and in what manner the same was to be and might be performed, was and is in the words and figures following, that is to say," (here specification engrossed) "as by the said instrument in writing, now remaining enrolled in the High Court of Chancery of our Sovereign Lady the now Queen Victoria, will fully appear; and the defendants in fact say, that the said plaintiff, James Beaumont Neilson, did not by the said instrument in writing, under his hand and seal, or by any other instrument in writing, under his hand and seal, at any time, within six calendar months after the date of the said letters-

patent, particularly describe and ascertain the nature of his supposed invention, and in what manner the same was to be performed, and by reason thereof, the said letters-patent became, and are wholly void; and this the defendants are ready to verify."

No doubt in England the difference is this, that if the points are raised by the record, they must (if I understand rightly the import of a remark of Chief-Justice Tindal in one of these cases) be in issue before the jury, if not disposed of before trial by demurrer. With us, although on record,—yet as we frame the issues which are to try the cause, it is admitted and clear, that they must be embraced in these issues which we frame. But that is a difference which only gives the greater point and importance and significance to our issues, carefully and specially extracted from the pleadings, at the desire of parties, by the issue clerks, in order to embrace and ascertain their case,—to try all they intend to stand upon,—and which they have the means always of discussing and objecting to before the Court, if dissatisfied with the terms of them, as was done in this cause.

Upon the grounds of objection to the patent, which have however been raised under this bill of exceptions, if competent under the issues, and competent under the exceptions, I retain the opinion in point of law which I stated to the jury. I shall not enlarge upon these matters. But I will only explain that the determination of the nature and extent of the patentee's claim, which may require the Court to look for certain purposes to the specification, and which clearly involves matter of law, in no degree whatever imports that the clearness and import of the specification for practical purposes and to practical men, is also matter of law, so far as there are questions at the trial upon that specification. The one may be decided before trial,—satisfactorily and justly decided in favour of the patentee; and yet the specification may be utterly insufficient, and may be so found at the trial (whether by the Court or the jury), without any inconsistency with the prior decision on the nature of the claim. A person's claim may be quite correct, but he may not afterwards have given such a description as to describe and ascertain distinctly the nature of his invention. I think it is right further to add, that I am quite aware that in many cases this question cannot well be disposed of except at trial. It may partly depend upon matters on which the opinion of the jury must be taken. In this case, I think the question, if comprehended under the issues, was purely matter of law; and for the decision of it, I do not think that the sufficiency of the specification (so far as involved in the pursuer's issue, or in the defender's issues,) required to be decided by the Judge.

The next set of exceptions relate to those matters which it is said the Judge ought not to have left to the jury. And here the pursuers reply, viz., that the defenders, in maintaining that a point was a matter of law for the Court, and to be ruled by the Court, were bound to state what law the Court ought to lay down; and further, that if the law in the bill of exceptions stated is bad,—and that if the only law which the Court would lay down, would lead necessarily to the very verdict which the jury have returned upon the matters so left to them,—there is no error in the result: The verdict is right. The exception cannot be sustained as to the law, which the defenders require, and the other exception cannot be sustained since it has produced no error in law.

This reply raises another most important question in reference to the disposal of bills of exceptions.

I own I have a great reluctance to exclude a party who says, I committed an error in leaving a point to the jury which was matter of law, by this sort of answer, that the jury have gone right in point of law, when the party was entitled to the opinion of the Judge, which might have been the other way, giving him the verdict, and placing the pursuer in the situation of struggling against the verdict. I probably might not entertain this feeling so strongly, if the exceptions were not to my own charge; and perhaps the desire I have that a party should be able directly to encounter any error I committed, if error there was, leads me to distrust this reply more than I might in other cases.

This is very clear, that the reply would be unsatisfactory and insufficient (so far as I at present see), under a general verdict. To admit and give effect to this reply, I think you must have certainty as to the exact view which the jury took. It would

not in my mind be satisfactory to indulge in conjectures as to the view the jury took upon a point incorrectly left to them by the Court, and on which they ought to have received direction in point of law from the Court. The function of the jury is not to decide law. One cannot tell, under a general verdict, whether they considered the point at all. One cannot tell what difference a direction in point of law might have made in their view of the facts, and in their general conclusion upon the whole case. In short, there could be no certainty under a general verdict.

Aware of this, and desirous that if I was wrong in leaving to the jury the matters on which I required their opinion, I put to them the propriety, if they were generally in favour of the pursuers, of considering and answering the three questions stated at the close of the charge, and I framed these so as to exhaust these points which were argued to be matters of law for the Court. The jury, whose opinion was in favour of the pursuers, took that course, and have specially found—"that by the description in the said specification, the patentee did not refer to any particular form or shape, or mode of constructing the air vessel or vessels, or receptacle or receptacles, in which the air under blast is to be heated; and farther find, that, by the use of the term "effect" in the specification, the patentee did not state that the form and shape of the air vessel or vessels were immaterial for the purpose of heating the air in such vessel or vessels; and further find, that the terms of the specification respecting the air vessels or receptacles, and the size and numbers thereof, are not such as to mislead persons acquainted with the process of heating air, so as to direct and cause them to construct the vessels in a form or manner contrary to the ordinary and necessary rules to be attended to in heating air passed into vessels for the purpose of being heated under the progress of the blast; and they assess the damages at £3060." There is thus perfect certainty as to what the jury did upon the points on which they were left to form their own opinion. No objection was stated to the terms of the questions, nor have the defenders shown in answer to the view opened very powerfully by Mr Inglis, that there is any matter in the specification left to the jury, but which the Judge ought to have decided, which is not included under these special findings.

The pursuers then certainly have been enabled in this case to put the point to the Court:—"Here is a verdict with these matters declared upon as to the specification. Is there error in that verdict? It is said, you, the Court, are to construe the specification. Do so. Do you differ from the jury? Are the jury wrong upon those matters, which by the error of the Judge (and the argument assumes error at the trial) was left to them? Can you sustain the meaning given to the specification by the 6th and 8th exceptions? If not, are you prepared to declare the construction only in conformity with the verdict, and then to end by setting aside the verdict."

I have arrived at the conclusion that this plea must be sustained; but I acknowledge with considerable distrust, and with no friendly feeling to the plea. There is no greater error in jury trial, I mean none that may produce greater miscarriage, than leaving to the jury, matters that are for the Court for direction in point of law. That is an error in the whole trial. It goes to the foundation of what was done. It gives the jury a function and a duty which in law they have not, and for the discharge of which they were in point of fact incompetent. Their conclusion then, in point of law, if right, must be held to be so by accident, and the exception taken is, that the jury, who were incompetent to judge of the matter, were left to form their own notions when it was purely a question of law on which the Court ought to have decided; and further, on which the party was entitled to have the opinion of the individual Judge who tried the case, so as to obtain the verdict whether the Court might agree with him or not. In most cases this view is conclusive, and it will not often happen that the reply I am now adverting to can be sustained.

It is necessary in the first place, that the Court should hold that the party was bound to state the law which he required the Judge to lay down. Now there are many cases in which a point may be improperly left to the jury, in which the party is not bound to state what law the Judge should state; and I have considerable doubt whether the defender was called upon to do

so at this trial. Observe:—The Judge left the questions stated on the specification (whether limited or not, and the meaning of the term "effect") to the jury. Now, the complaint is, that the Judge did not himself construe the specification and state its meaning. It is not a necessary part of the objection "you leave the jury to consider the specification, while it is matter of construction in point of law, and you ought to state your own opinion," to add what the party holds to be the meaning of it, and its true construction. The error of the Judge is, that he does not himself construe and state his own opinion. His error is in leaving it to the jury. Now, at that stage, I am not satisfied that I could at the trial have called on the defender to say what construction I should have put upon the specification. The defender could not decide for the Judge, whether the latter would construe it or not. He was to form his own opinion upon that point. The defender said, my point is, that you ought to construe. I have a right to have your opinion. I think and expect you to go right. If you go wrong I will except. But the verdict, so far as dependent upon this point of law, must be on your responsibility and opinion. You are wrong in leaving it to the jury. It is matter of law. You ought to construe and state your opinion.

Now, to enable the Judge to consider and decide that question—(whether he was to give his opinion on the import of the specification as a direction in point of law),—it does not signify what view the defender took of the specification as matter of construction, nor what view the Judge himself took. The point of difference is:—Is the question for the jury or for the Court? who is to declare whether the specification is limited to one form of apparatus, and in what meaning and sense the term "effect" is used? Now, is not the Judge first to decide whether the point is for him, or is a question for the jury? He leaves the matter to the jury as a question for them. Then the defender says, "there is the error. I had a right to the opinion of the Judge. The cause was not well tried without that opinion. The verdict should have been on his opinion. Until he stated his opinion I am called upon to do no more. I have no law to state, except that the Judge should have construed and stated his opinion."

To this extent I cannot get over the difficulties attending the reply which the pursuers make, and hence I have the greater difficulty in ultimately sustaining that reply. But after verdict there is a great difference in the shape in which a cause is placed.

In the first place, the charge in this case placed the jury and the defenders in a particular situation, for I asked them specially to find the meaning of the specification on certain points, if they agreed with the pursuer's views of the specification. Hence, I not only left the question to the jury, but special questions for them, and I think, therefore, that the pursuer could not avoid stating that he considered, in point of law, the construction to be different from that stated in these questions.

But farther, though the exception is taken at the trial, the bill is not prepared till after verdict. Now, could the defenders have prepared the bill of exceptions with the special findings in this verdict, without exceptions which declared the verdict to be wrong in point of law?

After verdict, the question as to what either the Judge or the jury did after the trial, is really material only in regard to the ultimate result of the verdict,—when that verdict is distinct, full, and special, so that the Court can judge of the result. Of course, I am not representing the distinctions between the functions of the Judge and the jury, as not most material to the conduct of jury trial in general, or underrating the necessity of the Judge taking the full responsibility of all directions in point of law. I allude only to alleged error in the individual case. Now the verdict, which is the *object* and the *conclusion* of the trial, is the result of the joint duties and consideration of Judge and jury. Both meet, and are brought together to produce that result. The verdict is distinct, and declares the meaning of the specification. If the Judge had thought it to be expedient,—and in this case I should, after what has taken place in England,—he might have directed the jury, in point of law, not only as to what was his own opinion on the specification, but directed the jury specially to find what was the meaning of the specification in terms of his opinion. If I had not left the mat-

ter to the jury, I would have done so, in order that the question as to the patent might be matter of record upon the face of the verdict. Now, that would have been perfectly competent for the Judge. He thinks a point is matter of law, and gives his direction. But he also sees that it is very material that it should distinctly appear that the jury proceed upon this ground. He sees that they might arrive at the same result upon other ground, and hence, that neither in a motion for a new trial, nor in a bill of exceptions, would there be certainty as to the ground on which the jury proceeded, and so he directs the jury to find specially in terms of his direction. Probably this is the only course that will satisfactorily raise points for the Court under issues respecting stake-nets.

Now, if I had thought the points contained in the 5th and 7th exceptions were matters for the Court, I would have directed them to find in terms, no doubt, of the direction, but to find the very matters contained in the verdict:—For my own opinion was coincident with the verdict. Now then, here is a verdict which is the result of a trial before a Judge and a jury. The verdict is special. An error is said to have been committed by the Judge, in leaving the matter so specially found, to the jury. Then was the defender, in the bill of exceptions, not bound to state his pleas in law upon those points specially found by the verdict, in order to allege error in the verdict, and to be entitled to set it aside? I think he was. The reason for excepting to what was done by the Judge as erroneous—the *title* of the party to insist in his exception—is the verdict returned. To get rid of that verdict is the party's interest. But if the verdict is special, is the Court not to consider if the verdict is right or wrong in what is so specially found? Well then, if in considering the pleas which assign error, and contain the exceptor's law, the Court are of opinion that they are ill founded, and if taking the specification and the verdict they could only declare and find upon the former, as a direction for another trial, the very declarations as to the meaning of the specification which are contained in the verdict, is it enough to set aside the latter, or reasonable or warrantable ground for producing another trial, that the jury, left to themselves no doubt by an error of the Judge, have ended in the very conclusion which the Court arrive at in considering the verdict.

If the Court, with the special declaration in the verdict, are satisfied that the jury have construed the specification rightly, the Court is bound to presume that the Judge, *a fortiori*, would have construed the specification rightly also, and to the same effect, if he had himself done that. Then, why allow the error in leaving the matter to the jury, to overturn the verdict, when the law required by the defenders cannot be sustained, and when the findings of the jury, being in truth on matters of law, are found to be right in point of law?

Taking then this as a special case, I am of opinion that the reply must be sustained, because I am also further of opinion, that the 6th and 8th exceptions are not maintainable, if they are matters for the Court, and am very decidedly of opinion that the declarations as to the description and terms of the specification contained in the verdict are well founded in the substance and in the terms of the specification, if the Court is to declare the same.

It is contended, however, that this mode of dealing with a bill of exceptions is inconsistent with the Statute; and that if any one exception is well founded, there must be a new trial. Now, this is not a correct reading of the Statute.

In the first place, I do not think, that in Scotland we are called upon to admit the great difference which seems to exist in England between the grounds of disposing of motions for new trials and bills of exceptions. Both are introduced with us by Statute. Both stand on the same footing. The Court is not restrained in judging of the one more than of the other. The nature of the two proceedings imply, it is true, the discharge of very different duties in several particulars by the Court. But in considering whether an exception is to be sustained, I cannot find sufficient warrant in the Statute for holding that the Court is entitled to disregard the reply which the pursuers have here made, founded upon the terms of the verdict, which gives the defenders their only title and interest to insist in their exceptions, and founded upon other exceptions, inseparable, in the determination of the matter, from the 5th and 7th. The de-

fenders have put the points in the form of separate exceptions. But the Court is not bound so to treat them, and give him the technical benefit of saying that the 5th and 7th must be judged of by themselves, and sustained if well founded, without reference to their bearing and effect upon the verdict in point of error, and without reference to the other exceptions, the 7th and 8th, if the latter are not tenable. The fact, that the defender splits his case into exceptions 5, 6, 7 and 8, cannot constrain the Court to do what is against law and justice, or prevent the Court from considering whether (say) the 5th and 6th are not substantially but one exception. The Court are entitled to look to the effect of the alleged error upon the verdict; and if they find upon the face of the verdict that the result, in point of law, is right, it would be a very strange construction of the Statute which requires the Court to set aside the verdict which, upon the face of it, is right in point of law. I think the exceptions come to be what are termed insensible, if they do not lead to the end of showing the verdict—the actual result of the trial—to be wrong in point of law. I have considered this point without reference to the effect of 7 Will. IV., c. 14,—for I must acknowledge that I do not exactly perceive the object or meaning of that Statute,—nor am I aware of the doubts which it is therein said existed as to the former Statutes. But, certainly, this subsequent Act, 7 Will. IV., c. 14, seems at least to support the view on which the Court is proceeding.

If such is the view we are entitled and bound to act upon under our Statutes, then certainly there are numerous cases in England, in motions for new trials, in which a similar reply has been sustained to complaints made of what was done at the trial. But I rather take a case as to a bill of exceptions. I admit there is scarcely any case, so far as one from books can ascertain English views as to bills of exceptions, which afford authority in support of the pursuer's plea. But there is one which seems to be a very direct and weighty precedent. I allude to the case of *Vines v. Corporation of Reading*, 1 Young and Jervis, p. 4. The nature of the case was in substance this: The Judge at the trial, and after the whole case for both parties was concluded, delivered his opinion, that the evidence of the pursuer was insufficient in point of law to maintain the pursuer's case, and directed the jury accordingly to find for the defenders. The Court, upon considering the bill of exceptions, which set forth the whole evidence, thought the Judge was wrong, and that the pursuer's evidence was sufficient, in point of law, to maintain his case. Had this been the only matter then which appeared on the face of the bill of exceptions, there must have been a new trial, according to the opinion of the Court. But in the defenders' evidence, the Court found a sufficient plea in bar of the pursuer's claim,—in other words, what would have been raised as the subject of a counter issue with us, and which was made out so as to sustain, in point of law, that counter issue, or bar to the pursuer's verdict. Taking that view of the defenders' case, the verdict came to be a right verdict in point of law, although the direction of the Judge at the trial, that the evidence of the pursuer was insufficient in law to maintain his case, appeared to the Court to be erroneous. As there was then no error in the verdict, in point of law—as the Court must have declared the law of the case in terms which would lead, in point of law, to the very same verdict which was pronounced, the Court disallowed the bill of exceptions, and so sustained the verdict. Now this was a stronger case than the present;—for, 1. The verdict was general. 2. The Court took up the matter themselves, as arising out of the defenders' case, as stated on the face of the bill—whereas the corresponding point here is forced upon us, not only by the terms of the special findings in the verdict, but also by the exceptions stated in the bill, which call upon the Court to consider the law which it is said the Judge ought to have laid down. This case then seems, *a fortiori*, to warrant us in holding, that if the exceptor's law is wrong, and if the law of the case (assuming the points to be matters of law,) would lead to the very verdict returned, we are not bound to sustain an exception in order to set aside a verdict which is right in point of law. If I understand this English case rightly, it is a satisfactory confirmation of the view which we take of this matter. But I wish to add, that I cannot admit that we are at all restrained by English rules or practice as to bills of exception, so as to prevent us taking a course

which seems to be agreeable to principle and to the justice and law of the case in its ultimate result.

Without referring to, or depending upon English authority. I do not think that the pursuer's reply is excluded by the terms of our Statute.

But I cannot rest my opinion upon this reply alone,—1st, because the point is new, difficult, and of very delicate application; and 2d, because I have a much more clear and decided opinion upon the points raised by the 5th and 7th exceptions, and involved, perhaps, in some others. Indeed, there is no point on which I have a more deep-rooted opinion than that the questions left at the trial for the jury were according to principle, to reason, and common sense, and, with a due regard to the only mode of obtaining a satisfactory result, questions for the jury; and further, that they were made questions for the jury under the issues in this cause.

I think this is a matter of the deepest importance. It goes to the mode of dealing with every patent. It enters into the construction and object of the issues. It affects every trial, and it must decide whether the meaning of a paper intended to form directions to practical men on matters of the arts and manufactures, is to be judged of by the Court, who, I think are unfit to form that opinion in the first instance, or by juries taken from the very classes of men to whom the specifications are addressed, with the aid of the evidence of workmen and men of skill conversant with the subject to which the specification relates. What is the nature of the paper or instrument termed the specification? It is not a document forming a contract, or relating to any legal right or interest. It is practical instructions directed to practical men, relating to the construction of apparatus, mechanical contrivances, the combinations of principles with such contrivances, and intended to enable practical men, after the expiration of the privilege, to do and perform what the patentee has been doing and performing. It is a record or preservation of what he does, so that when his exclusive right expires, all may be on an equal footing with him, and equally able to do easily from his description what he was doing.

The whole of the specification is addressed to practical men. The 5th exception says, that there are no terms of art involved. How can the Court know that, or safely affirm that in the abstract, as to a document intended entirely for practical direction. Even where, in a proper contract between the parties, terms are employed which appear not to be terms of art, there is great risk of error if the Court take the construction upon themselves, when it is averred that they are understood in a sense different from the construction the Court might put upon them,—of which a good illustration occurred in an English case, *Clayton v. Gregson*, 6th Nev. and M. 694, to which I beg the special attention of counsel. But there is no question here of particular expressions and terms in a document which, in itself, might fairly be brought before the Court for construction. The whole of the specification is matter of direction to workmen and men of skill in particular trades. The true question is, how are they to understand, not merely parts, but the whole of the directions? Nothing could be so hazardous as the Court taking upon itself to construe such a document, upon the notion that there are no terms of art involved. For instance, looking to this specification, nothing appears so general, or so easy for the Court to construe, as the term "*air vessel or receptacle*;" yet the defender endeavoured to make out, that in the understanding of practical men, that was a distinct term of art which had received a fixed meaning. Mr Hawthorn, p. 86-7, held *air vessel* to mean and to be descriptive only of a cylinder, because in his particular trade, he says, *air vessel* has received that special meaning. Mr Cottam, p. 72, held *cubical contents* necessarily to imply that the vessel was to be of cubical form. And if the evidence had been clear and satisfactory upon such points, it surely would have been a question for the jury, whether such notions were not necessarily involved in the directions contained in the specification.

In the next place, let us consider the issues here.

Under pursuer's:—Who is to consider the description in the specification in order to answer this question but the jury? It is admitted that they must judge of the identity or the variance, and whether the variance is substantial, or to the effect set forth in the specification. Then, must they not form their own view

of the description in the specification, and of the effect to be attained? How could there be any certainty if the Court were to construe, and the jury desired to inquire whether a thing was substantially the same, not with the view existing in their own minds, but with the view of apparatus stated by the Court, and as to which every one of the twelve jurymen might form a different idea? But if it is plain that they must consider the specification, and form their own opinions to the full extent of answering this issue, I apprehend that involves the consideration of the whole specification, so far as involved in this trial, and that consistently the Court cannot say that other similar questions on the specification are not to be decided by the jury. Else what might be the result? The jury might form their own view under this issue, and then be directed to take just an opposite view upon the other questions in the specification.

Then take the counter issues. How can they answer the first, without forming their own opinion as to what is described, and what has been previously used, and comparing the thing previously used with the thing described?

Again, take the second. Must they not consider whether workmen so read it, that they would not know how to act upon it, and could not find any directions for any apparatus whatever? Or, on the other hand, both as to this issue and the pursuer's, is the jury not to consider whether it is so understood by workmen that it is limited exclusively to one sort of apparatus, and therefore inapplicable to any other, and that workmen judging of, and acting on the specification, would produce no other contrivance but one, and that substantially different from the defender's apparatus, as in model No. 7?

Again, how could the third be answered upon the evidence, without the jury forming their own opinion of what is the description by which the apparatus is to be constructed? Again, take the 7th exception. I apprehend that is clearly a practical point for the jury.

I am of opinion that all the points that were left to the jury, and I should say generally the sufficiency of the specification, so far as involved in this trial (though there may be at times a question raised upon generality for the Court), are matters for the jury in all cases, and specially under these issues, to the extent of all matters involved in these issues, and which arose at this trial.

I confess I am satisfied that this was held to be a clear point in both of the recent cases in the Common Pleas, which I have referred to. But having gone over almost every case which has been tried, I find innumerable authorities quite conclusive upon this matter.

We have been much pressed with a passage in the judgment delivered by Mr Baron Parke on the part of the Court in the case tried upon this patent, *Neilson v. Harford*, and which was fully considered by the English Court of Exchequer. The passage is at p. 263 of the report, and is in the following terms:—"Then we come to the question itself, which depends on the proper construction to be put on the specification itself. It was contended, that of this construction the jury were to judge. We are clearly of a different opinion. The construction of all written instruments belongs to the Court alone, whose duty it is to construe all written instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury, and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed, as words of art, or phrases used in common, and no surrounding circumstances to be ascertained, or conditionally, where those words or circumstances are necessarily referred to therein." This passage is pressed upon us as a deliberate opinion, that the points raised on the specification at the trial before me were points of law exclusively for the Court. I must look to this judgment with great respect. But I am bound to form my own opinion, and I must look to the proposition that is here given to us as distinct and practical law, and consider its meaning and value as so stated. I own that I am not able to put any sensible meaning upon this passage which could be practically acted upon at a trial, if it points to any other course than that which I followed. I requested, during this discussion, the opening counsel for the defenders to state how this opinion could be acted upon at a trial, but neither he nor the Solicitor-General gave me any information. The

Court, in the English case, having a point reserved, had the whole matter, law and fact, fully before them for consideration, and I cannot help thinking that the separate functions of Judge and jury were not distinctly attended to in the use of the terms employed in this passage.

Observe:—It is said that the Court is to construe written instruments "as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury." Now this, I own, I do not very well understand, if the jury are not to judge of the meaning of the specification. If the jury is to ascertain the meaning of the words, then that was what I left to the jury, and what thereafter remains for the Court I do not know. Farther, when the Court is to construe, I apprehend that is a case in which nothing is left to the jury. Besides, how could this be acted upon at a trial? The Judge would have, first, to state certain questions to the jury as to the meaning of the words,—then, to deliver back to the jury his construction, founded upon their answers as matters of fact,—and thirdly, to require their verdict. But how can two parties so work together, as to the meaning of the specification? The answers by the jury, the Judge must hold to be conclusive, but they may be utterly at variance with the Judge's decided opinion upon the meaning of the specification. Nay, with these answers, he may not be able to make sense of the specification, while, on the other hand, but for that disturbance to his own views, he has a very clear view of the whole specification.

Again, how could you in such a process accurately separate the functions of Judge and jury, or be sure that the jury kept themselves clear of the Court, and the Court of the jury? Let any person try to act upon this sentence as to this particular specification, and say what sort of questions he would frame as to the meaning of the words, which could at the same time leave the construction of the specification as wholly matter of law for the Court.

I know there are cases,—The English case of *Clayton v. Gregson* is an instance in which particular words may occur in an instrument, which require to be explained by evidence, and may be submitted to a jury. But the judgment referred to is not given in a case of this description, for it applies directly to questions raised upon the meaning and import of the whole specification; and, curiously enough, the Court held the meaning of the only particular word,—viz., "effect,"—upon which any question is raised separately, to be matter for the Court, and not for the jury. Hence the judgment refers generally to the whole meaning of the specification, and of the description therein contained.

When the passage thus is pressed upon us as an authority, I must fairly own that I cannot subscribe to it as sound in principle, or as precise and distinct in expression, so as to convey to my mind any definite rule to be acted upon in a trial in regard to this specification.

It is very remarkable, that in not one patent case is there any appearance of a similar doctrine.

I lay aside, of course, all cases in England on motions for new trials, and in the consideration of questions raised after verdict, and so forth; for the Court in such cases have the full right to review the opinion formed by the jury upon evidence at the trial; and I also lay aside opinions given in the equity courts upon injunctions, where the court may be called upon to construe for itself, but in which, wherever there is doubt, they send the matter to a jury. Among other authorities, I may refer to the following: See *Davis's Cases*, p. 45. Charge of LORD LOUGHBOROUGH, p. 56. In *Arkwright's case*—of BULLER, 105-128, in the second case on that patent. In *Boulton and Watt v. Bull*, the questions arose on a special case. Hence there is no inference, that if the trial had not taken that turn, the sufficiency of the specification would not have been for the jury, but the jury found certain things in regard to the specification,—then as to the opinions of the Court respecting these findings, see *Roake*, l. p. 183-5. Ch. Justice *Eyre*, 215. See also opinion of *Kenyon*, 224, in *Hornblower v. Watt*; of *Ashhurst*, 225; *Grose*, 228. See *Lord Ellenborough*, in *Huddart*, 285-67; Ch. J. *Gibbs*, p. 400, in *Boswill and Moore*. I might add many other authorities.

I think the matter comes to a very short issue. Is evidence

competent in order to ascertain the sense in which alone the specification can be understood by those to whom it has been addressed? That never has been doubted. Then, if so, the question is matter of evidence for the jury. The defenders so treated this case. I am quite aware that there are many cases in which, when the evidence is led, there may be points on which the Court is to be aided by evidence in its own construction of an instrument, still keeping the construction in its own hands. But on the other hand, when the question is raised as to the meaning and understanding of the whole specification, as to the result that it will produce in working upon it, as to the sense in which practical men will be directed towards the object intended, or to wrong objects,—whether the real effect is truly described by intelligible and distinct terms in the specification, and the means of attaining that effect distinctly and sufficiently described. In short, when the meaning of the whole specification must be judged of in order to know whether it will be easily and satisfactorily understood by practical men together, I know of no ground on which that matter can be taken from the jury.

Upon the remaining points in the cause I shall say little. The parts of the charge to which the 9th and 10th exceptions relate, state the points in favour of the patentee, undoubtedly in very general terms; but if his patent is a good patent, I think it implies and requires law to the extent there stated. But of course, these passages are to be taken,—1st, In connection with the context: 2d, In reference to this particular patent, or one similar; and, 3d, With special reference to the limitation stated at the close of each of these passages. The sentences quoted from Baron Parke's charge show, that though he thought the patent too vague, yet, when putting to the jury the matter of infringement, he gives the patentee the benefit of the same law. The limitation at the end of the 10th exception makes the law sufficiently safe, and I do not see how this patent can be sustained at all without requiring directions to the full extent of the passages excepted to in the 9th and 10th exceptions, when the jury are considering the question of infringement.

On the 11th exception I have nothing to add. The defender's argument plainly confounded novelty and prior use.

On the 12th and 13th I retain my opinion, that, for the objects of this patent, it was not essential either that the patentee should describe existing contrivances for protecting the mouth of the furnace or the end of the pipe from being injured by the heat, or should invent better contrivances than those in use for these purposes. If, indeed, it had been proved that the invention was *utterly useless*, and that no benefit whatever could be obtained, such as the specification set forth, until a new water-twyre had been invented, there might have been more difficulty on this point. But the old water-twyre was well known—was used for several years in Scotland after the hot blast was applied, and, moreover, is still the only water-twyre generally in use in England, or at least in much use in England.

On the 1st exception I have nothing to add to what Lord Medwyn has stated. Holding the section of the Act of Parliament in question to apply generally to Scotland, so far that there must be notice which satisfies the terms of that clause, it is plain that it was not meant to affect the forms or principles of Scotch pleadings. Our system of pleading previously required everything to be stated which the provision in the Statute introduced for England. The question, then, is wholly a matter of Scotch pleading, and I concur with your Lordships, that, according to our settled practice, it is necessary in such a case that the prior use at particular places, and by particular persons, shall be so stated, that the pursuer may be able to meet distinctly the particular use by individuals in which his invention is said to be traced.

Lord Moncreiff.—I am of opinion that none of the exceptions can be sustained.

In general, it appears to me that there is one fallacy which runs through a considerable number of these *thirteen* exceptions, and the greater part of all the reasoning on the subject. And, indeed, the Solicitor-General, in his speech, in reality reduced the main controversy to the question, whether that which I think a fallacy is not the true state of the case.

That assumption is, that the essential point of what Neilson claims as his invention, is a *mode of heating air* in a vessel.

But, in my apprehension, this is refusing to look at what the invention claimed really is, and laying hold of a circumstance collaterally connected with it, as if it were the thing itself; to have claimed which, as the essence of the patent, would have rendered it no patent at all.

The *second* exception brings out the point. The defenders except, "in so far as his Lordship did direct the jury that the patentee did not claim, as any part of his invention, or profess to describe *any mode of heating the air* under blast in a vessel, or any particular form or dimensions of the vessel or vessels to be employed for that purpose."

To me it appears that the defenders here complain of the direction, because the Judge told the jury what the claim by the letters-patent and the specification plainly is, and because he told them that it was not that which the patentee entirely disowns, but which the defenders themselves wish to represent it to be, for the manifest purpose of destroying it altogether.

When we go to the part of the charge on which the exception is founded, pp. 108-9-10, and compare it with the letters-patent and the specification, I think I find in it only a very clear exposition of the nature and principle of the invention, and of the mode of carrying it into practical operation, under such safeguards as were essentially necessary to protect it against immediate piratical invasion.

The title of the patent is—"An invention for the improved application of air to produce heat in fires, forges and furnaces, where bellows or other blowing apparatus are required." Here there is not a word about a *mode of heating air* IN A VESSEL. It is not the thing enunciated, which is simply "for the improved application of air to produce heat in fires, forges and furnaces," &c. The specification is in perfect accordance with this, p. 10. The invention "consists in introducing into, and applying to the fires, forges and furnaces, atmospheric air in the following manner." No doubt there is a *mode or manner*, not of heating the air in a vessel, but of *applying or introducing* the air to fires, forges, &c. That manner is described, and, in one word, it consists in passing the air through a vessel or receptacle placed between the blast and the furnace—which vessel must be air-tight, except in the necessary apertures; "and at the commencement, and during the continuance of the blast, it must be kept *artificially heated* in a considerable temperature."

There is not any doubt, that, at the bottom of the invention, there is the principle, that a blast of hot air will produce more heat in a furnace than a blast of cold air. But it is not for this principle simply that the patent is taken, but for the principle carried into practical use, by a mode of operation or mechanical process laid down. After the principle was obtained, the difficulty was to find a practicable mode of applying it. The extent of this difficulty is explained in the evidence—*Jessop*, 58, 59—and the precise mode of overcoming it by this patent. "The heating the air between blowing apparatus and furnace is a mechanical contrivance to attain end, which, if placed elsewhere, would not answer." See also *Profr. Forbes*, p. 31.

Such being the principle, and the mode of application, the very term used in the specification, that the interposed vessel must be kept "*artificially heated*" during the blast, would necessarily imply that the invention claimed does in no degree consist in any particular mode of heating such a vessel. But it is in express words declared, that "the manner of applying the heat to the air vessel is immaterial to the effect, if it be kept at a proper temperature."

In like manner, the description given of the air vessel necessarily imports, that it is not a vessel of any particular form, size, or material, that is required or prescribed, provided only that it is capable of receiving the air under blast, according to the quantity or extent required, and capable of being "kept *artificially heated* in a considerable temperature." But it is in like manner expressly declared, that those particular qualities of the vessel—the form, shape, size, or material—are "immaterial to the effect, and may be adapted to the local circumstances and situation." That is, any such particular form, &c., is expressly disclaimed as part of the invention.

The specification being thus perfectly clear and explicit in these points, how can we possibly say that the direction is wrong, which simply tells the jury, as a *matter of law*, that which is self-evident on the face of the specification? That the

patentee did not claim as any part of his invention, or profess to describe any mode of heating the air under blast in a vessel, or any particular form or dimensions of the vessel or vessels to be employed for that purpose. Whatever may be the effect of it otherwise, I think it impossible that any other direction could have been given.

What, in reality, the defenders complain of is, that the pursuer, very vexatiously for them, has not claimed, and *will not claim*, as essential to his invention, what would at once render the patent nugatory, by laying it open to the easiest means of violation. For, as there are very many ways of heating such a vessel, well known to all men of ordinary skill; and as there may be very many forms of such vessels which will equally answer the purpose, according to circumstances, as the specification plainly declares, it is evident, that to have made any one mode of heating, or any one form of vessel, an essential part of the mechanical contrivance claimed in the invention, would have enabled any one the moment the real invention was disclosed, by simply adopting some variety in these points, to set the patentee at complete defiance. And yet, whatever construction of apparatus were adopted, the end could never be attained without beginning by appropriating the real contrivance of this patent, by applying heat in some manner to a vessel of some form, placed between the blast and the furnace, in which the air might be heated in the blast, and thence passed into the furnace.

I am therefore of opinion that the 2d exception is altogether groundless, and that any different or opposite direction from that given would have been entirely erroneous.

3d Exception.—That, upon such view of the nature and extent of the claim, the Judge directed in point of law, that the patent was valid, and did not direct that it was invalid.

This is founded on certain passages of the charge, pp. 112, 113—118-119.

1. The defenders are here met by a preliminary objection of great importance,—that there is no question of general invalidity, or of *invalidity* in respect of the vagueness or generality of the specification, raised by the issues.

I agree in the opinions delivered, that this is a question of great importance to the law, and the course of pleading in such cases. In the record there was a general averment, (p. 11,) that the “patent is invalid on account of the general vagueness of the specification.” But even this was connected with the statement, that it was not accompanied with drawings and models, and was “in itself insufficient to describe the alleged invention, or to enable workmen of competent skill to construct the necessary apparatus,” &c. But when the parties came to adjust the issues, while the pursuer’s issue was simply on infringement, the defenders took specific issues, directed against the validity of the patent, on precise and definite grounds. But they took *none* on the ground of *vagueness or generality* in the specification. And this is the more remarkable, because the matter of the second of the counter issues is taken from the same article of the defender’s statement on record, which he had introduced by an averment of invalidity on the vagueness of the specification. That is entirely left out in the issues. I apprehend that the defenders were under the necessity of taking these counter issues in regard to the specific averments of invalidity to which they relate, as held in the first case of *Russel v. Crichton*, 19th June 1838. But, at any rate, they did take them; and after doing so, they never can be allowed to plead under the pursuer’s issue any ground of invalidity, which they plainly abandoned by asking no issues upon it. Read every word of all these issues, and it is impossible to find in any of them any thing which can be twisted into the plea of invalidity put into this exception.

Very remarkably, this point arose also in the second case of *Russel v. Crichton*, 8th June 1839, in the trial of a bill of exceptions. The party had an issue on the averment that the invention claimed was not original. But at the trial he attempted to raise a new plea of invalidity, on the ground that the specification was *too sweeping and comprehensive*. The Lord President directed the jury that the patent was good. But in discussing a bill of exceptions, Lord Gillies said—“It appears to me that this point is not duly raised under the issues, and is therefore excluded.” Lord Mackenzie had not so much confidence in the objection; because he thought that, by a certain construction of the issue on want of originality, as, applied to the plea attempted to be brought in, it might possibly be held that the

matter of embracing both *new and old* might be held to be within the issue against the novelty of the invention. But the principle of Lord Gillies’s objection was not doubted; and the Court, being in general clear that the exception was not well founded on the merits, did not enter farther into the point. I think this perhaps unfortunate; and thinking the point very clear in the present case, with no such difficulty as that which occurred to Lord Mackenzie in the construction in that case, I am of opinion that we should not hesitate to declare the point of law in the present case.

If we are to look to English authorities, as I think we certainly may in such a question, the cases to which I have been referred, *Walton v. Potter, &c.*, Com. Pl., Law Journal, Vol. XI. p. 138, and *Gibson and Campbell v. Brand, ib.* p. 177, &c., appear to be very decisive of the point. It is clear to me, though I speak with great distrust of my own judgment, that the issues in those cases (I speak of *Walton* particularly), were in their *substance* the same which were put to trial in the present case. Their forms of pleading are not the same with ours; and therefore I speak with great fear of mistake. But as I understand the matter, the first plea of the defendants corresponds precisely to the plea of general denial of our *first* issue, viz.,—not guilty: Then the counter pleas are to be collected from the pleadings; and as I read them, they amounted precisely to pleas of *disprove*,—1. the novelty—2. the *workableness*—and 3. the *public benefit* of the invention claimed. If I take a right view of the issues joined, the case is identical with the present in the point in controversy. But, under these issues, an attempt was made to require the Judge to direct the jury that the patent was *invalid*, on the ground of a defect in the specifications, to which defect no allusion was made in the issues. The Court held (*Tindal, &c.*) that there was “no issue upon the record to raise the question before the jury, whether this was a fit subject for a patent?” The other case of *Gibson, &c.*, bears very strongly to the same point.

Independently of any authority, I think it of great importance that pleas should not be allowed to be raised, after issue joined on specific questions, which cannot reasonably be expected by the adverse party, under those issues which have been thought sufficient for the trial of the case. And on this whole matter, I am of opinion that the plea of invalidity, through vagueness in the specification, is not at all admissible under the issues in this case.

But as it has happened in other cases, I am here of opinion that, supposing the objection of invalidity to be perfectly admissible, it is altogether groundless. The whole plea for invalidity proceeds on the same fallacy which I think runs through all the case of the defenders. It is, in my apprehension, a mere misrepresentation of the specification to say, that because it does not claim a specific *mode of heating air*, or a specific form of the vessel, it does not claim *any mode* of carrying the principle of the patent into operation. The simple explanation has been already given. It is not in the *mode of heating* the air vessel, but in the *mode of intercepting the air in blast* between the blast and the furnace, that the nature of the invention consists. And therefore, though it may be perfectly true that that essential point in which the invention consists, admits of many varieties in the modes of heating and the forms of the vessel, it cannot be maintained, on any sound principles, that that shall destroy the validity of the patent as long as it is clear that there is a principle discovered, and a mechanical process for carrying that principle into operation pointed out. I think that the whole plea is groundless on its merits.

The 4th exception stands on a footing with the 3d in regard to its competency under the issues. There is no issue under which it could competently have been found, that the specification was *insufficient*, in respect of its not having given a *sufficiently particular description* of the nature of the invention. The defenders have totally failed to show that, under any one of the issues, there is any such question raised. And it is really a matter of no small importance in the pleadings in such cases, that, after a trial has taken place on issues very carefully and deliberately settled, parties should not be permitted to raise new questions, originating in the chances of a trial, and the desire of avoiding final judgment on the case.

It is certainly of the less consequence how the preliminary objection to the competency of this plea may be disposed of, that the plea itself seems to have no solid foundation: I must regard it as a very clear matter, that taking the plea to be fully before

the Court and the jury, it is altogether unmaintainable. When the true nature of the invention claimed is rightly understood and fairly stated, there can, in my opinion, be no doubt that that nature of it is particularly described, and that the specification does sufficiently describe the *manner* in which the essential process is to be performed, to comply with the condition of the patent. In what respect this question of sufficiency is a question for the jury, is a different matter, belonging to the next issue. But in so far as it is strictly a matter of law, I am of opinion that there is no colour or ground of objection to the sufficiency of the specification, when it is considered with reference to the true nature of the patent.

The objection to the verdict raised under the 5th exception is important in itself, and is rendered more so by the views of your Lordships. I do not *entirely* concur in either of the opinions delivered. For I am, first of all, of opinion, that the exception is not well founded on its merits; and supposing it were otherwise, I think the pleas brought forward for obviating it very clearly well founded, and do not feel all the difficulties in those points which have occurred to your Lordship. Your Lordship has so fully, and to my mind, so satisfactorily discussed the question as to the correctness of the charge excepted from, that I do not think it necessary to go into that matter so fully as I might otherwise have done. But it appears to me, that with special reference to this case, and the point of it to which the part of the charge excepted from relates, there can be little doubt that the direction was sound in law. I prefer considering the point in that view first.

I think it right to observe, however, that I do not mean to lay down abstract points of law in a branch of law not of daily practice in this country, but confine myself to the law which I think properly applicable to this case, and to the view which I take of the particular direction which is here excepted from.

The exception is thus expressed:—"In so far as the said Lord Justice-Clerk directed the jury that it was a question on the intelligibility of the patent, and for them, whether the specification contains a special, limited, and restricted description by which the inventor so described one sort of apparatus, that he cannot maintain that his patent is one which applies to all varieties in the apparatus which may be employed in the heating of air while under blast, and did leave that question on the evidence to the jury, and did not direct that the meaning of the specification on a matter not involving words of art, is matter of law for direction by the Court." This picks up some of the terms employed by the Judge. But I apprehend that, in order to judge fairly of the import of the charge, the sentence must be read in its whole connection, and particularly with reference to the direction in law delivered immediately before it.

It will be observed, then, that the passage occurs immediately after the law had been laid down, which forms the subject of the 2d exception, concerning the nature and extent of the claim of the patentee. And that law must be taken along with the statement which follows it. The charge goes on:—"But within," &c., p. 114, &c. What is the fair meaning of this? After having maintained, in point of law, that under this specification, Mr Neilson does claim the mode of heating the air and the *form* of the vessel as essential to his patent, and that, if he does not, his patent is void for generality, the defenders farther maintain, as now expressed in the 6th exception, but expressed as much as possible to give it the appearance of pure law, what is substantially this, that in the practical meaning and application of his specification, he is confined to one mode of heating and one form of vessel, so that *practical men*, working on that specification in order to attain the end, *could construct only one form of apparatus*; and consequently, that any other *would be no infringement of the patent*. Either this is the nature of the plea, or it is simply a repetition of the averments which are the subjects of the second and 3d issues. It is to the other view that the Judge is expressly addressing himself. And must not the practical *intelligibility* of the specification—the way in which practical men would understand it, to work on it—and the sorts of apparatus which they would construct in so working—be the subject of evidence to be considered by the jury, and on which they must be entitled to decide? They are to consider it, no doubt, along with the law previously delivered as to the nature and extent of the claim. If the defenders required law to be charged on that point, or whether they required it or not, they got it, and got it

correctly. But beyond and under that law, it remained for the jury to decide on the *working capability* of the specification, and the mode or modes of that working, as practical men would understand it. The defenders made this a question for the jury by the nature and terms of the 2d and 3d issues—and they made it so more definitely, in precise reference to the matter of this exception, by the evidence which they adduced by practical men concerning *their understanding* of the *working qualities* of the specification. It is to this that the part of the charge now excepted from is directed—"the *meaning and intelligibility*" of the specification to practical men—and whether, by its terms, they would feel themselves tied down to one single form of apparatus. Reading the charge as in its express terms and plain meaning of this import, I own I cannot entertain any doubt that it presented a question proper for the jury; and that without a deliverance of the jury upon it, no legal results could have been legitimately obtained.

But I do not think it immaterial in this question, that the Judge, while he so sent this matter to the jury, did expressly state, that if either party objected to this, and required him to state his own opinion as in matter of law on a simple view of the specification, he was ready to do so; and that the defenders did not so require him. I do not say that they were bound to make such a requisition. But as I look more to the practical attainment of the ends of justice than to the effects of particular modes of pleading, or the position of the parties, it is evident to me, that if they had so called on the Judge to direct, and a direction had been given leading to the very result of this verdict, it would have been impossible for them to maintain the exception now insisted on; and that would have been the just state of the case.

Your Lordship has referred to a great number of English cases, in which such matters, in the construction of patent specifications, were held to be matters for the jury. I have looked particularly into the two cases of *Walton v. Potter*, and *Gibson and Campbell v. Brand*, and as far as I may be enabled to judge, I think it is apparent that the Judges did hold such questions, in the practical construction of the patent, to be fit matters to be left to the jury.

If I entertained more doubt than I do on this part of the case, I should still think that, in the state of this case, the defenders could take no benefit by the exception. I apprehend that the 5th and 6th exceptions must be read together as constituting one plea. For the defenders, in complaining of the Judge for having left the points in the 5th to the jury, were bound to state the doctrine of law by which they say he ought to have withdrawn it from them, and ruled it as proper for the Court. They have done so. And now if the Court are of opinion, not only that that law could not have been delivered to the jury, but that, in so far as law ought to have been stated, it must have been the reverse of that laid down, and in precise accordance with the verdict as it stands, I really cannot conceive that any rule of proceeding can require us to sustain this exception. Indeed, I should humbly think, that unless the law required by what is put as the 6th exception can be sustained, we cannot allow the 5th. It would be so, assuredly, in a motion for new trial; and I do not conceive that there is any thing in our Statutes or practice to require us to proceed more strictly, in this respect, in the case of a bill of exceptions.

On this point of the case, Mr Rutherford's argument was perfectly satisfactory to my mind. I need not inquire how the matter might stand upon a general verdict; though I am not prepared to say that I should not have the same opinion in that case. Here, by your Lordship's direction, the jury have found the matters specially; and if the law which ought to have been stated (if it were matter of law), must have been such as to *constrain* the jury to return the very same verdict which they have returned, I cannot conceive that it must be incumbent on the Court to disturb that verdict. I think that neither principle nor authority requires us to do so. Justice has been fully done in the strictest view that can be taken of the matter. And being clearly of opinion that the verdict is in accordance with the correct law of the case (in so far as we can be called on so to treat it), as the jury have found it to be in accordance with the evidence, I should see no good ground for reversing the proceedings, even if I thought, which I certainly do not, that there had been any mistake in the form which the case has taken. If the

verdict is *according to law*, I cannot think that we are called on to set it aside as *contrary to law*.

The case of *Vines*, referred to by your Lordship yesterday, appears to me to be very much in point. I will only add, that I observe in the case of *Walton v. Potter*, that Mr Justice Coltman, while he was inclined to hold that the point of invalidity raised was within the issue, nevertheless, being of opinion that the patent was valid, concurred with the other Judges in sustaining the verdict.

The 7th and 8th exceptions seem to depend on the same question with the 5th and 6th. I will only observe, that I cannot imagine that there should be any reasonable doubt, either in *law* or *fact*, concerning the meaning of the word *effect* in this specification. But if there was such a doubt, it surely must have been a question for the jury on the whole evidence.

On the grounds which I have already explained, and concurring in the views of your Lordship and Lord Medwyn, I am of opinion that these exceptions (9th and 10th) cannot be sustained.

11th Exception.—Looking to the terms of the Statute of *James*, and the way it has been applied, and to the nature of the direction excepted from, I am of opinion that the direction was right. But the question is, whether the supposed previous invention must not have been *known and used as a useful thing at the time*—that is, in fair understanding at the time of the patent in question being obtained, in terms of the Statute.

I am of opinion with your Lordships, that there is no ground in law for these (12th and 13th) exceptions. I think it clear that the specification is not defective in the points referred to; the modes of protection of the mouth of the furnace, and the end of the pipe being perfectly well known to all persons of ordinary skill in such things.

On the first exception I entirely concur in the opinion of Lord Medwyn.

It is very clear to me, that our Statutes concerning the effect of the closed record, which are neither repealed, nor in any manner touched, by Lord Brougham's Act, must be in full force, and must rule the question; and that that record cannot be supplemented by any note of objections subsequently lodged.

Then it appears to me, that if the party meant to try to prove any special case of prior use, it should have been specifically stated. They did so in various instances, and the consequence was that they were *disproved* in the trial by persons who had made themselves acquainted with the works referred to.

The case of the gas tubes rather tends to illustrate the point. The averment was definite, and *limited* to previous use in Edinburgh and Glasgow; and it was so put in the issues. The making of such articles at all was of very recent practice; and all the persons employed in it in these places were well known. But if you make a general averment about common forges, with reference to numerous places or districts all over the kingdom, it is impossible for any one to tell or to discover what the particular thing is which you propose to prove under it.

An averment of a general custom would be a different case. But even for that, the record here would not be sufficient.

Lord Meadowbank absent.

The Court accordingly disallowed the bill of exceptions, and also refused a motion for a new trial.

Presiding Judge at Trial, Lord Justice-Clerk (Hope).—*Act*. Rutherford, P. Robertson, A. Anderson, Inglis; G. and G. Dunlop, W.S., *Agents*.—*Alt. Solicitor-General* (M'Neill), Whigham, Mure; Tod and Romanes, W.S., *Agents*.—[G.D.F.]

20th July 1842.

SECOND DIVISION.—(G. D. F.)

No. 277.—WILLIAM LANDELL, *Pursuer*, v. WILLIAM PURVES, *Defender*.

Process—Jury Trial—Leave to Appeal—Agent and Client—Reparation—Relief—*An action of relief having been raised by a pursuer to recover damages from a law-agent, in consequence*

of the former having himself been subjected in damages from the use of a border warrant, which had been obtained, as alleged, on the advice and employment of the defender as agent, and which had been found illegal, an issue was refused by the jury clerks, and the Lord Ordinary held the action irrelevant; but the Court, though expressing doubt, unanimously held the summons relevant. Thereafter an issue was approved of to try the case, but before that could be done, the defender applied to the Court for leave to appeal against the judgment finding the summons relevant. The Court, in the circumstances, granted leave, provided the petition of appeal should be presented on or before a (week) limited time.

Continuation of case *supra*, p. 417. Since the decision of the Court (*supra*) altering the Lord Ordinary's judgment, and finding the summons relevant, the defender presented a petition for leave to appeal against the interlocutor pronounced by the Court.

Rutherford, for the pursuer, opposed the application, in respect that as the case was now remitted to the jury roll after the finding of relevancy, it was unusual to grant leave of appeal, especially where it was understood the Court was unanimous, and, accordingly, he proposed that their Lordships should refuse leave, and approve of the issue which had been drafted and submitted to the defender.

The issue proposed was as follows:

"Whether the pursuer employed the defender as his law-agent, to adopt legal measures for making the said Mrs Margaret Brodie or Landell, the person named in the said warrant, amenable to the Scotch Courts, and whether the defender advised the pursuer to apply for said warrant, and represented the same to be legal and proper; and whether the defender thereafter, acting as agent aforesaid, obtained the said warrant, and after he obtained the same from James Bell, Sheriff-clerk of Berwickshire, gave instructions to the Sheriff-officer for putting the said warrant into execution against the said Mrs Margaret Brodie or Landell, by imprisoning her in the jail of Greenlaw, whereby the pursuer was subjected to the expenses and damages, of which he demands to be relieved by the defender?"

Lord Justice-Clerk.—What does the defender say to the draft?

Whigham had nothing to say about the pursuer's draft issue. All that the defender had to state was in support of the petition for leave to appeal. The Court had expressed doubts as to the summons being relevant; in particular, Lord Moncreiff was understood to be of that opinion; and as the judgment was not unanimous, leave should be granted.

Lord Justice-Clerk.—Do you admit that the proposed issue is conform to the summons?

Whigham.—I do so. It covers the point in the summons, certainly.

Rutherford.—Then the only course for the Court is to approve of the issue as drafted.

Lord Justice-Clerk.—That is the first step, certainly. But should you not add to the draft, "to the injury and damage of the pursuer?"

Rutherford was not sure if that would be conform to the summons. It was only a question of relief that was raised, and the summons contained no conclusion for damages.

Lord Justice-Clerk.—I know that: But why not insert the usual expression?

Whigham.—It would alter the summons.

Lord Justice-Clerk.—No, indeed. As the pursuer was subjected himself in damages and expenses, I confess I think the words ought to be added.

The other Judges rather thought that the words should be added, and they were so accordingly, and the issue approved of.

As to the claim for leave to appeal,

Lord Moncreiff (looked back to his notes of the advising.) There happened to be no register present I recollect, when

the case was argued, and I cannot now charge my memory with what I said. I thought the case attended with difficulty I recollect; but all I find in my notes, as applicable to what I said at the time in reference to the question of relevancy, is the expression—"Doubt." I forget exactly what I said, but I am inclined to think, that on the whole I concurred with your Lordships.

Rutherford.—Therefore the judgment was unanimous, and there is no ground for the appeal. We have now got an issue, and we shall give notice to try the case, and why not proceed to trial? We may not obtain a verdict: therefore the necessity for an appeal would be at an end. Besides, it is plain the defender wishes to endeavour to hang up the case from the jury indefinitely, by taking the case to appeal; but the pursuer, since the issue was approved of, had a material interest to prevent this, and the Court would be slow to interfere.

Dean of Faculty.—But if, on appeal, the decision is reversed, then a trial would be rendered unnecessary.

Lord Moncreiff.—The only thing I would remark is, that we have pronounced an interlocutor of relevancy, which is a very rare thing; and on that ground there may be a reason for granting leave.

Lord Justice-Clerk.—If the defender can show at the trial what he avers on the record as avoiding the damage, then the pursuer will not get a verdict. There are few or no cases in which an appeal has been allowed after the approval of an issue. There was the case of the Duke of Hamilton, but it was different; and the appeal here may turn out quite useless.

Dean of Faculty.—But if the pursuer get a verdict, and the decision of the Court here is reversed on appeal, the trial will have been useless, in which way the proper course would seem to be to grant leave; however, if the Court think that all our defences are reserved, to be raised at the trial, that may make a difference in our course.

Lord Justice-Clerk.—This is not a similar case to that of the Duke of Hamilton. There the question appealed was as to the state of interests; so that, if reversed, it materially altered the case.

Rutherford.—The plea in defence here was, not simply that the action was not relevant, but want of employment. This latter question was *ante omnia* to be tried; for if settled, it would supersede the question of law. An issue obtained in the common case, implies relevancy. Here relevancy is no doubt expressly found by the Court, and there is the issue also approved of; but what difference is there between the two cases? One might as well appeal against an issue after it is approved; but how unusual that is. Referred to the case of Magistrates of Wigton, 15th February 1834; 12 S. and D., p. 459.

Dean of Faculty.—The special defences will be superseded if the action is held to be bad.

Lord Justice-Clerk thought there was a great specialty in the case. The defender pleaded that the action was not relevant, but he did not content himself with that, and went on and closed a record on a variety of averments. Now, after the Lord Ordinary's interlocutor of March 1842, the pursuer could not amend his libel. His Lordship was against allowing the leave to appeal, after the course adopted by the defender in the record, who now had advantages he would not have had if the discussion on the relevancy had taken place before going into a record. The summons has now been found to be relevant. The issue has been approved of; and evidence may be lost by delay, to the great prejudice of the pursuer. Then the defender has his special defences, and if these be proved at the trial, the verdict will be in his favour, and that would supersede the necessity for any appeal. The question is entirely a matter of fact; and if the leave is granted here, it may be granted in every other case where the issue is to the loss and damage of the pursuer. This is not equivalent to the question which sometimes arises, whether malice should go into the issue. It is a case in which you can't begin anew. The defender can suffer no prejudice by the trial; and I am accordingly against granting leave.

Lord Medwyn was of a different opinion, and did not see why the closing of the record made any difference, as both pursuer and defender were parties to that. The pursuer ought to have got the question of relevancy set at rest himself before going

into a record. His Lordship was in favour of granting leave, since he was inclined to have the question of relevancy reconsidered, as it had been said that it was the first instance of the kind where malice was not averred, or want of skill in the professional man, or neglect or dereliction of duty.

Lord Moncreiff confessed he was of Lord Medwyn's opinion. It was a very special case, both from the fact that the jury clerks could not find matter in the summons to frame an issue, and also because he believed it to be the first case of the sort. His Lordship thought nothing of closing the record, nor could he see how it bore on the question. It was the pursuer's duty to look after his own interests, in the conduct of his case, and the Court could not either assume negligence or ignorance on his part. If the summons was not relevant, there was no case; and "were the Court, while in *dubio* as to whether there was any ground for action, to send it to trial?" He certainly doubted the judgment pronounced holding the summons to be relevant; but in the question, whether they ought to allow an appeal of that judgment, it was a very extraordinary case in the circumstances, and on that ground, and on the doubt as to the judgment itself, he thought leave should be granted. The issue clerks could find no issuable matter in the summons. The Lord Ordinary held it to be irrelevant; and the Court, only with some doubt, held it to be relevant. And they pronounced, what is a very unusual thing, an interlocutor of relevancy. In these circumstances, accordingly, in such an important question involving the liability of an agent, it would be going far to refuse the leave.

Lord Meadowbank absent.

The Court

"grant leave to the petitioner to present a petition of appeal to the House of Lords against the interlocutor of the 27th day of May last, provided, however, that the said petition shall have been presented on or before the 27th day of July current."

Act. Rutherford, J. S. More; Greig and Morton, W.S., *Agents.*—*Alt.* Dean of Faculty (Wood), Whigham; Ainslie, Macallan and Graham, W.S., *Agents.*—[G.D.F.]

20th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 278.—W. H. SANDS, *Trustee of the deceased John Duke of Roxburghe, Objector*, v. THE RIGHT HONOURABLE THE EARL OF WEMYSS AND MARCH, *Respondent*.

(In Locality of Whittinghame.)

Teinds—*Titularity*—*Completing Titles*—*Augmentation and Locality*—*Church*—*Circumstances in which held, that a certain progress of titles conferred the right of titularity on A, to the teinds of a parish, in preference to B, who claimed it in virtue of another set of titles; and that a disposition by A of the teinds of certain lands within the parish, was a valid and effectual heritable right in favour of the heritor to whom it was granted; and effect accordingly ordered to be given to it in a process of locality and augmentation of the parish.*

The objector set forth, that the collegiate church of Dunbar was established in the year 1342 by Patrick Earl of March, and confirmed by William, Bishop of St Andrews. Its constitution consisted of a dean, an archpriest, and eight canons, for whose support there were assigned the revenues of the church of Dunbar, and the incomes of the chapels of Whittinghame, Spot, Stanton, Panshiel, and of Hedderwick; and the churches of Linton in East-Lothian, Dunse and Chirnside in Berwickshire, were likewise annexed to the establishment—the granter reserving to himself the right of patronage. By a new regulation in 1492, when the establishment was again confirmed by the bishop of St Andrews, the churches of Dunbar, Pinkerton, Spot, Belton, Pitcokis, Linton, Dunse, and

Chirnside, were appointed prebends of it,—Chalmers's Caledonia, Vol. II. p. 511.

In 1372, George then Earl of March gave in marriage with his sister Agnes, to James Douglas of Dalkeith, the manor of Whittinghame, with the parsonage of the chapel; and by charter, of date 17th October 1564, Queen Mary granted to James Douglas of Dalkeith, then Earl of Morton, *inter alia*, the lands and barony of Whittinghame, along with "advocatione et donacione ecclesie de Quhittinghame et omnium aliarum ecclesiarum et cappellaniarum earundem ac omnibus pertinentiis jacen. infra vicecomitatum nostrum de Edinburgh et constabulariam de Hadintoun."

The estates of the Earl of Morton were forfeited to the Crown in 1581, and in the same year a Statute was passed ratifying a conveyance granted by his Majesty to John Earl of Morton of a considerable portion of the forfeited estates, but neither the tenandrie of Crumstane (afterwards mentioned), the deanery of Dunbar, nor the patronage of Whittinghame, formed parts of the grant. In consequence, the patronage of the deanery of Dunbar, and of all the benefices and chaplainries connected with it, including the patronage of Whittinghame, was vested in the Crown for some time previous to the end of the sixteenth century, and at that period, and subsequently, the objector alleged that the Crown possessed and exercised a right of property over the whole revenues which pertained to the collegiate church, and to the benefices, prebends, and chaplainries connected with it.

By an Act of Parliament in 1606, in the reign of King James the Sixth, the narrative of which set forth the great services of George Earl of Dunbar, Lord Home of Berwick, "Chief Treasurer of Scotland, Chancellor of the Eschequer in England," his Majesty granted, disposed, and confirmed to the Earl,

"his airis and ass'nais *inter alia*, all and haill the tennendrie of crumstane comprehending the landis and ground quhairone the Castell of dunbar is situat The foirthis castell steid and haill precinct yairof with housis yairdis and pelces of land vseit and wont to pertene to the said Castell The landis and boundis of the great loch of dunbar The landis of brovme-pairk wt. meadows et horswardis The lynkis and cunnynger of estbairnis and all p'tinentis belanging of auld to the lordschip and baronie of dunbar Alsua all and haill the landis of Rewlismaynis Sampsones Wallis crumstane with the myln yairof The landis and akeris besyd and within the towne of duns, with the cottages yairof The landis of Newtown quhiteaus, twa husband landis in hiltoun and landis callit prestoun waris with all thair pairtis pendiculis anequis conexis dependenciis and pertinentiis lyand in the said s'refdome of berwick toggidder wt. aduocationoun donatioun and richt of patronage of the benefices and chaplanreis following vizt. The denrie of dunbar including the personage and vicarage of the parochin of quhittingem The archiprestrie or vicarage of dunbar including all the kirklandis and teyndis vseit and wont of all and haill the parochin of dunbar The prebendarie of duns, including personage and vicarage of the haill parochin of duns The prebendarie of Chirnesyd including personage and vicarage of the haill parochin of chirnesyde The prebendareis chanonreis or personages of dunbar pincartoun Beltoun and pitcokis The Chaplanreis callit the saull preistis and all vtheris chaplanreis fundit of auld within the college anexit thairto with the comones or comountie teyndis depending vpon the zeirle fruittis and comoditeis of the foirsaidis as proper p'tinentis of the samyn, all vnitit and incorporat in the foirsaid tenendrie of crumstane," &c.

The Statute, after of new conveying the lands, proceeded:

"With all pairtis pendiculis and pertinentis yairof with advoca-

tioun dona'un and richt of patronage of the denrie of dunbar The Archiprestrie of Dunbar The Chanonreis and prebendaries of dunr. chirnesyd, dunbar, pynkertoun spott beltoun and pitcokis The chaplanreis callit the saull preistis and all vtheris chaplanreis fundit or anexit of auld To the said college of dunbar Toggidder with the prebendarie of the parochin of luntoun including personage and vicarage yairof anexit and fundit of auld within the sami college kirk of dunbar with the saidis comonis and comountie Teyndis Pertenig and depending vpon the zeirle rentis of the saidis kirkis as proper pertinentis of the samyn, And siclyk all and haill the landis of lochend with meadows and pertinentis yairof The haill toune and landis of mekill and litill pynkertownes Quhytrig and burt with tennent tennendreis and all thair pertinentis Pertenig to oure souerane lord being p'ts of his hienes anexit propertie and patrimonie of the Crowne."

Following on the Statute of 1606, King James the Sixth granted a charter in July of the same year, precisely in the terms of the Statute in favour of the Earl of Dunbar. The Earl having died, he was succeeded by two daughters; but by agreement between them, a title was made up in 1613 to the said lands and others, *inter alia*, to the deanery of Dunbar and other benefices, solely in the person of one of them, namely, his eldest daughter, Lady Anne, exactly in terms of her father's titles. Two sets of titles thereafter appear to have emanated from the successor of the Earl of Dunbar:—1st, In 1616, Lady Anne and her husband resigned the lands of Whittinghame into the hands of the Crown, "*nec non totas et integras terras ecclesiasticas et glebam de Quhittinghame,*" "*una cum advocatione et jure patronatus ecclesie parochialis de Quhittinghame tam rectorie quam vicarie ejusdem,*" in favour of Sir Archibald Douglas of Whittinghame, who thereafter was infeft, in 1616, on a Crown-charter dated in 1616, whereby there were disposed to him, and his heirs-male and assignees,

"omnes et singulas terras de Whittinghame cum turre fortalicio manerie domibus edificiis hortis pomariis molendino terris molendinariis, multuris, sequelis, annexis, connexis, partibus pendiculis et omnibus suis pertinentiis, nec non totas et integras terras ecclesiasticas et glebam de Quhittinghame, cum domibus edificiis et omnibus suis pertinentiis," &c., "*una cum advocatione donacione et jure patronatus ecclesie parochialis de Quhittinghame tam rectorie quam vicarie ejusdem,*" &c.

The Crown-charter, besides containing the right to the patronage of Whittinghame, contained a clause erecting the whole into a barony, to be called the Barony of Whittinghame.

Following on this deed, and on the narrative that Sir Archibald stood infeft "in the advocation, donation, and richt of patronage of the parish kirk of Quhittinghame" under Crown titles, a deed was executed in March 1618 by John Viscount Lauderdale, who appeared to have had some claim (the nature of which was not set forth on the record) to the patronage of Whittinghame, whereby he ratified and confirmed Sir Archibald's "said heritable right to the said patronage."

In regard to the 2d title emanating from Lady Anne, the eldest daughter of the Earl of Dunbar, it appears that James Baillie of Lochend had led an apprising against Lady Anne and Sir James Home of Whiterig, to whom she had been married, in consequence of which he was infeft on a Crown-charter of adjudication in March 1618. This charter, after narrating that certain obligations, rights and securities, formerly belonging to Lady Anne and her spouse, had

been lawfully appraised from them by decree, 19th December 1617, disposed to Baillie the lands and others which were previously mentioned as having come into the person of Lady Anne on the death of the Earl of Dunbar, viz.,

" cum advocacione donacione et jure patronatus beneficiorum et capellaniarum supra-script. viz., dict. Decanatus de Dunbar includen. rectoriam et vicariam dict. parochiæ de Whittinghame, dict. archipresbiteratus seu vicariæ de Dunbar, includen. omnes terras ecclesiasticas et decimas usitat. et consuet. totius antiquæ parochiæ de Dunbar, dict. prebende de Duns, includen. rectoriam et vicariam totius parochiæ de Duns, dict. prebende de Chirnside, includen. rectoriam et vicariam totius dictæ parochiæ de Chirnside, dict. prebendariorum canonicatum seu rectoriarum de Dunbar Pincartoun Beltoun et Pitcokis dict. capellaniarum vulgo nuncupat. lie sanct. priests, et omnium aliarum capellaniarum ab antequo fundat. infra dictam ecclesiam collegiatam de Dunbar eidem annexat. cum dictis communibus seu communibus decimis dependen. super annuis fructibus et commoditatibus ecclesiarum supra-script. tanquam de propriis bonis et pertinentiis earundem."

Baillie was duly infeft in April 1618, and the Earl of Lauderdale, who also claimed some right to the deanery of Dunbar, came forward, and by a deed, dated 11th July 1618, narrating "certain good reasons and considerations," resigned and conveyed to Baillie,

"all and haill the greens and cunnynghairs of East Barnes, pertinentiis thair of quhatsoever, lyand within the sheriffdom of and constabularie of Haddington, together with the advocacione and donatoun of the prebendaries of the college kirk of Dunbar after spect., viz., the deanerie of Dunbar, comprehending the personage and vicarage of the kirk of Qubittinghame, the archiprestrie of Dunbar, the prebendaries of Chirnside, comprehending the personage and vicarage of the kirk of Chirnside, The prebendaries of Dunbar, Pincartoun, and Beltoun, The chaplanrie called the saul-priests of Dunbar."

This deed specially excepted from the warrandice the deed of ratification previously executed by the Earl, viz.:

"Exceptund always furth of the said warrandice the facts and deeds already done by us before the making hereof, viz., ane ratificatione of the patronage of the prebendarie of Chirnside, made be us to Alexander Earl of Home, ane ratificatione of the patronage of the deanerie of Dunbar, comprehending the kirk of Qubittinghame, maid to Sir Archibald Douglas of Whittinghame, Knight, ane of the senators of the college of justice; ane disposition maid by us to the said James Baillie of the patronage of the archiprestrie of Dunbar, and saulpriestrie thereof, with the com'ouns of the kirk of Dunbar, and all deeds (gif any be) done by us the said Viscount in favour of umql. George Earl of Dunbar, his heirs and assignees, quhilks ratificationes and dispositions sall nowise be comprehended within the said warrandice, but exceptit from the same."

Following on this deed, and with a view apparently to confirm his right, Baillie of Lochend entered into a contract of sale with Lady Anne in July 1618, in regard to certain subjects contained in the apprising, being the lands of Broxmouth, the Links of East Barnes, the patronage of the deanery of Dunbar, and the lands of Meikle and Little Pincartouns, Brunt and Whiterig, and Lady Ann and her husband conveyed the same to Baillie, together with

"the advocatioun donatioun and right of patronage of the benefices and chaplanreis following, viz. the sd. Deanrie of Dunbar including the personage and vicarage of ye sd. parochin of qubittinghame the archeprestrie or vicarage of Dunbar including yr'intill all ye kirk lands and teinds vait and vont of all and haill the said parochin or Dunbar the sd. prebendarie of chirnside including personage and vicarage of ye sd. haill parochin of chirnside the sd. prebendaries chaplanreis or personagis

of Dunbar, pincartoun and beltoun the prebendaries callit ye saulpriest wr. the commounes and commoun teindis depending vpon ye zeillie fruitis and commoditeis of ye foresaids kirkis."

The contract excepted from the warrandice the conveyance of the patronage to Sir Archibald Douglas. Baillie thereafter obtained a charter under the Great Seal (on 30th July 1618), whereby the Crown conveyed to him these subjects,

"una cum advocacione donacione et jure patronatus ecclesiarum et beneficiorum subsequen., viz. decanatus de Dunbar, includen. rectoriam et vicariam parochiæ de Whittinghame Archipresbiteratus seu vicariæ de Dunbar includen. omnes terras ecclesiasticas et decimas usitat. et consuet. totius et integræ parochiæ de Dunbar, prebende de Chirnside, includen. rectoriam et vicariam totius parochiæ de Chirnside, prebendariorum cappellaniarum seu rectoriarum de Dunbar, Pincartoun, et Beltoun, prebende seu capellanie vulgo nuncupat. lie saulpriestrie de Dunbar, cum communibus seu communibus decimis dependen. super annuis fructibus et commoditatibus dictarum ecclesiarum Nec non totas et integras terras de Meikle et Littel Pincartounes, Brunt, and Qubittig cum domibus edificiis hortis partibus pendiculis earundem tenentibus tenandriis earundem et singulis suis jacen. infra constabulariam de Haddington et vicecomitatum de Edinburgh antedict."

This charter erected the whole of these subjects

"in unam integram et liberam tenandriam omni tempore futuro tenandriam de Pincartoun nuncupand;" "cum communibus seu communibus decimis dependen. super annuis fructibus et commoditatibus aliarum ecclesiarum."

Baillie afterwards (in August 1618) conveyed the great portion of the subjects composing this tenandry, as now described, to Robert Earl of Roxburghe, in whose favour a charter was subsequently (19th August 1618) passed under the Great Seal, the quæquidem of which described the subjects in similar terms to the enumeration in the charter to Baillie, of July 1618. The clause of novodamus was conform to that description; and the charter contained a clause of new erecting the same into a tenandry, apparently because the whole subjects previously contained in the tenandry were not now conveyed to the Earl of Roxburghe.

To follow out the titles to the Douglas family, the first above mentioned:—Sir Archibald (the 1st) having died, his succession was taken up by his eldest son, Arthur. Arthur—who was duly infeft in 1628 on a Crown title, which specially described the subjects contained in it, in the same way as they were disposed and held by his father, and as having been erected into a barony—thereafter, in 1642, under reservation of his liferent, resigned the barony, &c., and whole subjects above conveyed, with the exception to be mentioned, to his eldest son Archibald (Sir Archibald the second) who was infeft on a Crown-charter: But the charter excepted, or at least did not *per expressum* convey to Sir Arthur's son, the patronage of Whittinghame.

Thereafter, on the second Sir Archibald's death, a title was expedite (in 1662) in favour of his eldest sister and heir-at-law, the Countess of Kingston, and subsequently, on her death, a title was completed (in 1684) in favour of her son Archibald (the third Sir Archibald, and) Master of Kingston, in precisely the same terms as the titles stood in the person of the first Sir Archibald Douglas in 1616.

The Master of Kingston (the third Sir Archibald Douglas) having contracted debt, a decree of apprising was obtained against him, whereby there were appraised

from him the lands and barony of Whittinghame, "with the teinds great and small, both parsonage and vicarage, of the aforesaid barony and others." Thereafter, William Hay of Drummelzier obtained right from the creditor, Elizabeth Rutherford, to this apprising, and he was infeft in 1700, on a charter of adjudication and resignation from the Crown, which disposed to him the barony of Whittinghame, and others comprehended therein,

"Totas et integras terras et baroniam de Whittinghame inibi comprehendens. una cum advocacione donatione et jure patronatus ecclesiæ parochialis de Whittinghame, cum decimis ejusdem tam rectoriis quam vicariis."

The charter described the lands:

"Et quæ omnes terræ aliæque suprascript. in unam et liberam baroniam vocat. Baroniam de Whittinghame erect. fuerunt secundum antiqua jura et infeofamenta ejusd. quond. Archibaldo Douglas de Whittinghame et predecessibus suis concess. Et quæquidem terræ et baroniæ de Whittinghame comprehendens. ut predictur cum decimis magnis et minutis tam rectoriis quam vicariis dict. terrarum et baroniæ ad dictum quondam Dominum Archibaldum Douglas de Whittinghame et ad Dominam Elizabetham Douglas ejus sororem sponsam Alexandri Vicecomitis de Kingstoun et dicto Alexandro Vicecomiti de Kingstoun seipso et ad quondam Carolum Magistrum de Kingstoun filium legitimum natu maximum procreat. inter dict. Alexandrum Vicecomitem de Kingstoun et Dominam Elizabetham Douglas per prius hereditariè pertinuerunt, et quæ appreciatæ fuerunt a dicto Alexandro Vicecomite de Kingstoun ad instantiam Elizabethæ Rutherford."

The lands and barony of Whittinghame were possessed in virtue of this title down to 1817, when they came by purchase into possession of the present family of Balfour.

After this enumeration of titles, it is necessary to state, in regard to the teinds of the parish of Whittinghame, which, prior to the end of the sixteenth century, were in the hands of the Church, and drawn by the deanery of Dunbar, that in February 1590, Lord Claud Hamilton, who was the commendator of the Abbey of Paisley, and also the dean of Dunbar, with consent of his prebendaries and chaplain of the collegiate church of Dunbar, granted a lease to his son, Sir George Hamilton, and his heirs, for a very long period, of the "teynd scheaves, uteris teyndis of lamb and wool, fruits, rents, and emoluments, profitis and duties whatsoever, of the parsonage and vicarage of Whittinghame, with parts, pendicles and pertinents," &c., pertaining to the deanery of Dunbar. This tack was assigned by the lessee to Sir Claud Hamilton of Shawfield; and it appeared from a decree of platt, in January 1618, and relative proceedings, that a prorogation was obtained of the tack, which, it was averred, continued in subsistence till after the commencement of the present century.

The objector alleged that the Roxburghe family had always possessed the subjects described as contained in the tenantry of Pinkerton, which was so erected in 1618, from that period down to the present moment: That in particular, they possessed the titularity of the parish of Whittinghame in virtue of their right to the deanery; and in exercise of the right of titularity, the late John Duke of Roxburghe had, in 1798, disposed to Robert Walter Lord Blantyre, all and whole the teinds, parsonage and vicarage, of all and hail the lands belonging to the latter, lying within the parish of Whittinghame, and that they had exercised other un-

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equivocal and substantial acts of possession of the titularity, which were set forth on the record, viz., by conveying, in right of the title to the deanery, &c., the teinds on various occasions, to various heritors within the parish of Whittinghame. And the objector accordingly *pleaded* in this locality of the parish of Whittinghame, that in virtue of the titles and possession which has been explained, the late John Duke of Roxburghe had a valid and effectual title to the titularity of the teinds of the parish of Whittinghame, and that the disposition to Lord Blantyre in 1798, was therefore effectual to constitute an heritable right to the teinds thereby disposed; and it was argued, that the alleged title to the titularity in the family of Hay, was ineffectual in competition with that of the objector's constituent; because, 1st, the party from whom the right to the barony of Whittinghame was adjudged by the Hays, had no right to the teinds in question, and accordingly, that the charter of adjudication, and whole progress following on it, was void, as flowing *a non habente potestatem*; and, 2dly, because no possession of the teinds had ever been had by the Hays, or by their predecessors or authors; and the objector therefore objected to the schemes of locality and of accounting between the heritors, in so far as effect had not been given to the heritable right held by Lord Blantyre to his teinds in the parish; and he craved rectification and adjustment accordingly.

The respondent—denying that the titularity was conveyed at all to the objector's constituents—alleged, besides, that there were no sufficient acts of possession of it; and it was maintained that the titularity was in the respondent, who, or his authors, had invariably, from 1700 to the present time, possessed and exercised the right of patronage. And it was averred that the title to Lord Blantyre had been executed by the Duke of Roxburghe for a purpose, in order to enable Lord Blantyre, as having an heritable right to his teinds, to avoid being allocated on in the then pending process of locality and augmentation by the minister of the parish. It was admitted that the common agent had given effect to the title, but objections, it was stated, were lodged to it, which, however, never came before the Court, in consequence of Lord Blantyre's property and that of Drummelzier centering in the proprietor of Whittinghame. In 1808, however, in a new locality, these lands, which had belonged to Lord Blantyre, were localled on; but that process fell asleep. In 1829 a new process was brought, and in it the same lands were again localled on, in respect of no heritable right having been instructed to the teinds of them by Mr Balfour, the then proprietor, and a final scheme of locality (now objected to) was made up on the principle that neither the late Lord Blantyre nor Mr Balfour had any heritable right to their teinds.

The respondent accordingly *argued*, that the Duke of Roxburghe had no right, as titular, to grant the disposition to Lord Blantyre in 1798, and that the right to the titularity must be held to be in the respondent, and that his title was preferable to that of the objector. Further, it was argued, that as the present proprietor of the teinds in dispute had consented to be allocated on as a party having no heritable right to his teinds, there were fair grounds for presuming that the present objections were untenable.

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The Lord Ordinary pronounced the following interlocutor:

" 11th March 1841.—The Lord Ordinary having heard parties' procurators, and thereafter made avizandum, finds,

" 1st, That the titles of the family of Roxburghe do not contain any right to the titularity of the teinds of the parish of Whittinghame *per expressum*.

" 2dly, That although the patronage of the deanery of Dunbar, including the rectory and vicarage of the parish of Whittinghame, was erected into a tenantry in favour of Baillie in 1618, and that that tenantry of Pinkerton was afterwards conveyed, with parts and pertinents, to the Earl of Roxburghe, yet the patronage of the parish of Whittinghame had been previously conveyed to Douglas of Whittinghame.

" 3dly, That the Roxburghe family do not appear ever to have possessed the teinds of the lands in question, or of any part of the parish of Whittinghame.

" 4thly, That, in the absence of any heritable right in the family of Roxburghe, or any other person, William Hay of Drummzier had, by Statute, a right in 1700 to the teinds of the parish of Whittinghame, and that the same appears to have been contained in the charters of the barony of Whittinghame from 1700 down to, and since 1798, and conveyed to Mr Balfour, the present proprietor.

" 5thly, That, in these circumstances, the family of Roxburghe have not instructed any heritable right to the titularity of that parish, and that the disposition from John Duke of Roxburghe in 1798 was granted *a non habente protestatem*, and did not convey a valid and effectual right to the teinds of the lands in question: Approves, therefore, of the interim scheme as a final scheme of locality in this parish: Finds the trustee of John Duke of Roxburghe liable in expenses, subject to modification: Appoints an account thereof to be given in, and remits to the auditor to tax and to report.

" *Note.*—The question before the Court is, whether John Duke of Roxburghe had a right to teinds in the parish of Whittinghame, which he sold to the late Lord Blantyre in 1798?

" It is not necessary, with a view to its decision, to go into the earlier titles of the collegiate church of Dunbar, some of which, from the year 1342 to 1581, have been referred to. The paramount right seems to have been vested in the Crown in 1581. In 1606 an Act of Parliament was passed, which ordains a charter to be made under the Great Seal in favour of George Earl of Dunbar, of the barony of Crumstane, comprehending the lands on which the Castle of Dunbar is situate, 'togidder with advocacion, donation, and richt of patronage of the benefices and chaplanries following, viz., the deanrie of Dunbar, including the parsonage and vicarage of the parochin of Whittinghame, the archpriestrie or vicarage of Dunbar, including all the kirk landis and teyndis usit and wont of all and hail the parochin of Dunbar, the prebendarie of Duns, including personage and vicarage of the haill parochin of Duns, the prebendarie of Chirnside, including parsonage and vicarage of the haill parochin of Chirnside, the prebendaries, chanonreis, or parsonages of Dunbar, Pincartoun, Beltoun, Pitkokis, the chaplanreis callit the saullpriests and all utheris chaplanreis fundit of auld within the college annexit thereto, with the communes or comountie teyndis depending upon the yearlie fruittis comodities of the foresaidis as proper pertinentis of the samyn, all unitit and incorporat in the foirsaid tenandrie of Crumstane.' The Act of Parliament also of new 'grants to the said Earl the tenantry of Crumstane, with advocatioun, donatione, and richt of patronage of the denrie of Dunbar, the archpriestrie of Dunbar, the chanonreis and prebendaries of Duns, Chirnside, Dunbar, Pincartoun, Spott, Beltoun and Pitkokis, the chaplanreis callit the saullpriests, and all utheris chaplanreis fundit or annexit of auld to the said college of Dunbar; togidder with the prebendarie of Lyntoun, including parsonage and vicarage thereof, annexit and founded of auld within the sami College Kirke of Dunbar, with the saidis comunis and comountie teyndis pertenig and depending upoun the yeirle rentis of the saidis kirkis as proper pertinentis pertenig to our Sovereine Lord, being pts. of his hienes annexit propertie and patrimonie of the Crowne.'

" A charter and infestment in favour of George Earl of Dunbar followed on this Act of Parliament, and the rights of both

parties to the teinds in dispute may be said to be derived from that charter. There is a question between the parties, how far that grant included the titularity or teinds of the parish of Whittinghame, or only the patronage which, after the Statute 1690, carried with it the titularity where there was no heritable right. Under the grant of patronages quoted, the deanery of Dunbar includes the parsonage and vicarage of the parish of Whittinghame. The *novodamus* clause gives the patronage of the deanery of Dunbar without special mention of the parish of Whittinghame. Then follows an enumeration of the archpriestry of certain prebendaries, chanonreis and chaplanreis, followed with a clause of common teinds as pertinentis of them. It is contended that this clause of common teinds is to be considered as a grant of the titularity of all these separate benefices, and among others, of the parsonage and vicarage of the parish of Whittinghame, which was included in the deanery of Dunbar. On the other hand, the clause of common teinds of the said kirkis may be applied not to the deanery, but to the benefices which are specified afterwards, for the parish of Whittinghame, included in the deanery, might not then be considered as a separate benefice. This ambiguity might be cleared up by possession on either side, but unfortunately the possession was not such as to remove that difficulty.

" Lady Anne Home, the daughter of George Earl of Dunbar, conveyed the patronage of the parish of Whittinghame to Sir Archibald Douglas, who obtained a charter in 1616: from the *quæquidem* of which it appears that he previously had the property of the lands of Whittinghame, as also the ecclesiastical lands and glebe, by other titles, and that the patronage of the church of Whittinghame belonged to Lady Anne Home, and was conveyed by her, with consent of her husband, and resigned by them in favour of Sir Archibald Douglas.

" Infestments were taken on this charter, and it was confirmed by Parliament in 1621, and from that time down to the present, the patronage of Whittinghame appears to have been exercised under that title by the proprietor of the lands of Whittinghame. No heritable title to the teinds of the parish of Whittinghame appears to have been acquired by the proprietor of that estate un'il the year 1700, when William Hay obtained a charter and adjudication of the lands and barony of Whittinghame, 'una cum advocacione, donacione et jure patronatus ecclesie parochialis de Whittingham, cum decimis ejusdem tam rectoris quam vicariis.'

" It is contended on the one side, that this was fully warranted by the Statute 1690; on the other, that the titularity of the teinds of Whittinghame remained with the family of Dunbar, and was conveyed to the Roxburghe family.

" It appears that Lady Anne Home entered into a contract with Baillie of Lochend, with procuratory of resignation of the patronage of the deanery of Dunbar, including Whittinghame; but the clause of warrandice contains an exception of the disposition which Lady Anne Home and her husband had made to Sir Archibald Douglas of the right of the patronage of the parish of Whittinghame, parsonage and vicarage. Baillie, however, obtained a charter of apprising in terms of the Earl of Dunbar's charter, with the 'Decanatus de Dunbar, includen. rectoriam et vicariam parochie de Whittinghame,' with a clause of *novodamus* erecting the subjects contained in the charter into a tenantry. Baillie conveyed this tenantry to the Earl of Roxburghe, who, in 1618, obtained a charter of resignation of the tenantry of Pinkertoun, 'una cum advocacione, donacione et jure patronatus beneficiorum et capellaniarum subscript. viz., Decanatus de Dunbar, includen. rectoriam et vicariam parochie de Whittinghame, prebend. de Chirnside, includen. rectoriam et vicariam totius parochie de Chirnside, prebendariorum, capellaniarum seu rectoriarum de Dunbar, Pincartoun, et Beltoun.'

" The Earl of Roxburghe's charter contains no express reference to the common or comountie teinds, further than they may be understood to be carried by the word *pertenig*; and the subsequent titles of the Roxburghe family are in similar terms.

" The Lord Ordinary has therefore found, that there was no express title to the teinds of Whittinghame in the Roxburghe family; and although the patronage of the deanery of Dunbar, including the rectory and vicarage of the parish of Whittinghame was included in Baillie's titles, and passed into the Roxburghe titles, it is not disputed that the patronage of the parish

of Whittinghame was previously disposed to the Douglasses, and has been possessed by the barony of Whittinghame ever since, and was also excepted by Lady Anne Home in warrandice of her conveyance to Baillie.

"The right to the titularity of Whittinghame, so far as regards the titles of the Roxburghe family, comes therefore to depend on the clause of common or commontie teinds which occurs in Baillie's charter, but does not appear in the Roxburghe titles, unless it is carried as a part and pertinent of the tenantry of Pinkertoun. This is certainly a very slender title, but it might have been sufficient if it had been followed by clear and appropriate possession of the teinds of Whittinghame by the Roxburghe family.

"It is a peculiar feature of the present case, that neither party can show any actual possession of the teinds of Whittinghame unless constructively. The trustee for the Duke of Roxburghe refers to various decreets and conveyances of the teinds of different lands, but they all appear to be in the parish of Dunbar, or in some of the other parishes included under the different benefices of which the patronages remained with Lady Anne Home, and were conveyed through Baillie to the Roxburghe family, "is proved by Claud Lord Hamilton in 1590, granted as Dean of Dunbar, a tack for a yearly payment of £200 Scots of the teinds of the parish of Whittinghame to his eldest son, and to the heir next succeeding him, and the longest liver of them two successively during their lives, and for three nineteen years after the death of the survivor.

"Afterwards the Parliamentary Commissioners appointed in consequence of the Statute 1617, modified a stipend in 1618 to the minister of Whittinghame and his successors, with the consent of the Earl of Abercorn, present for himself and his father as Dean of Dunbar, and ordained the tacksman to pay the stipend, which considerably exceeded the tack-duty. The Commissioners, in recompense of the burden imposed on the tacksman, added to the years of the tack seven nineteen years, to begin at the end of the period contained in the tack. As the tack commenced with two liferents, the termination of which is not ascertained, it cannot be stated with certainty when it expired. The trustee for the Roxburghe family says it was current till very lately, and the respondents say it expired somewhere about the year 1800. Both parties therefore agree in making it endure after the date of the conveyance of John Duke of Roxburghe to Lord Blantyre in 1798.

"Sir William Hamilton, who was in right of the tack in 1632, assigned the tack and decret of platt prolonging it, so far as regards the lands and barony of Whittinghame, to Arthur Douglas, for crop 1630, and all succeeding years. The tack was also assigned by a Sir Andrew Ramsay of Abbotshall to Walter Lord Blantyre, so far as regarded the teinds of the lands now in dispute.

"Both parties are therefore agreed that for two centuries, down to 1800, the possession of the teinds in question took place under the tack, which both sides admit endured for a period of more than two years after the disposition to the late Lord Blantyre by John Duke of Roxburghe. There was therefore no appropriate possession of these or other teinds in the parish of Whittinghame by the Roxburghe family before the conveyance in 1798, and without such possession the titles of the Duke of Roxburghe to these teinds was not such as to establish in his person an heritable right to these teinds. If there was no heritable title to the teinds in possession of the Duke of Roxburghe, the title obtained by the Hays of Drummelzier in 1700 (since conveyed to Mr Balfour), strengthened by the Act 1690, was liable to no legal objection, and vested in the proprietor of Whittinghame a legal title to the teinds in 1798, while, on the other hand, the Duke of Roxburghe had no such right."

The objector reclaimed. At advising,

Lord Medwyn went over the terms of the original charter of erection of the collegiate church in 1342, observing, that the dean of Dunbar pro prebenda sua percepit omnes decimas tam majores quam minores et obventiones parochie de Whittinghame keeping a perpetual vicar. The archpriest had to superintend the chaplainries belonging to the establishments, &c. &c., and

to him pro prebenda assignantur omnes decimæ et obventiones altaragia spectan. totius parochie de Dunbar præter decimas capellæ de Quittinghame. After some remarks as to the duties of the canons, &c., his Lordship proceeded:—The March estates having been annexed to the Crown by forfeiture in 1487, an Act of Parliament was passed in 1606, ordering a charter to be granted to the Earl of Dunbar of the tenandry of Crumstane, part of these estates, together with the patronage of the deanery of Dunbar, including the parsonage and vicarage of the parish of Whittinghame, the archpriestrie, or vicarage of Dunbar, &c., and concluding thus,—“with the commons or commontie teinds depending upon the yearly fruits in commoditis of the foresaids,” as proper pertinents of the same. The subject of the grant was certainly in the Crown at that time. Now the benefices, with all their parts, profits, &c., and not the patronage of them merely, were granted to the Earl of Dunbar. The right to present to the benefice, conferred the benefice with all its emoluments on the patron, and that right was to present a titular to the office, who drew the teinds and other emoluments of it. When vacant, he drew them himself.

At the Reformation, the collegiate church of Dunbar was suppressed as an establishment, but the parish churches which had been annexed to it, and such as were served by vicars, were retained. Thus the parish churches of Dunbar and Whittinghame were retained. The teinds of the latter parish had been received by the dean of Dunbar as his provision; and at the Reformation, Lord Claud Hamilton was titular and dean, and drew the stipend, which was assigned to him out of the thirds, and not from the teinds of the parish. The teinds of Whittinghame, Lord Claud Hamilton drew as titular and dean of Dunbar, till he, in that capacity, and with consent of the chaplain, granted a lease of them in 1590 to his son, George Hamilton, for a very long period, on payment of 200 merks Scots to the granter.

The Earl of Dunbar was succeeded by his two daughters, and by agreement between them, Lady Anne took up the succession, and made up titles to that part of it which comprehended the deanery of Dunbar and other benefices, in *ipsisimis verbis* of her father's titles. In 1616, she and her husband resigned the lands of Whittinghame, “nec non totas et integras terras ecclesiasticas et glebam de Whittinghame una cum advocacione donatione et jure patronatus ecclesie parochialis de Whittinghame tam rectorie quam vicarie ejusdem” in favour of Sir Archibald Douglas. But this title merely conveyed the patronage of Whittinghame, as is clear from the ratification which followed on it by Lord Lauderdale.

In 1617, Baillie of Lochend then led an apprising against Lady Anne and her husband, and he also obtained a disposition of certain of the lands, with the advocacy and donation of the prebendaries of the College of Dunbar, viz., the deanery of Dunbar, comprehending the parsonage and vicarage of the kirk of Whittinghame, the archpriestrie and vicarage of Dunbar and others, of the benefices which constituted the collegiate church, with the commons or commontie teinds of these churches. And Lord Lauderdale, in his ratification, excepts from the warrandice the ratification he had previously executed of the patronage of the deanery of Dunbar, comprehending the kirk of Whittinghame, made to Sir Archibald Douglas. Mr Baillie, with a view to complete his right, entered into a contract of sale with Lady Anne, by which she and her husband conveyed to Baillie certain of the lands contained in the apprising, with the patronage of the deanery, including Whittinghame and the other benefices, with the commontie teinds, but she excepts from the conveyance the right to Sir Archibald Douglas of the patronage of Whittinghame. Then followed a charter from the Crown in favour of Baillie, with *novodamus*, and a clause erecting the subjects into the tenandry of Pinkertoun. Now, without adverting to the conveyance of the commonty teinds, which do not apply to the church of Whittinghame, as they were given to the dean for his support, it is clear that Baillie got all belonging to the church of Whittinghame which the Crown conveyed to the Earl of Dunbar in 1606, with the exception of the patronage of the church, so that the teinds of the parish were made over to him. These teinds were carried by the charter, 30th July 1618,—the patronage merely having been disposed away previously. After this, the tenandry of Pinkertoun

* Thus in the original.

is made over to the Roxburghe family, in August 1618, by Baillie. Then there is a Crown-charter in their favour, with a *novodamus*, and a clause of new erecting the subjects into a tenantry, as the whole subjects previously constituting the tenantry were not conveyed to the Roxburghe family. In particular, the archpriestrie was not conveyed, nor the commons and commony teinds. Both the contract and *quæquidem* set forth, that what was conveyed was with all right, &c., which Baillie had in the subjects; and though the common and commony lands were not conveyed, Baillie made over to the Roxburghe family the deanery, and parsonage and vicarage of Whittinghame, and all others. The archpriestrie, and the commons and commony teinds, were reserved to be included by Baillie in the barony of Lochend, which was done by charter in 1620. In this way, the subjects so reserved were disunited by the Crown from the collegiate church and united to Lochend. His Lordship thought it of little moment that these reserved subjects were not conveyed, as he doubted whether the right to the archpriestrie, commons and commony teinds, would fortify the right to the teinds of Whittinghame, which were, he thought, carried by the right to the deanery. The Roxburghe family continue to possess the subjects acquired from Baillie under similar investitures as that in the charter 1619; and in 1798, the late Duke of Roxburghe granted to Lord Blantyre an heritable right to the teinds of his lands in the parish of Whittinghame, which was given effect to down to the present locality.

As to the title in Sir Archibald Douglas, from the charter 1616 down to the acquisition by Hay of Drummelzier, that was a mere conveyance to the patronage of the church of Whittinghame. In 1628, the lands of Whittinghame and the patronage were conveyed to Arthur Douglas; and he, in 1632, obtained from Sir W. Hamilton, the lessee of the teinds of the parish of Whittinghame, an assignation to his lease, in so far as regarded the teinds of the lands. This was an important fact, as showing that Douglas had not an heritable right to the teinds of his lands of Whittinghame, and that he possessed them in virtue of the tack 1590; and it was so important, that Arthur Douglas got a parliamentary ratification of it in 1633. The next title, in 1642, in favour of Archibald, the son of Sir Arthur, omits the patronage. He was succeeded by his sister, and she by her son, the Master of Kingston, against whom an apprising was led of the lands of Whittinghame, with the teinds of that barony, but there is no mention of the patronage. That the apprising contained mention of the teinds, is no proof that they were in the debtor, as such decrees were made as broad as to comprehend every supposed right in the debtor; and here it could only carry the tack so far as the teinds of Whittinghame were concerned.

Hay of Drummelzier acquired right to this apprising, and was infeft in a Crown-charter of adjudication of the lands of Whittinghame, with the patronage of the parish church, "*cum decimis ejusdem tam rectoriis quam vicariis*." The instrument of resignation and the *quæquidem* in the charter, show that it was in virtue of teinds being included in the apprising that they were put into the Crown-charter, and not in virtue of the Act 1690; and the *quæquidem* most incorrectly sets forth that the teinds belonged to Douglas of Whittinghame. This title has been renewed to the present day in the same terms, and in a similar way in the sale of the lands in 1817.

It is clear, and not disputed, that the right of patronage was in the proprietor of Whittinghame; that under his title to the lands he might prescribe a right to the teinds; and under the Act 1690, also a right to the teinds of the parish, to which there was no heritable right. Now, as to this last, if he was right in holding that the grant from the Crown in 1606 conveyed the titles (lands?) as well as the patronage of the church of Whittinghame (as the patronage only was conveyed to Douglas), and that the rest of the grant, so far as regarded the church of Whittinghame, became the property of Baillie, the teinds of the parish must now be in Baillie's disponees—the family of Roxburghe. They could not enter into actual possession, because the tack subsisted till about 1808, and so excluded the titular from drawing the teinds. But the titular was in possession through his tackman. The tack was granted by the dean, and depended on his right, and again eventually supported the right

of the successor of the dean. The only act of possession the titular could have during the currency of the tack, was to dispose of the teinds to each heritor, subject to the tack. This was accordingly done by the Duke of Roxburghe in 1798, in his deed to Lord Blantyre, and it has not been challenged either by the heirs of Baillie or Hay of Drummelzier. Even as to the teinds of the lands of Whittinghame, I do not see that the proprietor has secured a right to them. His possession, and that of his predecessors, till 1808, was in virtue of the assignation to the tack, ratified in Parliament in 1633—the heir of the tackman being excluded from drawing the teind by the assignation, and the titular being excluded by the tack in favour of the tackman and his heirs; and since the expiry of the tack, prescription has not run on his title. It is of consequence that there is proof of possession by the Roxburghe family by sales, as titulars in the parish of Dunbar. The sale to President Dalrymple is sufficient evidence of this. This was under the same title, either as dean of Dunbar, or as succeeding to the prebendary of Dunbar—which, his Lordship could not say; but the title to both was the same, viz., the right of patronage of those benefices, which, by possession, had been shown to convey right to the teinds which formerly were drawn by the members of the collegiate church, and by the patron when the benefice was vacant. His Lordship was for supporting the right of the Roxburghe family, and finding that the disposition to Lord Blantyre gave him an heritable right to his teinds.

Lord Justice-Clerk concurred.

Lord Moncreiff also concurred.

Lord Meadowbank absent.

The Court accordingly (13th July)

"Alter the interlocutor of the Lord Ordinary: Find that the conveyance by John Duke of Roxburghe in favour of Lord Blantyre, of the teinds of the lands therein described, within the parish of Whittinghame, was granted by the titular of the said parish, and is a valid and effectual heritable right in favour of Lord Blantyre, and remit to the Lord Ordinary to remit to the Teind Clerk, with instructions to give effect to the said heritable right in rectifying the locality, and to prepare a final scheme of locality for the said parish: Find the Earl of Wemyss liable in expenses, after the date of the interlocutor of the Lord Ordinary of the 2d March 1839: Appoint an account," &c.

Lord Ordinary, Murray.—*For Duke of Roxburghe*, H. J. Robertson, Baillie; W. H. Sands, W.S., *Agent*.—*For Earl of Wemyss*, A. Anderson, Mackenzie; Tod and Hill, W.S., *Agents*.—[G.D.F.]

20th July 1842.

SECOND DIVISION.—(G.D.F.)

No. 279.—COLONEL ALEXANDER FINDLAY, *Pursuer*,
v. WILLIAM MACKINTOSH, *Defender*.

Process—Ranking and Sale—Writer's Hypothec—Lien—Circumstances in which, in a process of ranking and sale of an estate, the Court dispensed with the production of the title-deeds of the lands under sale.

In the process of ranking and sale of the estate of Millbank, belonging to the defender, which had been brought by Colonel Findlay, a postponed heritable creditor, Alexander Æneas Grant, writer in Nairn, who was trustee of the defender in virtue of a previous sequestration, was examined before the Sheriff-substitute of Nairn, under the usual commission and diligence from the Lord Ordinary in the ranking, and required to produce the title-deeds, writs and evidents, of the estate of which he was in possession as trustee; but he declined to do so, or to produce the act of sequestration and relative papers in his favour, on the allegation that they were hypothecated to him and Robert Roy, W.S., in security of business-accounts due to them by the defender. After this refusal, a correspondence ensued between the Edinburgh agents of the pursuer

and of Grant, in regard to the production of the titles, but the agents having disagreed as to the conditions on which production should be made, recourse was had to the Lord Ordinary on the question, whether the process could competently proceed without production of the titles, which the pursuer maintained he was entitled to insist on; or whether, as Grant maintained, he was entitled to lodge them in process, against the express wish of the pursuer, to the effect thereby of obtaining a preference, *primo loco*, on the price, in payment of the accounts covered by the hypothec?

The Lord Ordinary (Murray for Cuninghame) pronounced the following interlocutor:

"18th March 1842.—Having heard parties' procurators, before farther answer as to production of the title-deeds of the subjects under sale, over which a right of hypothec is claimed by Mr Grant, writer in Nairn, the holder of the same, as a security for payment of business-accounts alleged to be due to him and to Mr Robert Roy, W.S., by the common debtor,—Remits to Mr Gardiner, the common agent, to inquire into the facts, and to report to the Lord Ordinary *quam primum*, whether the proceedings can be properly carried on without production of the title-deeds in this process, and how far the want of these title-deeds could be otherwise supplied, and what effect the non-production of them in this process is likely to have upon the sale or the price to be obtained for the lands, keeping in view the amount of the sums in the said accounts so claimed, the amount of the heritable and other preferable debts secured over the estate, and the rights and interests both of the heritable and personal creditors, and his opinion as to the necessity or expediency of admitting the preference claimed under the said right of hypothec, in order to obtain production of these title-deeds in process."

The common agent reported as follows:

"The pursuer, Colonel Findlay, the party principally interested in opposing the production of the titles, is the holder, as already stated, of a security over the principal portion of the subjects embraced in the ranking for £1000;—it holds the second place among the heritable debts, a security for £2000 now held by Murdo Mackenzie, Esq. of Dundonnell, ranking first. The bond is dated 2d February 1822, and was originally granted in favour of Lachlan Mackintosh, Esq. of Raigmore, and others, as trustees for behoof of the Society for the Education of the Poor in the Highlands. By them it was assigned, in May 1826, to the Reverend Thomas Fraser and spouse, in conjunct fee and liferent, from whose heirs it was acquired by the present holder, Colonel Findlay, on payment merely of a consideration of £60, by disposition and assignation, dated 20th May 1841.

"The accounts for which the hypothec is claimed, and the admission of which the pursuer opposes, commence as far back as 1831, and appear to have been incurred under varied circumstances. Down to January 1833 the parties, Mr Alexander Aeneas Grant and Mr Robert Roy, W.S., acted simply as the private agents of Mr Mackintosh. At that period, Mr Mackintosh, whose affairs had fallen into embarrassment, executed a voluntary trust, by a disposition of his whole property in favour of Mr Grant, in virtue of which Mr Grant was infeft in the subjects embraced in the present summons, by instrument of resignation and sasine, dated and recorded 13th February 1833. He appears also to have been invested in other subjects belonging to the common debtor, which were afterwards sold, but for what sums, and how the prices were applied, the reporter has no means of knowing.

"Mr Grant seems to have acted under this private trust down to November 1834, and to this period a considerable portion of the accounts apply. About that date Mr Mackintosh was sequestrated, and Mr Grant was appointed trustee on his estate, and the remainder of the accounts then relate principally to the transactions under the sequestration.

"The amount of the accounts in all for which a preference is claimed, is £982. 11. 10½.—£843. 4. 7. by Mr Grant, and £139. 7. 3½. by Messrs Roy and Wood.

"It may be proper to state, however, as a point not immaterial to the present discussion, that the common agent has gone over the accounts in question, and is humbly of opinion, that for the whole accounts a preference, in virtue of the agent's right of hypothec, could not be sustained, even supposing the titles are received under the claim. To state, however, the precise amount which the hypothec would not cover, would require an investigation and length of detail which could not be gone into in present circumstances; but the reporter has little doubt that the extent to which the preference claimed would fall to be disallowed would be far from inconsiderable.

"The debts claimed in the process are very large, compared with the value of the subjects.

"Thus, of heritable debts there are,—

"1. The bond already mentioned, held by Mr Mackenzie of Dundonnell, being the first security, . . . £2000 0 0
(with such interest as may be due.)

"2. Colonel Findlay's bond, . . . 1000 0 0

"3. A bond in favour of Hugh Duff, Esq., and spouse, dated 18th August 1826, . . . 1000 0 0

"4. A bond, dated 28th November 1831, in favour of James Brown, junior, and Margaret Brown, . . . 400 0 0

"Only £250 of this bond, however, has yet been claimed.

"Amount of heritable debts, exclusive of interest, £4400 0 0

"While of personal debts, including the said accounts due to Mr Grant and Messrs Roy and Wood, claims are already lodged, exclusive of interest, for . . . £1599 0 0

In all, . . . £5999 0 0

"Being very far above the value of the subjects contained in the ranking,"—the probable value of which the common agent reported to be £2585. 12. 3.

In his report the common agent proceeded to set forth, after an examination of the register, what deeds he supposed the titles consisted of. The report then proceeded:

"From the foregoing enumeration of the titles, supposed to form the necessary progress which a purchaser would be entitled to require on a sale of the respective subjects, it will appear, in so far as regards the lands of Millbank proper, that the title is *ex facie* regularly made up; that the deeds, Nos. 2, 5 and 7 of that progress, being instruments of resignation and sasine; the disposition, No. 1, which has been recorded, and the retour, No. 4, might be supplied by extracts, but that the dispositions, Nos. 3 and 6, so far as appears, have not been registered, and could not therefore be supplied otherwise than by taking up the originals held in hypothec; and in so far as regards the field between the roads, that the title is also *ex facie* regular; that the deeds, Nos. 2, 4, 6, 7, 8, 9 and 11 of that progress, being instruments of resignation and sasine, or writs on record, could be supplied by extracts, while, as it does not appear that they have been registered, there does not seem any means of supplying the places of the original dispositions, Nos. 1, 3, 5 and 10. In regard, again, to the progress applicable to the feudal subject (the Brae of Millbank), to supply their place by extracts, even if in every case practicable, would incur an expense altogether unequal to the value of the subject,"—the yearly value of which was stated at 30s.

As to the necessity or expediency of admitting the preference under the hypothec, the common agent stated his opinion as follows:

"Supposing, then, that the original titles are not taken up, and the proceedings carried on with either no titles at all, or defective, in so far as they cannot be supplied by extracts, the principal results which would follow would be, that the subjects must be sold, in all probability at least, more or less at an undervalue, in order to give a purchaser an equivalent for the imperfect progress, and that, in the ranking, the heritable securities could not be subjected to the same scrutiny which the common agent might otherwise have it in his power to give

them had be the whole titles of the subjects before him. It is at least possible, although perhaps not very probable, that, on examination, such a flaw might be discovered to attach to the title in the person of the bankrupt as might cut down the preferences of the heritable creditors, and throw the price of the subjects open for general division.

"To what extent the want of a complete progress might affect the price, the reporter cannot venture an opinion. It is a matter that must depend in a great measure upon the views of an intending purchaser himself, and the desire he may have to become possessor of the property.

"Such, then, being the results in judging of the necessity of the titles being taken up, the reporter would merely observe, that, while there can be no doubt that not to have the titles produced is to adopt a course unusual in a process of ranking and sale, still, so far as he is aware, there is nothing in any of the Acts of Sederunt regulating the action of ranking and sale which directly requires that the procedure should not be carried on without the titles. By section 3 of the Act of Sederunt, 23d November 1711, it is provided, 'that after a process of sale is raised, the pursuer shall have diligence granted him against all havers of the writs of the debtor and bankrupt's estate, and the lands, to the effect the same may be timeously exhibited in the clerk's hands.' It is under the diligence authorised by this and similar clauses in other Acts of Sederunt that the titles are usually brought into process. In referring to it, Mr Darling, in his Forms of Process (p. 537), remarks,—'The title-deeds of the lands will be recovered under the diligence. If they be hypothecated in the hands of a law-agent, as generally happens, he will deliver them under a reservation of his right of hypothec, in virtue of which his claim will be ranked *primò loco* on the price of the subjects when sold, or he will be entitled to warrant on the factor to pay him out of the funds in his hands.—Mackenzie, 9th February 1793, M. 6254.'

"While, however, there seems to be no clause expressly requiring production of the title-deeds, it is also true that some of the regulations seem to proceed on the principle that the titles are accessible in the process. Thus, by section 7 of Act of Sederunt, 17th January 1756, it is provided, that 'the production in the ranking being closed in manner foresaid, the Lord Ordinary in the ranking shall assign a day to the common agent to make up a state of the interests produced, mentioning their rights and diligences, the sums claimed by the respective creditors, the order of their respective preferences, with such objections as occur to him either to the legality or to the justice of the several claims, or to the extent of their debts, or to their preferences, notwithstanding the apparent priority of their security or diligence.' And again, section 8 of the same Act provides, that 'after the state of the claims is made up as aforesaid, and reported to the Lord Ordinary, his Lordship shall assign a day to the common debtor, and to the creditors producing as aforesaid, to make such other objections to the interests produced as they shall think proper, and to lodge them in writing with the clerk of the process against the day so assigned; with certification that all objections that shall be omitted to be proposed either by the common debtor or the common agent, or by the creditors, against the day so assigned, shall be held to be passed from by all parties concerned; and it shall not be competent to them, or either of them, thereafter to propound the same in the course of the ranking, or in the division of the price of the bankrupt's estate, unless such objections shall arise from facts newly come to their knowledge.' While, by section 7 of the Act of Sederunt, 11th July 1794, it is declared, that 'the common agent, after his nomination is confirmed by the Lord Ordinary, shall take the most effectual steps for ascertaining the nature and extent of the subjects belonging to the common debtor, together with the encumbrances affecting them, in order to which he shall, if necessary, cause search the public registers, and apply to the Lord Ordinary for letters of first and second diligence against havers.'

"These regulations may perhaps be viewed as proceeding on the assumption that the titles are in process, as, without them, full effect could not in general be given to their requirements. It is, however, for the Court to judge whether they render it a matter of necessity to order their production in every case.

"On the other hand, looking to the production of the titles

as a matter of expediency, the question may be considered either in a general light, or with reference to this particular case.

"Regarding it as a general question, the reporter would merely remark, that if, on the one hand, the Court lay it down as a fixed principle, that in every case, without regard to circumstances, should any of the creditors require it, the titles are to be brought into process if they are accessible, there must necessarily occur many instances of individual hardship which the Court otherwise would be inclined to prevent. But then again, on the other hand, unless a fixed principle be adhered to, this evil must result, that in every case such as the present a door is thrown open for raising a question of circumstances, and the procedure becomes embarrassed with discussions and investigations. And further, it will, in most instances, come to be a matter in a great measure dependent upon the way in which a single creditor (the pursuer of the action) may think himself interested in the production. It may be very much against the interests of other creditors that the titles should be taken up; but if the pursuer wish it, he can in general force them into process, subject to such claims as may attach to them under the diligence for proving the rental, &c., that is, at a stage of the proceedings when none of the other creditors whose interest it may be to oppose the production, have for the most part appeared in the process.

"If, again, the question is viewed as one of expediency with reference to this particular case, its determination must depend very much upon the party whose interest may be looked upon as deserving chief consideration in the circumstances.

"There are here involved four different interests, viz., 1st, Colonel Findlay's, the holder of an active security for £1000, though purchased, it is true, at an undervalue. 2d, The agents', the holders of an indirect and passive security to the extent of nearly the same sum. 3d, The personal creditors', who have a material interest in having every means given for scrutinizing the heritable debts, and, if possible, reducing them, so as to throw the price of the subjects open for general division; and, 4th, The common debtor's who is clearly entitled to see that his property brings as large a price as possible, and that his debts are proportionally reduced either to one creditor or another. Whatever the subjects may sell for less than they would otherwise bring if sold with a complete title, is of course just so much lost to him.

"Such being the state of parties, it follows, from the statement already given of the probable value of the subjects, that Colonel Findlay's interest stands opposed to that of the agents, the personal creditors, and the common debtor. If, on the one hand, the titles are not taken up after the first heritable creditor is paid, there may remain a surplus from the price to meet a portion of Colonel Findlay's debt, the second heritable security. If, on the other hand, the titles are received under the hypothec in place of Colonel Findlay, an heritable creditor, the agents' profit, though at the same time the interest of the personal creditors is so far consulted as that a means not otherwise accessible is afforded of testing the validity of the heritable debts, and of making, if possible, the balance of the price available to the general body of the creditors, while the common debtor has the benefit of obtaining the full value of his property, and the consequent diminution of his debt. It is for the Court to determine as to these conflicting interests."

The Lord Ordinary (Cuninghame) pronounced the following interlocutor:

"21st June 1842.—The Lord Ordinary having heard counsel on the motion of the personal creditors, that the titles of the subjects under sale shall be required from Mr Alexander Grant, formerly agent for the common debtor, and latterly trustee in the sequestration, under the usual reservation of his right of hypothec,—In respect that the present is a question of considerable importance in practice, and that it occurs in a process of ranking and sale, entitled to summary despatch, makes *avizandum* with the case to the Lords of the Second Division, and appoints printed copies of the common agent's report to be boxed *quæsum primum*, that it may be reported.

"Note.—The present process of ranking and sale is brought by a creditor who holds a second security for £1000 over the

chief estate under sale. This security it is said he purchased lately, for the trifling sum of £60 Sterling.

"The property in question is rented at only £90 per annum, and there are four securities on it, extending in all to £4500. If these be unobjectionable, they will obviously far more than exhaust any probable price to be got for the lands, and leave no reversion to the personal creditors.

"In this view, the second heritable creditor states that he does not wish to recover the titles, as, if he took them out of the hands of the agent, unto whom they are *hypothecated*, the price would be subjected to a deduction, amounting to nearly £1000 Sterling, for the law accounts claimed by the agent. He therefore insists that this ranking and sale shall proceed without any *exhibition or examination* of the common debtor's titles to the subjects under sale.

"This appears to the Lord Ordinary to be a novel and very questionable form of proceeding. Lord Murray (acting for the Lord Ordinary during his indisposition) very properly directed the common agent to make a report as to the circumstances of this particular case, bearing on the question. A very distinct report by him accordingly has been put in, and it is now for the Court to determine whether they can sustain the motion made by the pursuer, to allow this process of judicial sale to proceed *without the titles*.

"The general rule is supposed to be clear, that in a process of ranking and sale the title-deeds of the whole properties under sale must be produced in an early stage of the cause. The reason for this is well explained by the common agent in his report, and is manifest on a short consideration. The titles of the common debtor are absolutely necessary, not merely for the satisfaction of purchasers, but for enabling the common agent and the Court to adjust the subsequent order of ranking. Till exhibition of the titles, *non constat* that any of the securities are unobjectionable. The titles of the common debtor afford the only satisfactory means of ascertaining the validity of the real creditors' security who pursue a ranking and sale, as, if there be any flaw in the debtor's title, it may affect every security that he has granted. Accordingly, it is expressly provided by the Act of Sederunt, 23d November 1711, § 3, 'That after a process of sale is raised, the pursuer shall have diligence granted him against all *havers of the writs of the debtor and bankrupt's estate and lands*, to the effect the same may be timeously exhibited in the clerk's hands.'

"The customary and regular mode of conducting such processes being thus fixed, the next question which occurs is, whether the pursuer is entitled to make an *exception* of the present case, and to have the sale carried through under the authority of the Court, *without exhibition of the titles*? The grounds on which the pursuer has urged this demand deserve consideration.

"1st, He brings into view the *great amount* of the accounts claimed by Mr Grant, and alleges that these will absorb nearly the whole free balance left for him as a secondary creditor. There is reason to think, from the common agent's report, that the amount of the balance which the hypothec will cover is considerably exaggerated by the pursuer. But, be it great or small, it is obvious that if the production of titles be dispensed with in the present case, a similar course must be sanctioned in every future case, where any creditor pursuing a ranking and sale finds it convenient to ask it. The Lord Ordinary therefore doubts if a rule of Court, salutary and proper for the protection of the public in perhaps nine-tenths of the cases in which processes of this sort are resorted to, ought to be departed from, because it may be attended with some hardship in an isolated case, on the holder of a postponed security.

"2d, The pursuer next referred to the case of Bell against Gordon's Trustees in 1838 (16 Shaw's Report, p. 657), in which it was found that a creditor might proceed to sell subjects *extrajudicially* under a clause of sale in his bond, without exhibition of the titles, which, as here, were hypothecated for a large account to intending offerers; and the pursuer added that he also had a clause of sale in his bond under which he could have sold the subjects *extrajudicially*. But the reference to that precedent appears to the Lord Ordinary to afford one of the strongest pleas against the pursuer in the present case. If he could have exposed these lands to sale *extrajudicially* under a special clause in his bond, why did he not take that course?

He must evidently have supposed that the judicial process of ranking and sale gave him some great and peculiar advantage; and, indeed, it is not easy to anticipate or to calculate what may be the extent of that advantage. It may be that the estate will sell for a fourth, a third, or one-half more on the title given in a process of ranking and sale, than what it will fetch when exposed by a bondholder without a progress of writs.

"By the operation of a decree in a ranking and sale all prior encumbrances are wiped off,—the grounds of debt, in so far as legally preferable, are assigned to the creditors in corroboration of their title,—and posterior securities are extinguished—none of which advantages are obtained in an extrajudicial sale by a bondholder; and the short question which the Court have to determine is, whether the Court will give a creditor the great advantages thus conferred by a decree in the process of judicial sale, without a strict compliance with all the salutary rules of Court framed for the purpose of expiating the titles, both of debtor and creditors, and of insuring an ultimate appropriation of the price to those whose securities are legally unimpeachable?

"The Lord Ordinary must add, that if the rules of Court regulating the forms of this important process are to be dispensed with in any case, he has great doubt if a party like the pursuer, who confessedly acquired his claim for a mere trifle, *after the bankruptcy of the debtor*, should be viewed as a creditor entitled to such a boon."

At advising (16th July),

Lord Justice-Clerk said, that he had considered this question very attentively, and the opinion he had formed of it he had written down in such a form, that if it coincided with the views of their Lordships, it might form the interlocutor for the disposal of the case. He would, with the permission of their Lordships, read his opinion. His Lordship then said,—“1st, That the common debtor does not in this case appear to state any objection to the non-production of the titles. 2d, That the titles of the heritable property included in the ranking and sale were in the possession of the personal creditors and of the trustee on the sequestrated estate of the common debtor for several years before the said process of ranking and sale was instituted, and that they had thus a full opportunity of considering the state of the said titles, and of bringing forward any objections thereto, by which the preferences of the heritable creditors might have been set aside. 3d, That, on the report of the common agent, it appears that the value of the estate, at the highest computation, will not pay off the heritable securities affecting the same. 4th, That no statement has been made that there exists any objection to the common debtor's titles by which the personal creditors could derive any benefit from their production, or be enabled to reduce any of the heritable securities. 5th, That the effect of ordering production of the titles would in this case only be to enable the trustee in the sequestration, who has a hypothec over the same, and who is stated to have a right of recourse against the personal creditors as his employers in the business for which he holds the titles to be hypothecated, to obtain payment out of the price of the lands, at the expense of the heritable creditor, who is the pursuer of the ranking and sale, and that such result would, in the circumstances of the case, be unjust to the said pursuer, Colonel Findlay. 6th, That Colonel Findlay has, by a minute lodged in process, 'guaranteed that the estimated value of the lands under sale, mentioned by the common agent in his report, being £2585, should be offered therefor, if the same are exposed to sale without production of the titles, and that the pursuer was willing to consign in the Royal Bank, or in such other bank as the Court might appoint, the said sum of £2585, being the amount of the said estimated value, in order to secure that a sum to this extent shall be available in the ranking.' 7th, That, according to the report of the common agent, it appears that the estimated value of the estate is not likely ever to pay off the debts to which Colonel Findlay is in right, and that in such circumstances, the pursuer of the ranking and sale insists that he shall be allowed to proceed in the process, although the titles are not produced, and, *lastly*, in respect that there is no incompetency in allowing the sale to proceed, although the titles are not produced, Find it to be unnecessary to pronounce any opi-

nion on the general point to which the report of the common agent relates: Refuse to pronounce any order for the production of the titles of the common debtor; ordain the ranking and sale to proceed, and the articles of roup to be framed in such terms as not to imply any obligation to deliver or make forthcoming the titles: Reserving, in the event of the estate not being sold, to the parties interested again to apply to the Lord Ordinary, if they can show that the sale has failed owing to the non-production of the titles; and reserving all other questions which may arise after the sale between Colonel Findlay and the personal creditors."

Lord Medwyn concurred in the opinion now read. It was just his view, and he regarded this as entirely a special case. His Lordship observed, that in pronouncing a judgment in these terms, he did not consider that the Court were deciding any general question. He thought the opinion might just form the interlocutor for the case.

Lord Moncreiff.—If this had been the ordinary case, he could not have got over the Act of Sederunt. But it was a special case altogether, in which it was but plain justice to approve of the case proceeding without production of the titles. His Lordship concurred in the terms of the opinion read by the Lord Justice-Clerk.

Lord Justice-Clerk.—I take it for granted that the pursuer will give in a minute offering the value stated in the report.

Dean of Faculty stated, that a minute would be given in before the rising of the Court.

The Court intimated that it was unnecessary to ask expenses, as their Lordships were agreed against allowing any.

Of this date (20th July) a minute was given in, making offer of the upset price; and the Court pronounced an interlocutor in the terms, within quotation, in the opinion of the Lord Justice-Clerk.

Lords Ordinary, Murray and Cuninghame.—*Act. Dean of Faculty (Wood)*; *J. and W. Jollie, W.S., Agents*.—*Act. Inglis, for Mackenzie of Dundonnell*; *T. Mackenzie, W.S., Agent*.—*Shand, for Grant and Roy*; *John Shand, W.S., Agent*.—*James Gardiner, W.S., Common Agent*.—[G.D.F.]

23d September 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 280.—*SIR JAMES GIBSON-CRAIG, Bart, Appellant, v. SIR THOMAS JOHN COCHRANE, Bart, and OTHERS, Respondents.*

Superior and Vassal—Liferent and Fee—Held competent for a superior, uninfest, to dispose the fee of the superiority to one party, and the liferent to another, with power to the latter to enter vassals; and the entry of a vassal by the liferenter in the exercise of this power held to be effectual.

Superior and Vassal—Circumstances in which the title of a vassal was sustained, who had entered with a superior whose title was defective, but had subsisted on record, unimpeached, for nearly forty years,—had been twice declared by the Court of Session to be valid, and acquiesced in as such by parties having an adverse claim to it.

The superiority of the estate of Murdieston was part of the entailed estates of the dukedom of Hamilton, and the *dominium utile* was possessed in fee-simple by Alexander Inglis, who in 1719 executed an entail of the lands (alleged to be defective in one of the prohibitions) in favour of his nephew, Alexander Hamilton Inglis, and a series of substitutes. On the entailor's death, Alexander Hamilton Inglis, the institute, made up titles, and was duly infest under the entail; and on his death in 1712 (leaving four sons, Alexander, Gavin, James and Walter), his eldest son,

Alexander, entered with the superior as heir of entail by precept of *clare constat*, and was duly infest. In August 1772, Douglas Duke of Hamilton exped, upon his own procuratory, a charter of resignation of the superiority of Murdieston and others, in favour of himself and the heirs of entail of the dukedom; and on 22d September 1772, his Grace's commissioners, upon the narrative of the Act, 20 Geo. II., c. 50, empowering the sale of the superiorities of their lands to vassals, sold and disposed to Alexander H. Inglis the superiority of Murdieston—the Duke and his heirs of entail being taken bound to infest Inglis therein, and the Crown-charter and unexecuted precept being assigned to him for infestment. No infestment passed in favour of Inglis under this disposition, and on 24th September 1772, he sold and disposed one-half of the superiority to his younger brother, General James Hamilton Inglis, in liferent, and Duke Douglas and his heirs and assignees in fee; and the other half to his next brother, Walter Inglis, in liferent, and Duke Douglas and his heirs and assignees in fee, *with full power to the liferenters in both halves to enter vassals, receive compositions, &c.* These dispositions contained assignment to the still unexecuted precept in the Crown-charter of resignation by Duke Douglas; and infestment accordingly passed upon it in favour of the two liferenters, and Duke Douglas, the fiar. Walter Inglis then died, which cleared the Duke's title to the one-half of the superiority liferented by Walter; and in 1786 Alexander Hamilton Inglis died, and was succeeded by his immediate younger brother, Gavin. Gavin made up his title by taking infestment, in June 1787, as nearest and lawful heir of tailzie to his brother, Alexander, upon a precept of *clare constat* in his favour, granted by General James Hamilton Inglis, the liferenter, and the commissioners of Duke Douglas, the fiar, of one-half of the estate liferented by General James, and lawful superiors of the other half.

Duke Douglas died in March 1801, and was succeeded in the dukedom and entailed estates by Duke Archibald, who was not, however, his heir-at-law. Under a general trust-disposition by Duke Douglas, of all his unentailed estates for the benefit of his natural daughter, Mrs Westenra, and Mrs Harriet Pye Esten, these parties, on being vested by the trustees with the superiority of the whole lands of Murdieston, sold it to Sir Alexander Inglis Cochrane. Meantime, Duke Archibald proceeded to make up his title to the superiority of Murdieston, as if the charter 1772 had been open, and the precept on it had not been exhausted. He exped in 1801 a service as heir-male of tailzie of Duke Douglas under the charter 1772, and thereon took infestment, *inter alia*, in the superiority of Murdieston. On Gavin Inglis Hamilton's death, his succession was taken up by his brother, General James Inglis Hamilton, who proceeded to make up his titles to the estate, first, in regard to that portion of the lands of which he previously held the liferent superiority, by expeding in his own favour a precept of *clare constat*, which designed him as "immediate lawful superior in the liferent of the lands, &c., after mentioned, with power to enter vassals," &c., and bore under the usual heads,—

"(1.) That Gavin Inglis Hamilton, Esq., late of Murdieston, my brother-german, died last vest and seised as of fee, &c.:

(2.) That I, bearer hereof, am immediate younger brother to the said deceased Gavin Inglis Hamilton, last of Murdieston, and nearest and lawful heir of tailzie to him in the said lands, &c. (3.) That the lands are holden immediately of and under me in liferent, and the said deceased noble duke (Duke Douglas), his heirs or assignees, in fee."

On this precept General Inglis Hamilton was infeft in June 1802. To the other portion of Murdieston, of the superiority of which his brother Walter Inglis had been liferenter, and Duke Douglas fiar, the General did not immediately make up a title, and while still on apparenay as to this portion of the estate, and proceeding on the alleged defect in the entail of 1719, he, in June 1802, executed an entail of the whole estate of Murdieston in favour of his natural son, Captain, afterwards Colonel James Hamilton, and his heirs male and female, whom failing, to the late Sir Alexander Inglis Cochrane—thus altering the destination in the entail 1719. In compliance with the provisions of this new entail, General Inglis Hamilton was, in September 1802, served and retoured heir "in special and of line" to his brother, Gavin Inglis, and thereafter, Archibald Duke of Hamilton, or the heir of Duke Douglas whoever he might be, was charged to obtain himself entered and infeft as heir of the deceased Duke Douglas in the superiority, and being so infeft, to grant all onecessary writs for completing the General's titles to the lands, after the form and tenor of his special retour as heir to Gavin. Duke Archibald accordingly granted a precept of *clare constat* to the General for infefting him. This precept contained a reference to the entail 1719, but did not contain the destination, nor describe General Inglis Hamilton as heir under the conditions of the entail. On this precept the General was infeft in November 1802, and on his death, Colonel James Hamilton, the institute under the new entail, succeeded, and was infeft in 1803, and possessed till his death, without issue, in 1815. Sir Alexander Inglis Cochrane succeeded, and was served heir of tailzie and provision to him in November 1815.

In 1816, Duke Archibald brought a reduction-improbation against the trustees and beneficiaries under Duke Douglas's trust, Lord Stanley, his Grace's heir of line, and Sir Alexander Cochrane, on the ground that the sale of the superiority of Murdieston, under 20 Geo. II., c. 50, was carried through in contravention of the Statute and of the Hamilton entail, and calling for reduction—(1.) of the disposition of the superiority by Duke Douglas's commissioners; (2.) of the disposition by Alexander Inglis to his brothers in liferent, and Duke Douglas in fee; (3.) of their several infeftments; (4.) of the trust-disposition executed by Duke Douglas; and (5.) of the conveyance to Mrs Westenra, and any contract or other title obtained by Sir Alexander Cochrane.

Sir Alexander Cochrane, the defender's father, and Miss Hamilton (afterwards Mrs Westenra), appeared in the action, and in June 1817, the Lord Ordinary (Pitmilley) sustained the reasons of reduction, &c. Several representations were lodged against this judgment, which were refused, and before a reclaiming petition to the Inner-House, lodged in September 1818, could be heard, Duke Archibald died in February 1819. In June 1819, the defenders, by a minute, withdrew from the litigation, and on 11th June 1819, the Court, without Duke Alexander being sisted as pursuer in place

of the deceased Duke Archibald, "adhered, of consent, to the interlocutor complained of" (Lord Pitmilley's).

In July 1820, Sir Alexander Cochrane was infeft on a precept of *clare constat* by Duke Alexander, as heir of tailzie and provision to Colonel Hamilton, the institute in the entail 1802. On Sir Alexander's death, his son, Sir Thomas John Cochrane, succeeded, and entered as heir of tailzie and provision to his father, by a precept of *clare constat* by Duke Alexander, on which infeftment followed in May 1832. Some time after Sir Alexander's death, Duke Alexander attempted to cure the defect in the decree of 11th June 1819, by having it reduced, and the process in which it was pronounced awakened and revived in his own name; and after some procedure, the same judgment which had been pronounced on 11th June 1819, was repeated in the awakened process.

In 1833, Sir James Gibson-Graig, as adjudging creditor of Dr Ramsay, the heir of entail of the *dominium utile* of Murdieston under the entail 1719, brought a reduction of the precept of *clare constat* by General Inglis Hamilton to himself, and sasine thereon; the brieve and retour of service of the General to his brother Gavin; the precept of *clare constat* by Duke Archibald to the General, and sasine thereon; the General's deed of tailzie 1802, and sasine thereon; and the writs and sasines under which the titles of the succeeding substitutes of that tailzie had been made up. The grounds of this action, and the pleas of Sir Thomas John Inglis Cochrane in defence, are fully reported *ante*, Vol. XI. pp. 5 and 6, and are also fully referred to in the following opinion of Lord Cottenham.

The Court of Session, on 10th July 1838, sustained the defences; and an appeal being taken by Sir James Gibson-Craig,—

Lord Cottenham.—My Lords, in this case it appears that the entail of 1719 not having been properly fenced, General Inglis Hamilton, who became entitled under it to the property in question, in 1802 created a new entail, under which the defender claims. The pursuer, who claims under the entail of 1719, does not pretend that that entail was incapable of being destroyed, but contends that it was not effectually destroyed by the act of General Inglis Hamilton in 1802, upon the ground that the supposed superior, through whom it was effected, had not at that time a proper feudal title so as to enable him to give effect to it. This objection was, in the course of the cause, attempted to be supported upon various grounds, which have been since abandoned, and with good reason, as the answers given upon those points were conclusive. I propose, therefore, to confine my observations to those points which were still insisted upon in the cases before this House, and by the arguments of counsel at the bar. The superiority which had belonged to Douglas Duke of Hamilton was by him conveyed to Alexander Inglis, who conveyed it, as to one moiety of the lands, to General Inglis Hamilton for life, and to the Duke of Hamilton in fee; and as to the other moiety, to Walter Hamilton for life, and to the Duke in fee. General Inglis Hamilton completed his title under a precept of *clare constat* granted by himself as superior; and the first objection to his title was, that being a liferenter by constitution, he had no power to enter vassals. Had he been merely a liferenter by constitution, without more, the objection might have been good; but it has no application to the present case, for it was not in that character that he assumed the power, but under an express grant and conveyance from Alexander Inglis Hamilton, in whom the whole superiority was vested, "of full power to him, General Inglis Hamilton, during his life, to enter and receive all vassals in the said lands, and receive the composition due by law therefor, fully and freely in all respects,

without the consent of the Duke and his forebears, the fiar of the said lands,"—Alexander Inglis by the same deed conveying the superiority to him, General Inglis Hamilton, in liferent, and the fee to Douglas Duke of Hamilton. That the owner of the superiority might dispose of that part of it which consisted in the right of entering vassals to such persons and for such interests as he might think fit, is not disputed. It was therefore competent for him to convey it to the liferenter. To say that it would not pass as incident to the conveyance of the life estate, proves nothing, and no authority has been referred to for the purpose of proving that the owner of the superiority could not so grant this power; and if it was competent to him so to deal with, and dispose of this power, he, beyond all doubt, did so dispose of it in favour of General Inglis Hamilton by this deed. This objection, therefore, wholly fails. That Alexander Inglis was not himself enfeoffed, is not insisted upon as affecting his right to pass any interest in the estate to which he had a personal title, as with such interest he conveyed the means of obtaining the proper feudal title; but it is urged by the appellant, upon the supposition that General Inglis Hamilton's power of entering vassals was in exercise of a right vested in Alexander Inglis, and so exercised by virtue of an authority from him for that purpose; and as he, not being himself enfeoffed, could not enter vassals, it is urged that he could not delegate that power to others; all which reasoning assumes that General Inglis Hamilton acted, not by virtue of an interest or estate in the superiority vested in himself, but by virtue of a power delegated to him by Alexander Inglis, by virtue of the superiority remaining in him, Alexander, which was not the fact; and yet upon this misapprehension the whole of the first reason of the appellant's case is founded. The second reason stated in the appellant's case was, that James Inglis Hamilton had no power to grant a precept of *clare constat* in his own favour as nearest and lawful heir of tailzie to Gavin Inglis, without establishing, in the first place, the death of Gavin, and the extinction of his heirs, in terms of the entail of 1719. That Gavin did in fact die without issue, entitled under the entail, and that General Inglis Hamilton was at the time entitled, as next heir of tailzie under that entail, is not disputed, and that he made up his title as such, is proved by the retour of his special service of the 7th of September 1804, printed in the 82d page of the appellant's case, which states the death of Gavin, and that James Inglis Hamilton was the *propinquior et legitimus hæres tailzie*, and the other documents referred to in the appendix to the appellant's case. He stands, therefore, upon the record as nearest heir of tailzie, which character it is not disputed that he in fact holds. As to this portion of the estate, it appears to me that the objections raised to the respondents' title are not maintainable. As to the second portion of the estate, as to which, in September 1772, the superiority was conveyed to Duke Douglas in fee, and Walter Hamilton in liferent, the objection was, that Archibald Duke of Hamilton had not made up a legal title to the superiority when he granted the precept of *clare constat* in favour of General Inglis Hamilton, and that it was therefore null and void; and the objection to Duke Archibald's title is alleged by the appellant to consist in this, that the precept of sasine contained in the Crown-charter of 1772 was exhausted by the sasine taken in favour of Duke Douglas in fee, and Walter Hamilton in liferent, and consequently that the enfeoffment taken by Duke Archibald in 1801 upon the same precept, was inept and null. The facts appear to be, that Duke Douglas, holding the superiority in tail, under which Duke Hamilton was heir, was not justified in taking to himself the fee in 1772, and consequently, in 1801, Duke Archibald procured himself to be served as heir of entail, and took enfeoffment accordingly under the precept in the charter of 1772, which was in favour of Duke Douglas and his heirs of entail. The enfeoffment thus taken by Duke Archibald was in conformity with the precept and the charter, which the enfeoffment of Duke Douglas was not; and in 1802, when General Inglis Hamilton made up his title under the *clare constat* from Duke Archibald, he the Duke appeared upon the record as regularly enfeoffed of the superiority; but this is not all, for as if to remove all possibility of error, General Inglis Hamilton previously obtained letters of horning against superiors, directed to the heir of line of Duke Douglas, to the trustees under his trust-settlement, and to Duke Archibald, calling upon them severally

to obtain himself entered and enfeoffed, and to complete the title of him, General Inglis Hamilton, to the *dominium utile*. Neither of the former parties made any claim under this proceeding, but permitted Duke Archibald to take enfeoffment as before stated, and thus to become feudally vested in the superiority, and so he continued enfeoffed up to the time of his death, and those who claim after him under the same title so continued enfeoffed up to the present time. The vassal, therefore, in this case, did all that could be done to ensure his own title; and if, after all this, any objection can be raised to such title through any supposed defect in the title of such superior, it is obvious that it will be impossible in many cases for vassals to obtain unimpeachable titles. Apprehensions are expressed on the part of the appellant, of the grounds upon which the Court of Session proceeded upon this point, but such apprehensions appear to me to be wholly misplaced. Not only danger to property, but necessary insecurity would arise from the Court having recognised the doctrine contended for by the appellant. This question, indeed, does not appear to have been decided for the first time in the present proceeding, for in 1817, Duke Archibald raised a process of reduction and declarator for reducing the title made up by Duke Douglas in 1772, and *separatim* for having it found and declared that Duke Archibald, by the aforesaid title completed in 1801, had the only right and title to the property, which included the superiority in question, and that the title so made up in 1801 constituted the only good right and title; and in that process decree in terms of the conclusions of the libel was pronounced by Lord Pitmilley, and adhered to by the Court; and owing to some alleged informality in those proceedings, a decree has since been pronounced in terms of Lord Pitmilley's interlocutor. It appears, therefore, that the title to the superiority under which General Inglis Hamilton made up his title in 1802, and under which the respondent now claims, has not only been the title upon record for nearly forty years, but that the Court of Session has twice declared that it constitutes the only good right and title to such superiority; and in this title, all persons who could have claimed the superiority by adverse title have acquiesced. By the English law of copyholds, the copyholder can only complete his title through the intervention of the Lord, but the act of the Lord is considered as merely ministerial; and if the title of the copyholder was capable of being affected by any defect in the title of the Lord, this tenure, now sufficiently inconvenient, would become perfectly intolerable. This is a case of purely Scotch conveyancing, in which this House would, under any circumstances, be very unwilling to act in opposition to the unanimous opinion of the Judges of the Court of Session by whom the case was decided. I have, however, in this, as in all other such cases which have come before this House, thought it my duty to examine the authorities cited, and the arguments urged against the judgment appealed from, and I have had much satisfaction in finding so much of reasoning and authority in support of a judgment which I consider of the highest importance to the security of property in Scotland. I therefore move your Lordships to affirm the interlocutor appealed from, with costs.

Interlocutor affirmed, with costs.

First Division.—*Lords Ordinary*, Cockburn and Cuninghame.
—George Webster, *Appellant's Solicitor*. — Richardson and Connell, *Respondents' Solicitors*.—[W.H.D.]

23d September 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 281.—ELIZABETH IRVINE or DOUGLAS, *Wife of Lord William Robert Keith Douglas*,—the said LORD W. R. KEITH DOUGLAS, and MISS CHRISTIAN CHARLES IRVINE, *Appellants*, v. JOHN KIRKPATRICK, *Esq., Respondent*.

Passive Titles.—Where three sisters were served as *heires-portioners* of their father, for the purpose of conveying Scotch estate to the trustees of the marriage-settlement of one of them, in which settlement the father provided the *heiress* in one-third of his estate (subject to his power of disposal, legacies,

gc.)—Held that the service inferred a legal representation of the father by all the sisters, and liability for his debts,—the other sisters having joined in the service, and in conveying the Scotch estate in implement of a direction in the father's general settlement, from which they took benefit.

Jurisdiction—The Court of Session held to have jurisdiction, ratione contractus, over an heiress-portioner domiciled in England, and personally cited during a residence in Scotland of less than forty days, in respect she was liable for the debts of her father on the passive titles, as having been served to a Scotch estate, for the purpose of conveying it away in implement of her father's general settlement, from which she took benefit, and as possessed of a mid-superiority alleged to be of little value.

Process—Parties called—Held to be no objection to a process against heiress-portioners, for making them liable on the passive titles for the ancestor's debts, that the trustees under the ancestor's settlement, who were resident in England, and vested by the settlement with a right to take up and administer the ancestor's whole estate, real and personal, had not been called.

Mr Charles Irvine, for many years a planter in Tobago, died in Scotland in 1798, leaving a widow, two brothers, Walter and Christopher, and four sisters. By deeds of sale or assignation, executed in December 1798 and June 1800, Walter, the heir of Charles in heritage, purchased from his brother Christopher, and his sisters, and from the widow, the shares of Charles's executry to which they were respectively entitled. The present pursuer is the only child of Isabella Irvine, one of these sisters, and the residuary legatee of the other two sisters, Anne and Margaret, both deceased, and as such brought the present action in 1837 against the defenders, Lady Douglas and Miss Irvine, as co-heiresses and representatives of their deceased father, Walter Irvine, concluding for reduction, on the ground of fraud, of the foresaid transaction by which Charles's executry was purchased by Walter, and for payment of £50,000, or such other sum as should be found to be the value of that executry. Lady Keith Douglas was domiciled in Scotland at the date of the action, but the other defender, Miss Christian Irvine, when personally cited in Scotland, had been there less than forty days, on a visit to her sister, and had her domicile in England.

In the circumstances now to be mentioned, the defenders *pleaded*—1. That they were not their father's representatives; and, 2. In regard to Miss Irvine, that she was not amenable to the Scotch Courts.

Walter Irvine died domiciled in England. On the marriage of his daughter Elizabeth, the defender, with Lord Douglas, he by indenture became bound to devise and secure to the marriage trustees one-third of the free real and personal estate he should die possessed of (after payment of annuities and legacies, and subject to a power of disposal during his lifetime), for the purpose of paying over to the defender, Lady Douglas, exclusive of her husband's control, the yearly rents and profits of the said third of his estate during the subsistence of the marriage,—the said yearly rents and profits, on the death of either of the spouses, to be paid by the trustees to the survivor, and on the death of the survivor, the whole capital and income to be distributed by the trustees in a certain order and manner among the children of the marriage. It was expressly stipulated in the indenture that Lady Douglas should accept of the said provision in lieu and full satisfaction of all dower, third, or other legal claim. Walter Irvine died in 1823, having previously executed

in England a will and settlement in the English form (incapable of conveying Scotch heritage), by which he conveyed and made over to certain persons, as his trustees and executors, his whole heritable and personal estate, wherever situated, for certain purposes; *inter alia*, 1st, he directed his daughters to make up titles to, and convey to the foresaid marriage trustees, in fulfilment of the provisions of the marriage indenture in favour of Lord and Lady Douglas, the testator's heritable estate in Fifeshire (believed to amount to about one-third of his whole estate); 2d, he directed the testamentary trustees to set apart, and hold in trust, two sums of £35,000 each, for behoof of the testator's two unmarried daughters, Christian (defender), and Catherine (since deceased), and their families,—the trustees holding the capital sums in trust, and paying over to the Misses Irvine the annual income during their lives. The residue of the property, after the purposes of the trust were provided for, was appointed to be held in trust by these trustees for the three daughters, under similar conditions to those attached to the specific bequests in their favour.

On Walter Irvine's death the trustees and executors accepted and took possession of his property. The daughters, in July 1824, were served and retoured heiresses-portioners of line in special to their father, and proceeded, *sine beneficio inventarii*, to make up titles to his Scotch heritable property, 1st, by taking infeftment in the Fifeshire estates on a precept from Chancery proceeding on the foresaid retour; 2d, by expediting a Crown-charter of resignation, upon which they were infeft in certain lands, to the superiorities of which their father had only a personal title, although infeft in the *dominium utile*; 3d, by thereafter taking up the *dominium utile* of these lands by precept of *clare constat* granted in their own favour, on which they were infeft; and, 4th, by taking up certain lands held by their father under subject-superiors, by precepts of *clare* from these superiors, on which they were infeft. They thereafter, along with the trustees under the will, disposed and conveyed, with a double holding, to the foresaid marriage trustees, in implement of the direction in the marriage indenture, the testator's lands in Scotland thus taken up by them. On the precept in this disposition these trustees were base infeft, and never having obtained confirmation of their title from the superior, the mid-superiority of the lands remained in Walter Irvine's daughters.

In these circumstances the defenders maintained the pleas in defence, fully stated *ante*, Vol. X. pp. 303 and 522.

The Court, by interlocutors on 17th February and 23d June 1838, sustained their jurisdiction, and repelled the preliminary defences as to both defenders.

The defenders appealed.

Lord Cottenham.—My Lords, this appeal is upon preliminary defences only, and does not touch the merits of the question between the parties; but as the relative situation of the parties is material to the consideration of these preliminary defences, a short statement of the transactions impeached is necessary to explain the opinion I have formed on these defences. Walter Irvine had a brother, Charles, and several sisters. Charles died domiciled in Scotland, and his property thereupon became divisible between Walter and his sisters. Walter entered into arrangements with his sisters, by which he purchased their shares in Charles's property. This took place in 1800. The respon-

dent (the pursuer) represents the sisters, and impeaches this transaction as fraudulent; and the object of the suit is to reduce and set aside this transaction, and to obtain payment of the property of Charles, received by Walter, which, but for this transaction, would have come to the sisters. The deeds in question were executed in Scotland, and Walter had an estate in Scotland which he did not dispose of according to the forms of the law of Scotland. He died domiciled in England, and left three daughters, the appellants, Elizabeth, the wife of Lord William Douglas, and Christian Irvine, and Catherine, who has since died unmarried. The domicile of Lord and Lady William Douglas was in Scotland, and as to them there is no question of jurisdiction, but the domicile of Christian was in England. She was, however, at the time process was served upon her, in Scotland, upon a visit to her sister, Lady William Douglas, but she had not been there forty days. Walter's will was proved in England by Lord William Douglas, and two other executors; but although Lord William Douglas is a defender, the summons does not seem to seek to make him liable in that character of executor, but is addressed to the daughters of Walter Irvine as his heirs-portioners, or otherwise served "and retoured to him, or as otherwise representing him on one or other of the passive titles known in law." It appears, that upon the death of Walter, his three daughters, the two appellants, and Catherine, deceased, were served and retoured heirs-portioners of Walter, and that they completed their feudal titles as such to part of the property. Walter was also entitled to the superiority, and other parts he held under other superiors; and the heirs-portioners completed their title to the superiority to which Walter had been so entitled, as well as to the *dominium utile* of the whole. Upon this statement of the facts, if there had been nothing else in the case, there would not, I apprehend, have been any doubt of the liability of these heirs-portioners to answer to any creditors of the deceased, they having so taken possession of his estates and made up their titles without any inventory or protection against such liability. It was, indeed, said, that the pursuer was not for this purpose to be considered as a creditor, because it was necessary for him, in the first instance, to reduce and set aside the assignment which Walter had obtained from his sisters. But the object of the suit is to obtain from those who represent Walter, those parts of the funds of his brother, Charles, which by law devolved to his sisters. If the right to those funds be established, the claim of the pursuer will be strictly that of a creditor. Why, therefore, is he to be deprived of the mode of obtaining payment of his debt, which the law of Scotland allows to other creditors, because a preliminary question must be decided in his favour before his title as a creditor can arise. Every disputed debt requires an adjudication establishing it, before the title to the remedy can be applied. No case has been cited to establish this distinction between the present claim and the claim to any other debt; and there does not appear to be any ground for it upon principle. It was there said, that if the pursuer was entitled to the ordinary remedy of a creditor, the defenders, as heirs-portioners, are in nowise liable to be sued for such debt; and the reason assigned was, that they took nothing from the debtor whose estate they inherited. This was attempted to be made out from the provisions of the settlement made upon the marriage of Lady William Douglas, by which Walter Irvine, her father, covenanted that she should have, for the purposes of her settlement, one-third in value of the property he might be possessed of at the time of his death, but subject to an absolute power of disposition in his lifetime, and a power by will to charge the property with such legacies and annuities, and other charges, as he might think proper, to any extent. This one-third in value would only be what should remain after payment of his debts. If, therefore, his real estate in Scotland was subject to the present claim, it was so subject in preference to any claim under the covenant. Walter, by his will, directed that his Scotch estate should be settled on the trusts of Lady William Douglas's settlement, in execution of his covenant, and he gave £35,000 to each of his other daughters, and the residue equally between the three; and so well aware was he that he had no power by such will to dispose of the Scotch estate, that he directed that all his daughters should concur in the disposition of it, and if they refused so to do, that the principle of election, according to the English law, should

be applied to them. Upon his death, the daughters, as heirs-portioners, became entitled to the Scotch estate, and they and each of them might have held and enjoyed it, or her portion of it, as such heirs-portioners, but they could not do so, and at the same time claim the benefit of the provision intended for them by their father's will. They therefore concurred in carrying his intentions into effect, and in conveying the estate to the trustees of Lady William Douglas's settlement, that is, they sold their interest in the estate for the benefits provided for them by the will, and then it is said, that they were not *lucrati* by the inheritance to which they succeeded. Had they merely succeeded to this inheritance, or elected to enjoy the estate as heirs-portioners, they would have been *lucrati* to the value of their shares; but, responsible for their father's debts, are they to escape from this responsibility, because, instead of being *lucrati* to the amount of their shares, they are enabled, by conveying such shares for the purposes of Lady William Douglas's settlement, to procure for themselves the benefits provided for them by the will, which probably exceeded the value of such shares. The cases referred to, in which heirs having no beneficial interest in the estate make up their titles only for the purpose of conveying it to those who are beneficially entitled to it, can have no application to this case. The appellants, therefore, are heirs-portioners *lucrati*, who have made up their titles, and entered as such without the benefit of inventory, and so become liable to the pursuer's suit. It was said that the trustees of Walter Irvine, that is, those who proved his will in England, ought to have been parties, but independently of the answer, that none of them except Lord William Douglas were in Scotland, the objection assumes, that an heir who has incurred the passive representation by his mode of dealing with the estate, cannot be sued by a creditor without also suing the personal representative, for which there does not appear to be any authority. The remaining ground of the appeal is, that the appellant, Christian Irvine, was not liable to the jurisdiction of the Court of Session, because her domicile was English, and she had not been in Scotland forty days before service of the process. But this domicile, after forty days, for the purpose of jurisdiction only, does not seem to apply where the Court had original jurisdiction over the subject-matter, and certainly does not apply where the party served is sought to be affected by virtue of property in Scotland. In the present case, the subject-matter of the suit is the property of Charles, the brother of Walter Irvine, who was a domiciled Scotchman. The deeds sought to be set aside were executed in Scotland, and respected that property; and the liability sought to be attached upon the defenders, the appellants, depends upon their mode of dealing as heirs-portioners with a Scotch estate. The forty days are required where the jurisdiction is assumed *ratione domicilii*; but if Christian Irvine was subject to the jurisdiction at the time she entered upon and made up her titles to the land, can she escape from that jurisdiction (being personally served), upon the ground that her domicile was English and that she had not been forty days in Scotland, and was there only upon a visit? If jurisdiction once attached *ratione contractus*, it continues to operate although the defender has her domicile elsewhere. If it were necessary, in order to support the jurisdiction, to show that she had immovable property in Scotland at the time the citation was served, it appears that the fact is established that she is still possessed of the superiority of part of the estate. It was said, indeed, that it was of no value; but that does not appear. The appellants' argument seems to assume, that if a person not domiciled in Scotland incurs a passive representation by dealing with the estate of the debtor, and therefore becomes liable to the jurisdiction of the Courts in Scotland, so long as he continues to hold such estate, he can escape from such liability, and bid defiance to that jurisdiction, if he sells the estate, though personally served with process, if he has not resided forty previous days in Scotland. No authority has been referred to in support of such proposition, and there does not appear to be any reason to support it. If a Court have jurisdiction over the subject-matter, and the party against whom the claim is made be properly brought before it for the purpose of resisting it, there does not appear to be any reason for the Court declining to exercise such jurisdiction. Such is the rule in this country, and I see no ground for extending a contrary rule in Scotland beyond

what the established practice of the country has laid down. With respect to the other parties alleged to be proper parties to this litigation, none of them appear to be in Scotland, and no authority has been cited to show that the suit cannot, under such circumstances, proceed in their absence. In the courts of equity of this country, suits proceed in the absence of parties out of the jurisdiction, who, if within it, would be necessary parties to the suit, except in cases where the decree cannot be carried into effect in their absence. For these reasons, I move your Lordships that the interlocutors appealed from be affirmed, with costs.

Interlocutors affirmed, with costs.

Lord Cuninghame, Ordinary.—A. Gordon, Appellants' Solicitor.—Richardson and Connell, Respondent's Solicitors.—[W.H.D.]

6th October 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 282.—ROBERT LAIDLAW, Appellant, v. JOHN SMITH (Garden's Trustee), Respondent.

Diligence—Arrestment, Breach of.—Bona Fide Payment—Principal and Agent—Statute 1581, c. 118.—Where an arrestee transmitted funds to his agent, who therewith paid the original creditor in bona fide, both being, at the time of such payment, ignorant that any arrestment had been used against him, such arrestment having been executed in his absence at his dwelling-house previous to the payment—Circumstances in which held (affirming the judgment of the Court of Session) that he was not liable in second payment, as for breach of arrestment.

Mr Robert Dunlop, W.S., had a claim against the sequestrated estate of H. W. Garden, merchant in Glasgow, on which estate the respondent was trustee, arising from his, Dunlop's, employment as law-agent in Edinburgh by Messrs Cuthill and Turnbull of Glasgow for Garden, their client; which claim was secured by hypothec over Garden's title-deeds in their possession. After the bankruptcy, a correspondence took place as to Dunlop's claim, which was finally transacted through Messrs Dundas and Wilson, C.S., the agents in the sequestration in Edinburgh.

On 14th May 1831, Messrs M'Grigor Murray and M'Grigor, the agents in the sequestration in Glasgow, wrote to Messrs Dundas and Wilson in these terms:

"We have had repeated letters from Mr Dunlop, urging very earnestly a partial payment to account of his claims against Garden's estate. We have written him, that as the matter is in your hands, we decline interfering, but that we have remitted you such a sum as we trust will cover the utmost extent of his claim—leaving it to you to dispose of it as you may think proper. We accordingly send you prefixed an order on Mr Smith's account with the Royal Bank for £200 Sterling, which will enable you, we hope, to settle with Mr Dunlop. It will be desirable, we think, to make one work of all, and to make no partial payment. But in this you will act as you think proper."

On 19th May, Mr Wilson wrote to M'Grigor Murray and M'Grigor:

"I have had several conversations with Mr Dunlop on the subject of his claim against Garden's estate, and he has this day offered to settle it, by receiving £210 as in full of all demands. In the whole circumstances of the case, I think the trustee would do well to compromise the claim, by paying Mr Dunlop £200 or 200 guineas. I shall be glad to hear from you on the subject."

On the 20th, M'Grigor Murray and M'Grigor wrote to Mr Dundas in reply:

"We leave the settlement of Mr Dunlop's account entirely to yourself; and unless there are charges in it which you think

would, on an appeal to the auditor, be cut down, you may pay him the sum he has agreed to take in full thereof. We will remit you through the bank, to-morrow, the balance required to enable you to pay the amount."

Several partial payments had been made to Dunlop, but a sum of £130 was still unpaid, when on 19th May, the appellant, having raised letters of arrestment on the dependence of an action against Dunlop, arrested the funds due to him by the respondent, by leaving a schedule of arrestment at his dwelling-house in Glasgow. The respondent was absent from Glasgow at this time for a few days, and did not receive the schedule till his return on the evening of 21st May.

On 21st May, the following letter was written by Wilson to M'Grigor Murray and M'Grigor:

"Mr Dunlop mentioned a few days ago that an arrestment had been raised against him, and he seemed to think it possible that it might be for the purpose of arresting the money due to him by Garden's trustee. Could you ascertain from Mr Smith this evening, whether any arrestment had been laid in his hands, and let me know by Monday morning, when I suppose Mr Dunlop will be here for his money. Mr Smith would probably have informed you of any arrestment, but, in case of accidents, it is better to ascertain that there is none."

To this letter the following reply was given on the 22d:

"Mr Smith, the trustee on Garden's estate, had been from home for some days, and returned only last night—but not in time to enable me to write to you by the evening post. It has so happened that an arrestment was used against Mr Dunlop during Mr Smith's absence, and, therefore, no farther payment can be safely made to him until it is loosed."

Before this last letter was received, payment of the £130 had been made to Dunlop, in the circumstances mentioned in the following letter of Mr Wilson to M'Grigor Murray and M'Grigor, of 24th May:

"After I wrote to you on Saturday morning, Mrs Dunlop, Mr R. Dunlop's wife, called here with a letter from her husband, addressed to her, authorising her to receive the balance of £130 due to him from Garden's estate, in which he says:—'Luckily, on calling for Mr Smith and Mr Murray, I found my fears, as to an arrestment, quashed. They never heard of such a thing, and Mr Murray, on my explaining my fears, at once dictated a letter to Mr Dundas, which he will get to-morrow, desiring him to pay me the £130;' and, as you had mentioned nothing about arrestments, and as I understood from Mr D.'s letter that he had seen Mr Smith, the money was paid to Mrs Dunlop; and I am sorry to find, from your letter of the 22d inst., that the arrestment had been previously executed in Mr Smith's hands."

The appellant having obtained decree in his action against Dunlop for the sum of £450. 3. 6., then raised the present action of furthcoming against him and the respondent, libelling on the payments made to Dunlop, after the arrestment had been served, as a breach of arrestment on the part of the respondent. Against this the respondent pleaded on the merits—That there were no grounds on which he could be made liable as in breach of arrestment, he having, before the diligence was raised, remitted to the place of the creditor's residence funds specifically appropriated for the discharge of the debt—the debt having been paid and extinguished in ignorance of the arrestment, and in the due execution of the arrangement under which that remittance was made; and the defender, without any blame imputable to him, having had no personal knowledge of the arrestment till the creditor had actually received payment of the debt.

The Lord Ordinary, on 12th May 1836, sustained the defence above stated, for reasons assigned in a relative note subjoined, *ante*, Vol. X. p. 222.

The Court thereafter refused a reclaiming note presented by Mr Laidlaw, on which he appealed.

On 16th July 1840,

Lord Chancellor.—My Lords, I certainly feel some difficulty in this case, on account of the obscurity in the papers as to the question of fact. I see in the reasons of the appellant he states that the Court below have proceeded to adjudicate upon some facts which were not proved, but I cannot find, upon looking into the proceedings, that any such objection was raised there. Undoubtedly, if the appellant has adopted the course of taking the opinion of the Court below upon an assumed state of facts, and not asking that Court to adopt a course enabling him to prove his own case, and disprove that of his opponent, and taking the opinion of the Court on an assumed state of facts, he has come now to complain of the conclusion to which the Judges have come, it would be attended with the greatest possible injustice to the respondent to permit him to avail himself of that course of conduct. But, my Lords, I cannot at this moment state how far that may appear, upon the papers before your Lordships, to have taken place, and I shall therefore look over the papers, and if I find the argument below proceeds upon an assumed state of facts, I think that your Lordships will be doing great injustice to the respondent if you permit the appellant to open the case before your Lordships upon that ground. I shall be glad to receive information upon that, and upon the mode in which the learned Judges dealt with it. They appear to have assumed that the fact is as stated in the letters; and the Lord Ordinary has stated, that if he had been asked to direct a trial of the question of fact, he should have done it. Now, then, I assume that no such application was made to him, and that they were not willing to take the opinion of a jury upon the facts. At the same time, the letters were not evidence to prove the facts on behalf of the parties who produced them, but it is not inconsistent that the appellant may not have precluded himself from going into the case by taking the opinion of a court of law. This difficulty cannot occur in this country, because the proceedings here are so well framed as to separate the question of law and of fact, and there cannot be any of that confusion which seems to exist in this case. My Lords, if that part of the case is brought to a satisfactory conclusion, I shall have no difficulty in advising your Lordships upon the question of law, for nothing can be more monstrous than that if a party who is trustee, who has been guilty, as is admitted, of no breach of trust, holding the sum for some other person—having a letter or a message of arrestment left at his house under circumstances under which he could not know what was contained in the document, and who pays it away to the party entitled to it,—if he, under those circumstances, is to be compelled to pay that money over again to some other person who has left the notice at his house, under circumstances in which it could not regulate his conduct. That is a state of the law which I am sure your Lordships would lament if it existed, and your Lordships, I am sure, will feel greatly gratified if it is held not to exist, upon the authority of the case of *Scott against Fludyer*. There was an expression of the Judge in that case that such was not the law of Scotland; and such not being the law of Scotland, it seems fit to consider whether there is that degree of negligence, which, according to the law, would render him liable for the consequences, if he was guilty of that negligence. Now that makes the detail of the facts material; and looking to the detail of the facts, I can affix no meaning to them except from the letters; and if the party has so dealt with them in the Court below as to make them conclusive, then the only question to be considered is, whether, upon the faith of the letters, there appears to be such a case of negligence as, in the absence of an actual knowledge of the arrestment, would subject the trustee to responsibility. Now, looking to the letters, certainly, I think they do not state any such case of negligence; because, what they state is, that he was absent at the time it was left, and that he never came back until after the money was actually paid, and of course, he did not know what took place in his absence; nor

can I consider that what took place on the part of his agent (for to a certain extent he was his agent,) amounts to negligence. In the first place, there is no culpable negligence on his part, namely, in not acting for him as trustee; but the circumstances which, the appellant says, shows the negligence, is the act of those who were acting at Edinburgh. Now they were, no doubt, for a certain purpose, agents for the trustee, for it was through their hands that the money was directed to be paid; but it does not follow that any want of caution is to bind a person who does not employ an agent in the general management of his affairs, but only in the one particular act. But even as to that act, all which was in the information of Mr Dunlop was, that there had been some arrestment from somebody. Now, on the 21st, the same day in which the information was received, he was informed that no such arrestment had taken place; and that is no fiction, because it appears that Mr Dunlop had caused inquiries to be made at Mr Smith's house, and no person there knowing what had taken place, there was no information at that time communicated to any one that this arrestment had taken place. There was a report of there being an arrestment, and an application was made to ascertain the truth of it, by applying to those who were likely to know the names of the agents in Glasgow, at the house of the trustee himself, but no person having any information at that time of the arrestment having been made, because Smith, the trustee, had not returned—he acted upon that same day on which he ought to have received information of the arrestment being made, and paid the money. All this was in ignorance, as it respected all the parties, of there being such arrestment, but upon these facts a claim is made against Smith to repay the money which he has once paid over. Now, my Lords, unless I find a difficulty in disposing of the case upon the question of fact, I shall take the facts as assumed by the Judges in the Court below, and I shall have no difficulty then in advising your Lordships to affirm the decree of the Court below. If there was a miscarriage in point of fact, the question is, what statement the appellant will make to this House to entitle himself, as against the other party, to a trial of the issue? If he cannot make such statement, then the course to be taken is obvious. If, on the other hand, the party answers that the case is in such a state that it is still open to him to try the question of fact, the question is, whether the circumstances are such as to entitle him to do so? and perhaps the counsel can state that to me now.

Mr Anderson.—I am afraid I cannot take upon myself that responsibility, but I would refer your Lordship to a passage in the respondent's case. It is the fifth reason in page 16: it is in these terms:—"V. Hitherto the defender has confined himself to the consideration of the pure abstract question of law, whether, where an arrestee pays his original creditor *in bona fide*, being confessedly, at the time of such payment, utterly ignorant that any arrestment has been used against him, the mere production of an execution, valid on the face of it, to show that such an arrestment had, though unknown to him, been in fact executed in his absence at his dwelling-house, shall *per se* be held sufficient to subject him in second payment, as a person guilty of breach of arrestment? And upon that question he humbly trusts he has satisfied your Lordships that such an arrestee is not so liable. Having done this, the defender does not know that it is at all incumbent upon him, at least *in hoc statu*, to go further. For any further question must plainly resolve itself into matter of fact, and of course, whatever ground it may afford for sending the case to a jury, it would seem altogether out of place, in an argument which the defender understands your Lordships to have directed with a view to settle the law. In truth the case, as it comes before the Court under the Lord Ordinary's judgment, has only been decided by his Lordship as a case of law, and it would be, *hoc statu*, premature to dispose of it upon any other view." It goes on to state his understanding upon the question of relevancy, assuming the facts to be as stated, but not upon an admitted state of facts. On the contrary, it would be improper to argue it upon an admitted state of facts, and then go to a jury.

Lord Chancellor.—The course the Court of Session had was to dispose of the case upon the facts, and I do not find it made a ground of objection that it was irregular in that state of the case to adjudicate finally.

Mr Anderson.—The judgment was given upon the papers; and one of the reasons given by us is, that the facts were admitted. If they were not, the Court ought to have entered further into the question of fact, and to have adopted some mode of investigation of the facts.

Lord Chancellor.—There is a distant allusion to that I see.

Mr Pemberton.—Not an allegation, my Lord, that the proof ought not to have been received, and that the Court ought not to have decided upon the proof that existed; but what they say is, that we have not sufficiently established our claim.

Lord Chancellor.—Their 5th reason is, “because there is no specific averment on record stating where the respondent was at the date of the arrestment, or in what manner he was engaged, or any other data given towards disclosing whether the cause of the alleged absence was necessary or excusable.” That raises the question here in the reasons, but I cannot find any such ground taken in the Court below.

Mr Anderson.—Your Lordship sees we could not state it. Their own case is, that the Court could not then dispose of the facts, but only of the abstract question of law; and the proper way to do that, would have been to send it to a jury. The first opportunity we have of stating that is in the reasons. We could not state it after what the respondent had pleaded.

Mr Pemberton.—What they could have done would have been to have stated that the Lord Ordinary had no right to dispose of the facts on the evidence before him.

Lord Chancellor.—What is done is generally complained of.

Mr Pemberton.—I do not think there is any statement that the Lord Ordinary had admitted the facts as alleged by them.

Lord Chancellor.—The claim in the petition does not specify the particular ground of objection.

Mr Anderson.—No, my Lord.

Lord Chancellor.—The proof, by their letters, is a sort of incidental proof.

Mr Pemberton.—I believe, my Lord, there is no question about the facts.

Lord Chancellor.—There is no reason to suppose those letters are fabricated.

Mr Anderson.—There is a case behind that, my Lord; the letters may be true, and yet they may not prove the contents.

Lord Chancellor.—They were used on both sides—by the pursuer as well as by the defendant.

Mr Anderson.—They were used in argument; but if your Lordship will read the papers, we shall be satisfied.

Lord Chancellor.—I should be glad to be informed on Monday morning, in the event of the House not being of opinion that the facts are established, after what has taken place, whether you would ask for an opportunity of proving them.

Of this date, (6th October 1841),

Lord Cottenham.—My Lords, the first, and for the reasons I shall presently give, the only question, in my opinion, in the present case, is as to the proposition of law raised by the first plea of the respondent, which may be shortly stated to be, whether the arrestee of a debt, paying it *bona fide* to the common debtor after a regular arrestment, but, in ignorance of it, can be compelled to pay it over again to the arrester? In considering this question, I shall assume the facts to be as stated by the Lord Ordinary. Independently of authority, the proposition that the arrestee is subject to such liability, would be one which it would be impossible to support upon principle. The law of Scotland allows the power of arrestment of property belonging to the debtor for the benefit and security of the creditor; and it would be most unjust to enforce that right to the prejudice of others. To the arrestee, who owes the debt or possesses the property arrested, it must be matter of indifference to whom he pays or renders it. If the dealing between his creditor and another give to that other the right to recover the debt, the law, in carrying that right into effect, ought carefully to protect the person owing it. In other transfers of debt and liabilities it does so, and imposes no responsibility upon him to the person becoming entitled, until he has distinct personal notice of such transfer. Many instances of this are mentioned in the respondent's case. What creates the liability in any case to pay the debt over again to a person originally a stranger to the party paying? Clearly the having paid it to the person with the know-

ledge that another was entitled to it; which amounts to this, that a payment *mala fide* shall be considered as no payment at all. It was for the appellant to show why this general principle of law and justice is not applicable to cases of arrestment. The Statute of 1581 prescribes the mode of making arrestments; and following the directions of that Act, the arrester is entitled to all the benefits of his arrestment as against the property or debt *in medio*—that is, as against his debtor and other competitors; but there is nothing in that Act making the prescribed service at the dwelling-house the ground, without more, of personal liability in the arrestee, who, in ignorance of the arrestment, pays the debt *bona fide* to his original creditor. The assignment of a debt gives to the assignee a title to the debt, but not to recover the amount from the debtor, who, without notice, has paid it *bona fide* to the assignor. If the arrestment give such a right to the arrester as against the arrestee, it must be by a positive rule of law, independent of particular circumstances; and if so, it must operate in the cases put by the Lord Ordinary, in which no caution on the part of the debtor could possibly protect him. Such consequences may not prove what the law is, but in deciding between conflicting authorities, may be permitted to weigh powerfully against those from which they must flow. If, then, this liability be inconsistent with this rule of law in other cases, and be not enacted by Statute, and if it be contrary to the principles of justice, it can only be supported by the weight of legal and judicial authority. Only two cases have been referred to in which the question has been discussed—that of Blackwood in 1703, and that of Fludyer in 1770. It is true that the first is mentioned by Mr Erskine, B. III. t. 6, § 14, and apparently with approbation. But the latter case was decided after Mr Erskine's death in 1768, though before the first publication of his work in 1793. It does not appear how the case of the office, referred to by Mr Erskine in the same passage, could have arisen, as neither the arrestee nor the property were within the jurisdiction. It appears to me, however, that Blackwood's case is a very distinct authority in favour of the appellant's proposition, but it is of an old date, and does not appear to have been followed; for nothing can be more explicit than the opinion of all the Judges who decided the case of Scott v. Fludyer on the 8th of March 1770. The appellant attempts to get rid of the weight of this case, by stating that the arrestment against Tait was clearly void; but all the Judges concur in considering it as regular and valid, but that it had ceased to have any operation by his *bona fide* payment before he had notice of the arrestment. This, then, is a much later decision than that of Blackwood, and is in conformity with the rule of law in all similar cases, and is consistent with the principles of justice, which the former decision was not. I cannot, therefore, hesitate to approve of the judgment of the Judges of the Court of Session, who preferred adhering to this decision rather than to establish the rule as laid down in Blackwood's case. It was, however, argued, that the facts of this case, as stated by the Lord Ordinary, did not raise this question; because, although Smith had no personal notice of the arrestment, his agents, Mr Wilson and Mr Murray, had, and that all were guilty of so much negligence; that notice of the arrestment ought to be assumed, or rather, that Smith ought not to be at liberty to say that he had not notice. So far as affects Smith personally, the alleged negligence is the having left home without appointing some person to act for him in the event of an arrestment being served in his absence. There is no attempt to show that his absence was from any improper motive with respect to the arrester, or that he had any reason to expect that there would be any arrestment. The proposition therefore, is, that every person owing money to another is bound, under the penalty of personal liability, before he leaves his own house to appoint some person who, in his absence, may deal with any arrestment of the debt which may be served. The general operation of this proposition would be alarming, when it is recollected how large a proportion of the inhabitants of Scotland must necessarily be liable to debts and obligations to others, none of whom, according to the proposition of the appellant, could safely, or without being guilty of a neglect of duty, leave their houses for any time whatever without appointing an agent, and leaving orders to provide against the possible event of some arrestment of such debt or obligation being served during his absence. But it was said that Wilson, the agent at

Edinburgh, and Murray, the agent at Glasgow, had sufficient intimation of the arrestment, to make the payment of the debt on Monday, the 21st, an act of negligence which ought to subject the principal, Smith, to this liability. To this the short but decisive answer is, that Wilson and Murray were not Smith's agents for this purpose. Wilson's authority was only to settle the amount of Dunlop's debt, and to pay the sum agreed upon, which had been remitted to him for that purpose. If the money in Wilson's hands was not to be treated as still in the hands of Smith, then at the time of the arrestment, the property was no longer *in medio*, and if it was to be so considered, then the agency of Wilson cannot be extended beyond the real nature and object of his employment, and notice to him of the arrestment would not be of any effect to subject Smith to responsibility. If, indeed, he had had any such notice, which he had not, he would properly have suspended the execution of his orders till he had communicated with Smith, but his not doing so would not have affected him. Such is the recognised rule of law in this country respecting principal and agent, and which the security of mankind requires; and the case of Campbell, referred to in Erskine, B. III. t. 6, § 4,—edition by Mr Ivory, Note 310 to § 14,—proves that the same rule prevails in the law of Scotland, and is applicable to this particular subject of arrestment. I therefore think that the judgment of the Court of Session, upon the proposition of law raised by the plea of the respondent, is correct. The principal difficulty I have had in this case is as to the facts; for although there seems to be no reason for doubting that the facts as collected and stated by the Lord Ordinary, are the real facts of the case, I cannot find in the proceedings any admission or proof that they are so; and it is, in my opinion, so essential to the due administration of justice, and so important to the science of the law that the facts of a case should be clearly ascertained by either admission or proof before the rule of law is applied, that I have been anxious to discover, if possible, some judicial ground for assuming that the facts are as stated by the Lord Ordinary, and I was for some time disposed to advise your Lordships to send the case back to the Court of Session for that purpose; but looking to the provisions of the 6th George IV. c. 120, and particularly the 14th section, upon this subject, and the manner in which the appellant brought his case before the Inner-House, in which I do not find any complaint made of the Lord Ordinary having proceeded to adjudication upon the merits without a proper previous ascertainment of the facts, and that it formed no part of his application there that directions might be given for that purpose, I think that the appellant cannot now object to the interlocutor upon that ground. I must assume that all parties were aware of what the facts really were, and were desirous of having the opinion of the Court upon an admitted state of facts. I therefore propose to your Lordships to affirm the interlocutors appealed from, with costs.

Interlocutors affirmed, with costs.

Lord Moncreiff, Ordinary.—Deans and Dunlop, Appellant's Solicitors.—Richardson and Connell, Respondent's Solicitors.—[W.H.D.]

6th October 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 283.—WILLIAM ALLAN, Esq. of Glen, Appellant, v. PETER McCRAW, Collector of the Poors' Assessment for the Parish of South Leith, and a COMMITTEE of the HERITORS of the said PARISH, Respondents.

Poors' Rates—Liability—Statute 7 Geo. III. c. 27—Construction—Annexation—Held (affirming the judgment of the Court of Session), that by the Statute 7 Geo. III. c. 27, for extending the royalty of the city of Edinburgh, the lands of Hillside, thereby disjoined from the parish of South Leith and annexed to the parish of Saint Giles, in the city of Edinburgh, remain liable in payment of poors' rates to the parish of South Leith, and that not only on account of the solum, but also for the buildings erected thereon.

The lands of Hillside, now the property of the appellant, formerly belonged to the Governors of George Heriot's Hospital, who, in January 1756, granted a feu-charter of that property in favour of James Grant, after which period the lands were called "James Grant's Feu." The subject is described as situated in the barony of Broughton, parish of South Leith, and sheriffdom of Edinburgh. The charter, *inter alia*, contained the following clause:

"And also, that in case the royalty of Edinburgh shall at any time hereafter be extended, so as to comprehend the grounds now feued, the said Mr James Grant and his foresaids, or the proprietors of the said ground for the time, shall not only be subjected to build such houses as they shall build thereon, agreeable to the plan to be concerted by the Town-council of Edinburgh, and other managers for the time, but likewise, the houses to be built thereon shall be subject and liable to pay the same public burdens as the other inhabitants of the city are subject and liable to pay."

By Statute 7 Geo. III. c. 27, entitled, "An Act for extending the royalty of the city of Edinburgh," the royalty was extended over a variety of lands specially named, among which were the subjects of James Grant's feu, under the conditions on which they and the others had been feued out by the Governors of the Hospital, viz., "the said houses to be built thereon shall be subject and liable to pay the same public burdens as the other inhabitants are subject and liable to pay."

The Statute then has the following clause:

"And be it further enacted, by the authority aforesaid, that the said Magistrates and Town-council of the city of Edinburgh shall have full power to appoint stent-masters to levy from the proprietors and possessors of all such houses as are built, or shall hereafter be built, upon the foresaid grounds hereby annexed to, and comprehended within the said royalty, an equal portion of the cess, annuity, poors'-money and watch-money payable by the city of Edinburgh, in the same way and manner as the same are now levied within the present royalty."

The Act farther provides,

"That the several lands hereby annexed to the royalty of the city of Edinburgh shall, besides the cess to be levied by the collector of the town, for and in respect of the houses and buildings, remain liable, and be subjected to the payment of a rateable proportion of the cess and land-tax, and other public taxes imposed, or to be imposed on the shire of Edinburgh, for and in respect of the ground, to be levied in the same manner as formerly, any thing in this Act to the contrary notwithstanding."

By another clause of the same Statute it is enacted, "that the foresaid grounds hereby annexed to, and comprehended within the royalty of the city of Edinburgh, shall be, and they are hereby for ever after disjoined from the parish of Saint Cuthberts or West Kirk and South Leith, and are hereby annexed to the parish of Saint Giles, within the city of Edinburgh; provided always, that the lands hereby disjoined from the parish of Saint Cuthberts and South Leith, and the heritors thereof, shall remain liable and be subjected to the ministers' stipends and other parochial burdens, and that the tithes payable out of the lands hereby annexed shall be, and the same are hereby saved and reserved to the owners thereof, in the same manner as if this Act had never passed."

The royalty of the city was subsequently extended over a portion of the parish of St Cuthberts in 1809, by Statute 48 Geo. III. c. 21. In that Act certain arrangements were made in regard to a sum of poors'-money being paid by the Magistrates of Edinburgh to the parish of St Cuthberts. The lands disjoined from South Leith parish by the 7th Geo. III., were however

allowed still to stand on the footing prescribed by that Statute.

The royalty was farther extended in 1813, by the Act 53 Geo. III. cap. 77, and the same conditions as contained in that of 7th Geo. III. were again inserted. This Statute, however, does not disjoin from the parish of South Leith the lands to be acquired under it, or annex them to any parish within the city of Edinburgh.

In 1823, the appellant's father began to erect buildings on the lands of Hillside, which had formerly been possessed as a villa and grounds, and in 1830, the boundaries of the property, within the royalty, were fixed by the Sheriff in terms of a clause in 7th Geo. III., by which he was authorised to do so. Up to this last date these lands had always been assessed for the poors'-rates of South Leith parish, but when the boundaries of the royalty were now fixed, the appellant refused to pay poors'-rates to the parish of South Leith, on the grounds that he was liable to be called upon for poors'-rates on the part of the Magistrates of Edinburgh; that his property, so far as consisting of Grant's feu, was annexed to the parish of St Giles in that city, and that he was not liable for parochial burdens to two parishes.

The present action was then brought by the respondents, the collector of poors'-rates for South Leith, and a committee of the heritors. The summons contained a declaratory conclusion for payment of £70. 6. 11., being poors'-rates and cholera assessment due for property belonging to the appellant, forming part of what was formerly styled James Grant's Feu,—also for £4. 3s. 9½d., as his share of the expense of a process relative to Restalrig burying-ground, and it also concluded for payment of £53. 19. 3½. for poors'-rates, &c., on houses belonging to the appellant in the parish of South Leith, but not upon James Grant's feu, and £1. 7. 7½. for his share of the expense of the same process, effeiring to his other property.

It was *pleaded* in defence—1. According to the sound and legal construction of the Statute libelled, the defender, or his property, can only be liable for one poors'-rate or tax, and it is contrary to public law, as well as the true construction of the Act, to assess the same property twice for the same tax; and, 2. At least, according to the proper construction of the Statute, the defender is only liable in poors'-rate to the parish of South Leith for the ground or *solum*, and is not liable for any poors'-rate on account of the houses erected on the ground—these, by the annexing Statute, having become burdened with taxes or assessments due to the town of Edinburgh.

The pursuers *contended*—1. In virtue of the Statutes founded on, the property mentioned in the libel, as united to the royalty of the city of Edinburgh, remains liable in poor-rates to South Leith, according to the express terms, as well as the true intent and meaning of the Statute; and, 2. The distinction suggested by the defender is not made in the Statutes, or in practice, between a house and the ground on which it stands. The amount of assessment is measured by the rental or value of the property built or not built upon.

The Lord Ordinary, on 15th November 1838, repelled the defences, and decerned in terms of the libel, with expenses,—the grounds of his judgment being fully detailed in a note subjoined to his interlocutor,—

SCOTTISH JURIST.

See *ante*, Vol. XI. pp. 340, 341. On a reclaiming note the Court adhered.

Mr Allan appealed.

Lord Cottenham.—My Lords, I think the interlocutors appealed from in this case ought to be affirmed. The question is, whether the lands of the appellant are liable to the payment of the poor-rate to the parish of South Leith, which depends altogether upon the construction of the Act of 7 Geo. III. c. 27, under which they have been taken within the royalty of the city of Edinburgh. The lands were situate within the parish of South Leith; and by section 10, all houses built and to be built upon the lands in question are made subject to an equal portion of the cess, annuity, poor-money and watch-money payable by the city of Edinburgh, as the same was then levied within the then royalty. By section 12, the land, besides the cess to be levied by the collector for the town for and in respect of the houses and buildings, is to remain liable, and be subjected to a rateable proportion of the cess and land tax, and other public taxes imposed or to be imposed on the shire of Edinburgh for or in respect of the ground, to be levied in the same manner as formerly. By section 15, the lands are declared to be, and are for ever after, disjoined from the parish of South Leith, and are thereby annexed to the parish of St Giles, within the city of Edinburgh; and by section 16, it is declared, that the lands thereby disjoined from the parish of South Leith, and the heritors thereof, shall remain liable, and shall be subjected to the ministers' stipends and other parochial burdens, and that the tithes payable out of the lands thereby annexed shall be, and the same are hereby saved and reserved to the true owners thereof, in the same manner as if the Act had never passed; and by section 18, all rights and interests (other than the extension of the royalty) of all person or persons which they had, have, or may have in the lands thereby annexed, are saved. So that the lands in question are disjoined from South Leith by one section, which, if there had been no other provision, would have exempted them from the liability to pay poor-money to the parish; but by another section they are to remain liable, and be subjected to the parochial burdens of South Leith, as if the Act had never passed. If, therefore, the poor-money be a parochial burden, and if the property in question would have been liable to such poor-money if that Act had never passed, the case comes within the very terms of the Act. It was argued, that the poor-rate is not a parochial burden. It is a rate to be paid by the heritors or owners, and by the occupiers of lands within the parish. It is therefore parochial, and that it is a burden will not be disputed; and the 16th section accurately describes it as a parochial burden, to which the lands and the heritors thereof were before the passing of the Act liable, and were to remain so after it had passed. If the Act had never passed, the lands in question, and any houses built upon them, would have been liable to this rate. If the same lands and the houses built upon them are not now liable to it, how is the provision of the Act carried out, which declares that the lands shall remain liable to it in the same manner as if the Act had never passed? The argument, however, that though the land may be liable, the houses are not so, does not require this comment upon the terms of the Act to refute it. A distinct parliamentary enactment might, no doubt, subject the land upon which a house is built, and the house itself, to different rules and liabilities; but in this case there is no such distinct parliamentary enactment, and the general rule of law must therefore prevail, which considers the house as an accretion to, and as part of the land upon which it is built. This appears to me to be so clearly the true construction of the Act, that I cannot but think that the question would not have been raised, had it not been for the case of *M'Craw v. Cunningham*, reported in 2d Shaw and M'Lean, 773, upon which there was a great difference of opinion. The question in that case did not turn upon the same Act of Parliament as the present, but upon an Act of 54 Geo. III. c. 170, under which the lands there in question were included in the royalty of the city of Edinburgh. It is true that that Act declared that the extension of the royalty over the lands there in question, was made under all the clauses, provisions, declarations, exemptions and reservations in favour of his Majesty and others, which are specified and contained in the Act of 7th Geo. III. Whether that

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decision was right as to the extent to which the latter Act incorporated the provisions of the former, is not material, because it was assumed; and indeed the decision proceeded upon that ground, that the provision of the Act of 7th Geo. III., as to disjoining the lands from South Leith, and holding them, nevertheless, liable to the parochial burdens of that parish, did not apply to the lands taken into the royalty under the 54th Geo. III.; and in deciding that case, the Judges of the Court of Session assumed, that if the case had been under the 7th Geo. III., the lands would have been clearly liable to the parochial burdens of South Leith; and I do not find anything in the speech of the noble and learned Lord who moved the judgment of this House throwing any doubt upon that proposition. The case of *Burns v. Ewing*, and the Magistrates of Glasgow, is also inapplicable to the present. That case arose under another Act of Parliament which separated the lands there in question from the parish of which they had formed part, but there was no provision as to their remaining liable to the parochial burdens of that parish. The question was, whether such liability was to be inferred from a clause compelling the city of Glasgow to relieve the occupiers of poor-rates payable by them, as having been part of the parish before the passing of the Act. The holding that, under such circumstances, the liability continued, would be a strong authority in favour of the respondent in the present case; but the holding that it did not, would be no authority in favour of the appellant, who has not an inference to contend with to be deduced from other provisions of the Act, but a positive enactment, as to the construction of which I do not see any room for doubt. I am therefore of opinion that the interlocutors appealed from are correct, and I move your Lordships to affirm them, with costs.

Interlocutors affirmed, with costs.

Lord Jeffrey, Ordinary.—Spottiswoode and Robertson, Appellant's Solicitors.—Archibald Graham, Respondents' Solicitor.—[W.H.D.]

5th October 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 284.—*MRS CHRISTIAN STEWART or MENZIES, and CATHERINE MENZIES and JOHN MENZIES, Appellants, v. JOHN MENZIES, Esq. of Chesthill, Respondent.*

Marriage, Constitution of.—Husband and Wife.—*A gentleman addressed the following letter to his housekeeper: "You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born, in consequence of the present connexion betwixt us." The letter was dated 1826, but not delivered till 1828, at which period a child had been born—the gentleman's averment being, that he had antedated and delivered the letter for the purpose of making a third party, to whom he had promised marriage, believe that he could not fulfil his promise.—Held (affirming the judgment of the Court of Session), that the letter was not sufficient, either per se or with reference to the facts proved, to constitute a marriage.*

Marriage.—Husband and Wife.—Proof.—Parole.—Held competent for the defender in a declarator of marriage to prove the purpose for which, and the circumstances under which, a written declaration of marriage was given by him to the pursuer.

Proof.—Adminicle.—*A memorandum, made by, and found in the repositories of a deceased country gentleman, of a conversation with a female about the real purpose of a letter intended to be used by her in a declaration of marriage, about which she had come to consult him—held competent evidence.*

The appellants brought an action of declarator of marriage between the respondent and the first appellant, on the narrative, that about the month of April 1825, while housekeeper to the respondent at his house in Duneaves, he professed the greatest love and affection for her, and in consequence of his repeated addresses and solicitations, and his promise to marry her,

she accepted him as, and admitted him to all the privileges of a husband: That in consequence of the said promise and subsequent cohabitation, they became married persons: That on 25th March 1836, the respondent gave the appellant the following letter, acknowledging and declaring the marriage:

"Duneaves, 25th March 1826.

"CHRISTY,—You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born, in consequence of the present connexion betwixt us.—And I am yours truly."

(Signed) "JOHN MENZIES of Chesthill."

That both previous and subsequent to the date of this letter the respondent acknowledged, on various occasions to various persons, that he was married to the appellant: That the other appellant, Catherine, was procreated of the said marriage on 10th June 1827, and the other appellant, John, on 18th November 1829: That subsequent to the said marriage, the respondent treated, acknowledged, and cohabited with the first appellant as his wife, and acknowledged the other appellants as his lawful children; and that in these circumstances, the respondent and first appellant were married persons, and the other appellants lawful children. There was an alternative conclusion for damages as for seduction, which was based principally on the correspondence of the respondent, particularly a letter addressed by him to the clergyman of the parish on the birth of the second appellant, containing the following passages:

"I am so annoyed and hurt at the business, that I can scarcely say or tell you any thing." "I will pay all the fines and things that are requisite, by your letting me know as soon as possible all the different things and fines, and what would be the amount expected. I beg of you not to bring her before any session, or thing of that kind, as I was myself the transgressor." "I feel for the poor woman more than it is in my power to mention, when I think of the mischief I have done in destroying her character for ever."

In another letter, addressed to the appellant herself during her second pregnancy, the respondent expressed himself as follows:

"I am sorry that I cannot be able to go to see you to-night, but I send you a letter which I had been intending to do long ago, and before I ever expected or understood that you were again with child,—a circumstance which I can assure you gives me most distressing ideas, as I am alone the person to blame, and on whom I trust all the blame will be laid. I have every inclination and feeling to take you to myself, but there are just two things to be considered; one is, that all my respectability and connection with my equals will be at an end; and another, that I will lose all the respectability which my inferiors at this time pay to me; but that won't be a sufficient excuse for my destroying you."

He further offered in this letter to settle an annuity on the appellant, and a sum on the children, provided she would remove to some distance from his property.

In defence, the respondent denied the statement of facts founded on as implying marriage or seduction, and averred that the pursuer had, after the date of the letter of 25th March 1826, continued in his service as a menial servant, and the children had been treated and baptised as bastards; and with regard to the granting of that letter, he averred that it had been written and given by him to the appellant in 1827, or early in 1828, to enable him to mislead the relations of a young lady, to whom he had promised marriage, into a belief that

it was not in his power to enter into that state, of which fraud the appellant was cognisant and participant; and in point of law he *pleaded*—1. The promise of marriage contained in the letter libelled on, being qualified by the condition, that a child should be born in consequence of the illicit connexion which is stated to have then subsisted between the parties, the presumption that an agreement to marry was interchanged at the time of the subsequent *copula*, is necessarily excluded. 2. An express declaration on the part of the defender, that the pursuer was his wife, would not have constituted a marriage, if it could be proved that, at the time when it was made, neither of the parties intended that it should have that effect. 3. As the defender did not seduce the pursuer, he is not liable to her in the damages which she alleges that she has sustained in consequence of her seduction.

In a proof before answer of the defender's averments, evidence was adduced by him to show that the children were, with the mother's acquiescence, baptized as bastards, and that they were universally reputed as such; that the principal appellant never claimed the rights or title of a wife; and that, previous to raising this action, she had gone to consult a Mr Stewart of Crossmount, on whose property she had originally resided, as to the course she should follow, and in her interview with him she had admitted that the letter of 25th March 1826 had been written and delivered in the circumstances, and for the purpose alleged by the respondent;—of this conversation Mr Stewart had made a memorandum at the time, which was found in his repositories after his death, and admitted in evidence. There was other evidence to the same effect. The direct testimony on the part of the appellant of her near relations (sisters and brothers-in-law) was rejected, as inadmissible, by the Lord Ordinary (9th December 1834), and subsequently by the Inner-House,—the Lord Ordinary, in a note subjoined to his interlocutor, intimating, *inter alia*, that he would have disallowed such evidence without difficulty, if the attempt had been to prove a marriage by open marital cohabitation, and mutual habitual acknowledgments, but that he had some difficulty in rejecting it in a case like the present, where a temporary concealment of the marriage from the public was intended, and was influenced in rejecting it (which, *in dubio*, he held to be the least unexceptionable course), by the great extent to which her examination of stranger witnesses had already gone, and by some strong expressions both in the summons and condescendence. The proof of the appellants' allegations as to acknowledgment or open marital cohabitation failed.

The Court (4th February 1836) adhered to an interlocutor of the Lord Ordinary (Jeffrey) sustaining the defences against the declaratory conclusions of the action for marriage and legitimacy; and on 27th June 1837, the Court adhered to an Interlocutor of the same Lord Ordinary assailing the defender from the conclusion for damages as for seduction.

Against these judgments the pursuers appealed.

Lord Cottenham.—My Lords, a considerable portion of the voluminous papers in this case is occupied in the discussion of a question raised by the appellant, which was most properly abandoned at the bar of this House by the eminent counsel who appeared for the appellant. The point discussed in the papers, and abandoned at the bar, was, that it was not competent for the respondent to adduce evidence to show the circumstances

under which, and the purposes for which, the letter dated 25th March 1826 was written and delivered to the appellant. This point was attempted to be supported by reference to a principle to which it has no application, and in the face of several authorities. It is unnecessary further to notice this point. The main question, which is that of the *status* of the appellant—whether she is to be considered as the wife of the respondent—turns principally upon the effect of the letter of the 25th March 1826, with reference to the law of Scotland upon the subject of marriage—*first*, taken *per se*, and, *secondly*, taken with reference to the facts proved. It is an admitted fact that cohabitation preceded and followed the date of that letter, and the time at which it is admitted to have been delivered to the appellant. The letter is dated 25th March 1826, and is in these words:—"Christy, you and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born, in consequence of the present connexion betwixt us. I am yours truly, JOHN MENZIES." The summons puts the alleged marriage upon two grounds—1st, a promise of marriage previous to any cohabitation *cum subsequente copula*, of which no proof was given; and, 2dly, upon this letter, as being an acknowledgment and declaration of the marriage; but it does not put the case upon this letter as being a promise to marry *cum subsequente copula*,—*consent de presenti* is essential to marriage; and marriages established upon a promise *cum subsequente copula* are so established upon a fiction, that the *consent de presenti* was mutually given by the parties in consequence of the anterior promise; but if the promise be conditional upon the happening of a future event, there is no room for any such fiction. The *copula* cannot be the perfection or consummation of the prior contract, neither can this letter constitute a marriage by consent. It is not an acceptance by the parties of each other for their lawful spouses. By contemplating a future *status* of marriage upon a certain event happening, it negatives all the essentials of a marriage by consent expressed; neither can it be considered as a declaration constituting habit and repute that the cohabitation is that of husband and wife. The contemplation of such a relationship arising upon the happening of a future event, negatives the habit and repute which it is referred to as proving. It did not require the cases of Macdonald v. Macdonald, and M'Innes v. Moir, to prove this. The letter, therefore, taken *per se*, does not support any of the grounds upon which a Scotch marriage can be supported. The very able counsel for the appellant felt this so strongly, that he rested his client's case principally upon this—that the letter, though dated in 1826, was not delivered to the appellant till late in 1827 or early in 1828, after the birth of the child, and therefore ought to be considered as a positive declaration of present marriage,—the condition having at that time been performed. This would indeed be doing what the appellant properly insisted cannot be done; that is, construing a written document by extraneous evidence of intention. But if the fact of the letter not having been delivered till 1828 be resorted to, so must all the other evidence connected with the same matter, and which proves the reason for its having been delivered at that time, with the date of 1826, and the purpose for which it was so delivered; and which evidence so resorted to, and which, it is now not in dispute, was legally admissible, amply proves that the parties did not intend that the letter should constitute a present marriage, or operate as a promise of marriage, but that it was written in pursuance of a scheme of the respondent, acquiesced in by the appellant, to commit a fraud upon a third person. The cases of Kennedy v. Campbell, in 3d Shaw and Wilson, 135; M'Innes v. Moir, in Ferguson's Rep., App., pp. 125, 128; Taylor v. Kello, Morr. Dicty., 12,687; Grant v. Menzies, Ferguson, Rep., App. p. 110, and many other cases, prove, what indeed required no such proof, that to constitute a contract of marriage there must be contracting parties, and that the expressions used, though of themselves sufficient words of contract, are of no avail, if not intended by the parties to have that effect, but are used for some collateral purpose. This in no respect infringes upon the principle of not construing a written contract by extrinsic evidence of intention,—the question being, not what the written contract imports, but whether it is to be treated as a contract at all. I have already observed, that in order to construe the letter dated in 1826 according to the cir-

cumstances which existed at the time it was delivered in 1828, extrinsic evidence must be resorted to; but that proves that the parties must have had some design in antedating the letter. To construe it, therefore, as if dated in 1828, would be to defeat the proved object of the parties, and to construe a written document distinctly expressing one purpose as importing one totally different upon evidence debors the instrument itself, and that not proving such to have been the intention of the parties, but that their intention was that the letter should be construed according to the literal terms used, that is, a promise made in 1826, subsequently consummated by the birth of a child, and therefore, as they supposed, in point of form binding. This alone would have answered the purpose of imposing upon the third party. The position, therefore, attempted to be maintained by the learned counsel for the appellant is wholly untenable. If then this letter be inoperative for the purpose of constituting or proving a marriage, the case of the pursuer fails altogether. There is no other evidence deserving of observation; and the other points in the case are of no difficulty. The rejection of the evidence of the pursuer's near relations, according to the law as it then stood, was clearly right; and there is no reason to suppose that their evidence, if given and believed, would have benefitted the pursuer, seeing what was the real history of the transaction, as proved by unquestionable evidence. The course adopted with respect to the conclusion for damages upon the alleged seduction, was also, I think, strictly proper. The pursuer had a choice of proceeding at once in an action for that purpose, in which case the jury would have been the constituted tribunal to try the question; but she chose to conjoin the claim for damages with the action of declarator of marriage; and after proofs in such suit, complains of the Court assuming jurisdiction as to the case of seduction. The evidence does not establish a case of seduction. It proves, indeed, conduct in the defender highly discreditable, as it leaves no doubt of his having been a party at least to the ruin of the pursuer, whom, as being in his service, he was in honour bound to protect; but that by no means establishes, *per se*, a title to damages for seduction; and the time during which the intercourse continued, without complaint, is an important feature in a question of this kind. For these reasons, I have no hesitation in advising your Lordships to affirm the interlocutors appealed from. A question important, I fear, to the pursuer, remains to be considered—the costs of the appeal. Looking at the conduct of the defender throughout the transaction in evidence, and particularly to his treatment of the woman he had ruined, and the children she had borne to him, and the probably distressed circumstances of the appellant, I should have been glad to have found grounds upon which I could have advised your Lordships not to fix upon the appellant the costs of this appeal. Such reasons probably operated upon the Court below, in refusing to the defender the expenses of the suit,—but it is, I fear, to the practice as to costs in this House having formerly been so imperfect and uncertain, that the number of frivolous appeals, particularly from Scotland, is to be attributed. Nothing can be more important to the interests of suitors than to discourage such expensive and useless litigation. It has, I have reason to hope, been much checked of late years by the altered system as to costs; and I have always felt it my duty, in considering the question of costs in each particular case, to look to the effect which the course to be adopted might have upon this general question; and in this House and in the Court of Chancery, I have thought that benefit would arise from adhering more closely than had been done by some of my predecessors to the principle of making the question of costs follow the result of the suit upon the merits, particularly when the question depended upon matters of fact and the conduct of parties. I have been assured, and I have reason to believe, that this course has materially checked useless litigation. Acting upon this principle,—although I think that the respondent will acquire some redeeming credit by not exacting costs from the appellant—I cannot do otherwise than propose to your Lordships to affirm the interlocutors appealed from, with costs.

Lord Brougham.—My Lords, I entirely agree with my noble and learned friend in this case, which I heard the greater part of with him. It is a case subject to the observations which he has made, and it is therefore with some reluctance that I have come to the conclusion I have arrived at.

Interlocutors affirmed, with costs.

Lord Jeffrey, Ordinary.—Alexander Dobie, *Appellants' Solicitor.*—Richardson and Connell, *Respondent's Solicitors.*—[W.H.D.]

6th October 1841.

HOUSE OF LORDS.—(W.H.D.)

No. 285.—ROBERT HILL and OTHERS, *Appellants*, v. WILLIAM PAUL, *Respondent*.

Trust—Construction—Title to Sue—Assignment of Patent Office—Alimentary Office—A party executed a trust-deed, by which he conveyed, for behoof of creditors, his whole estate, heritable and moveable, and without prejudice to the generality, certain heritable and other subjects specified in the deed, and he bound himself to grant such deeds thereafter as the trustee should think necessary for the more effectual execution of the trust. The truster, at the date of the trust, held the office of keeper of a local register of seisions by patent under the Crown, but no mention was made in the trust-conveyance of the emoluments or right to the office. The trustee having brought an action to compel the truster to account for the emoluments—Held (reversing the judgment of the Court of Session), on a construction of the trust-deed, that neither the office nor emoluments were carried by the deed, and consequently, that the trustee had no title to pursue.—Opinion, That the clause as to granting other deeds was merely to render the trust more effective in its execution, so far only as the subjects actually conveyed by the principal deed were concerned.

Pactum Illicitum—Public Officer—Question, Whether, where an office under the Crown is not itself assignable, the emoluments may legally be assigned or conveyed for behoof of creditors?

In 1826, Mr Robert Hill, W.S., granted a general conveyance of his property, funds and effects, to the respondent, as trustee for behoof of creditors.

The dispositive clause conveyed

“All and sundry superiorities, lands and heritages, debts heritable and moveable, and whole goods, gear, sums of money, and effects, and, in general, my whole means and estate, heritable and moveable, of whatever nature or denomination, or wherever situated, presently belonging to me; and in particular, without prejudice to the said generality, all and whole these parts and portions of the lands and estate of Auchindinny,” &c.; “together with the teinds, parsonage and vicarage, and whole pertinents of the haill foresaid lands, with all right, title and interest which I have, or can pretend, to the said whole lands, teinds and others, or to any part or portion thereof in time coming; which lands and others last mentioned were latterly acquired by me from Laurence Hill, writer in Glasgow, liferenter, and James Hill, my eldest son, far thereof, conform to disposition dated the 1st day of April 1811 years, and recorded in the books of Council and Session the 21st day of October 1812 years, and instrument of sasine in my favour, dated the 5th, and registered in the Particular Register of Sasines, &c., at Edinburgh, the 8th days of April 1811 years, with the haill parts, pendicles and pertinents thereof; together with all right, title and interest, claim of right, property and possession, petitory and possessory, which I, my predecessors or authors, had, have, or any ways may have, claim or pretend, to the lands and other heritages, and others generally and particularly above disposed, or to any part or portion thereof, surrogating and substituting the said trustees in succession in my full power, right and place of the whole heritable and moveable estates and effects above disposed and assigned, with full power to uplift and discharge the rents and feu-duties of the said lands and others for crop and year 1826, in so far as the same are still outstanding, and all future crops and years, and also all arrears of rents and feu-duties due for bygone crops and years, to intromit with the personal estate hereby conveyed, compound, transact and agree, or enter into arbitration concerning the said lands and estate, real and personal, or any part thereof, and generally to do every

other thing requisite and necessary for making the same effectual which I could have done before granting hereof."

Then followed this declaration :

" Which conveyance is granted in trust always, for the uses, intents and purposes following, viz. :—To the end that the said William Paul, whom failing, as aforesaid, the said Lindsay Mackerray, whom failing, any other trustee or trustees who shall be named in manner after mentioned, may and shall enter into the immediate use and possession of my whole estate, heritable and moveable, means and estate above conveyed, with power to the said William Paul, or other trustee acting for the time, to sell and dispose of my said lands and others, or such parts and portions thereof as to the said trustee acting for the time shall appear proper and expedient, and that either by private sale or public voluntary roup," &c.

After an enumeration of the purposes, and statement as to the manner of carrying out the trust in regard to the subjects conveyed, the deed contained the following clause :

" And farther, I bind and oblige myself, and mine aforesaid, to grant and to execute, at any time when required, such farther deed or deeds as may be judged necessary by my said trustee or trustees, or by a majority in value of my said creditors, for the more effectually carrying the purposes of the present trust into full and complete execution."

The precept of sasine contained the following clauses :

" Moreover, I do hereby make and constitute my said trustees in trust, for the uses and purposes foresaid, and their donees, my cessioners and assignees, not only in and to the whole writs, rights and evidents, title-deeds and securities, old and new, concerning the said lands and others above disposed, with the whole clauses of warrandice, and other clauses, tenor and contents thereof, and all that has followed, or is competent to follow thereupon ; but also in and to the rents, mails and duties, customs and casualties due or payable for or forth of the said lands, for crop and year 1826, and all arrears of preceding crops and years, and in and to the tacks of the said lands, and whole prestations therein contained incumbent on the tenants thereof, and all diligence and execution of the law competent to follow thereupon ; surrogating and substituting my said trustees in my full right and place of the whole premises, with full power to them to do everything requisite for completing and establishing the absolute right and property of the said lands and others, and titles to the same, in their persons, and for making the rents thereof effectual, in the same manner, and as fully and freely in all respects as I could have done myself before granting these presents : Which lands and others above disposed, with this disposition thereof, and resignation and infestments to follow hereupon, and assignation to the writs and evidents, I bind and oblige me and my heirs to warrant to my said trustees, for the uses and purposes foresaid, and to their assignees, at all hands, and against all deadly, and the assignation to the personal estate, and the rents, mails, and duties of my said lands, from my own proper facts and deeds only ; and I specially empower the said William Paul, or other trustee acting for the time, to call for and receive the whole foresaid writings and evidents from all persons whatever, in whose custody and keeping the same may be. And I consent to the registration hereof," &c.

At the time of executing the trust-deed, Mr Hill, as alleged in the summons in the present action,

" was keeper, or joint keeper, along with the deceased Frederick Fotheringham, W.S., of the Register of Sasines for the shire of Renfrew and regalties of Glasgow and Paisley, under a certain commission or appointment made by the Crown in favour of the said Robert Hill and Frederick Fotheringham, or one or other of them, and the survivor of them : That the said Robert Hill drew the fees and emoluments, as sole keeper of the said register, after the death of the said Frederick Fotheringham, which happened upon the day of ; and the said Robert Hill was entitled to, and applied the whole fees and emoluments for his own behoof, at least since the death of his last surviving sister Helen Hill, who died on or about the

1st day of March 1835, the brothers and sisters of the said Robert Hill having and claiming, during their respective lifetimes, some share or interest in the fees and emoluments arising from the said office."

An action was raised in 1837 by the trustee, in order to compel Mr Hill to account for the emoluments of the office, and the summons alleged,

" That the said Robert Hill contrived for some time to conceal from the pursuer and his creditors the fact that he held the said office, or at least that he had right to the fees and emoluments arising therefrom, which fees and emoluments he, the said Robert Hill, was uplifting and wholly applying for his own use and behoof, at least from the death of his said sister : That the said fees and emoluments have amounted, and did amount, during the period referred to, to about the sum of £1200 of free yearly income, after giving deduction for allowances to clerks, substitutes-keepers, and other charges."

The summons proceeded to allege, that having discovered the fact, the pursuer by letter requested the defender to state the amount of the emoluments from the date of his sister's death, but that this was refused. It went on to aver,

" That the pursuer having, some time after the date of the said letter, obtained intelligence which led him to suspect that some improper arrangement was contemplated, or was in progress in regard to the said office, the pursuer caused inquiry to be made on this subject in London, and at the public offices, about the end of August or beginning of September 1836 : That it now appears that the said Robert Hill, after the date of the foresaid requisition from the pursuer, and on or about the day of August 1836, renounced or surrendered his right to the said office, and gave up his commission, but under a promise or understanding that a new commission was to be forthwith granted by the Crown to and in favour of Thomas Grahame, writer to our Signet, who is a near relative of the said Robert Hill, and Thomas Hill, son of the said Robert Hill : That accordingly a warrant under his Majesty's sign-manual was issued on or about the 10th of August 1836, reciting that the office of keeper of the register of sasines within the city of Glasgow, for the sheriffdom of Renfrew, and regalties of Glasgow and Paisley, was vacant by the resignation of the said Robert Hill, and directing a writ or grant to pass under the Privy Seal of Scotland, nominating the said Thomas Grahame, and the said Thomas Hill, keepers, or joint keepers, of the said Register of Sasines, the said Robert Hill to be paid £300 a-year out of the fees and emoluments arising from such office ; or at least a letter or order for a writ, of the above or similar effect, was issued at or about the time specified : That a commission from the Crown has accordingly been obtained by the said Thomas Grahame and Thomas Hill to the said office, dated on or about the 24th August 1836, following upon the surrender or resignation of the said Robert Hill : That the said Thomas Grahame and Thomas Hill, or one or other of them, and in virtue of, or under pretence of said commission, are now drawing and uplifting the whole fees and emoluments arising from said office."

It also contained allegations that the arrangement set forth in the summons was collusive and fraudulent on the part of Robert Hill, Thomas Grahame, and Thomas Hill, for the purpose of defeating the trust granted by Robert Hill, in so far as the emoluments of the office were concerned. And it concluded, that Robert Hill should account for the emoluments drawn since his sister's death, and likewise that his son and Grahame were bound to pay over the emoluments they had hitherto drawn, and in time coming.

Defences were lodged for Robert Hill, Thomas Grahame, and Thomas Hill.

In his defences, Mr Robert Hill denied that the emoluments of the office, or the right to it, was carried, or intended to be carried by the trust, which, he averred, contained no allusion, far less any assignation to

them. He averred that it was well and publicly known at the date of the trust, that, along with Fotheringham, he held the office, but that he paid his share of the emoluments, by a family arrangement, to his brothers and sisters so long as they lived; that after the death of Fotheringham, and of Helen his surviving sister, he entered upon the office, and received the emoluments; but about 1836, he stated that his health had become so broken that he felt obliged to resign. He accordingly did so in favour of his son Thomas and Mr Thomas Grahame, who, as a condition of their appointment by the Crown, were specially bound, as appeared on the face of their commission, to pay him an annuity of £300 for life. He further stated, that he tendered his resignation at the exact period he did, in the hope of benefiting his son, and securing this provision.

He *pleaded*—1. That the pursuer had not instructed, and did not possess any right or title to pursue the present action, in respect the trust-deed contained no conveyance of the office, or of its emoluments: 2. That viewing the true nature of the present action, which involved a challenge of a Crown appointment, the summons was not aptly framed for a trial of the question, and the proper parties were not in the field: 3. That as the office of keeper of the register was not adjudgable, nor capable of being assigned, and was not *de facto* adjudged from, or assigned by the defender, he was entitled to exercise the office, and to receive the emoluments, in so far as the office was not held by him in trust for others: 4. That, in so far as the action concluded for payment of fees drawn prior to the death of Miss Helen Hill, it could not be maintained, seeing that these fees were paid over to parties to whom the defender was under an obligation to pay them: 5. That in so far as the action applied to fees and emoluments derived from the office after the death of that lady, it could not be legally maintained, seeing that these fees belonged to the defender, and were not conveyed by him to any party, nor attached by any legal diligence: 6. That the defender was entitled to resign the office, and on the conditions attached to the resignation; and that the charges of fraud and deceit founded on that resignation were entirely groundless.

Separate preliminary defences, and on the merits, were lodged for the other defenders, but it is unnecessary at present to enter upon them, farther than to mention that the preliminary defences were directed against the relevancy of the action as applied to these defenders, and those on the merits to the effect that the parties now in possession of the office held it in respect of a sufficient title from the Crown, which was not called in question by any reduction.

The Lord Ordinary pronounced the following interlocutor:

"10th March 1837.—The Lord Ordinary having heard the counsel for the parties on the preliminary defences, repels the defence or objection to the title of the pursuer, founded on the allegation that the trust-deed in his favour did not convey any of the profits or emoluments of the office then vested in the truster, which accrued subsequently to the date of that trust-deed; and, 2do, In respect that all the other defences pleaded as preliminary, either depend on disputed matters of fact, or are involved in the merits, reserves and supersedes the consideration of them till the cause comes to be discussed on the closed record: And, in respect the defenders state they do not mean

to acquiesce in this judgment, finds them liable in expenses, allows an account to be given in, and remits the same to the auditor of Court for his taxation and report."

To this interlocutor his Lordship added the following

"*Note*.—The question of title is not without difficulty. But the Lord Ordinary is of opinion that the defender Hill being, at the date of the trust, vested in a *life office*, which he executed by deputy, and which yielded large, though fluctuating annual profits, is to be regarded as the owner of a *life annuity*, which, he apprehends, would clearly have been carried by the general conveyance of his whole moveable property and estate of every description, to his trustee: That he was under a previous obligation to account for a part, or even the whole of these profits, to his sisters during their lives, would not bar the effect of this conveyance, as the radical right to them was still in his person, as incident to the office itself, of which he was the only holder. If such previous obligation was onerous and unchallengeable, it was still but a temporary burden upon his primary right; and *that*, being onerously conveyed to his trustee, such conveyance would take effect as soon as the burden was worked off, just as the conveyance of a fee under the burden of a liferent would vest the radical right in the disponent from the first, though its actual enjoyment must be postponed till the liferent was run out. If the whole profits were not so pledged to the sisters, or, if their right was not onerous, the form of the action seems sufficient to make the defender Hill still account for them to the pursuer.

"With regard to the other preliminary defences, the Lord Ordinary inclines to think that the summons would have been better if it had rested the case against the new patentees, on a *positive* averment of their having been actually participant in the fraud charged against the defender Hill, without any alternative, and had either embraced *reductive* conclusions on this ground, or put the claim against them expressly as for damages, the measure of which might, no doubt, have been the whole amount of their actual intrusions. But, even as the libel is framed, and with a view to the more detailed averments which may yet be made in support of it, he is not prepared to say that it is incompetent, or such as the defenders are now entitled to have dismissed, or even amended.

"As against Hill, where there is an unconditional averment of fraud, and also an express conclusion for damages, he thinks the libel is clearly relevant and sufficient; and even as to the patentees, it is to be observed, 1st, That fraud is also distinctly charged against them, although with an alternative, and that it is not clear that it would be necessary or expedient to make any finding, *hoc statu*, as to the relevancy of the other alternative ground of conclusion, if this primary one, which may be ultimately sufficient for the determination of the cause, be clearly sufficient. But, 2d, It is expressly stated in the summons that these patentees were one of them the *son*, and the other a *near relation*, of the original holder, and the summons is otherwise so expressed as to make it competent for the pursuer to allege more specifically, in a condescendence, that these *conjunct persons* are truly to be regarded as drawing the profits of the said office in trust for the said defender Hill, and bound, consequently, to account for them to the pursuer, for behoof of his creditors; and, 3d, To the extent of the £300 per annum which the said patentees are bound, by the terms of their commission, to pay over to the said Robert Hill, the Lord Ordinary thinks there is no doubt that the claim of the pursuer is irrelevantly and insufficiently libelled, and as this is a part, and may by possibility be the *whole* of the profits and emoluments actually drawn by them, in the first instance, under their said commission, the conclusion for the whole of the said profit is, generically and technically, competent, and the question, whether it should be limited to the said £300, or to any other particular amount, less than the whole, is a question upon the merits, and as to the *quantum* for which decree should be issued, and not as to the relevancy of the action, or the sufficiency of the grounds of conclusion libelled.

"As to the objection raised on the terms of the Act of 49th Geo. III. c. 126, as to the sale or brokerage of offices, the Lord Ordinary is satisfied that it has no application to such a case as

the present. The provisions in the 11th section of that Act are plainly referable only to the case of a party stipulating for a share (or the whole) of the profits of an office which, by his resignation or instrumentality, is obtained or secured for another, and not to that of one, who, like the present pursuer, is seeking to vindicate for their true owners, profits actually drawn by persons who, in law and justice, are bound to account for them to others. At all events, this is a question upon the construction of a public Statute, which must form, if insisted on, an important part of the discussion on the merits of the case, and could not be, with any propriety, disposed of as a preliminary and exclusive plea."

The two Hills and Grahame reclaimed to the Court, when their Lordships ordered cases "on the question, whether to any, or to what effect and extent the emoluments of the office were, or could be carried by the trust-conveyance to the pursuer libelled on."

Thereafter the Court (Vol. XI. p. 59) adhered to the interlocutor of the Lord Ordinary. See *supra* for what took place at advising.

Against this judgment the defenders appealed.

The appellants *pleaded*—1. The trust-deed did not convey the office nor its emoluments, and it was proved by the summons that the trustee was not aware of Hill's right to it at the time. This was founded on as indicative that it was not within the meaning of parties at the time of the execution, though Hill averred that it was well known. An arrear of fees might pass under the general words "means and estate;" but there were no arrears at the date of the deed. General words of conveyance joined to particulars, could not apply to particulars different from those enumerated: *Ersk. III. 4. 9. Cuninghame, M. 11,660. Ross, M. 14,948. Peebles, M. 5019. Fife, M. 2325. Fraser, M. App. Clause, 2. Waddel, M. 5022.* 2. The obligation to grant other deeds was merely in order to render the trust more easy of execution, not to grant conveyances substantially of new subjects. 3. If it were held that such an office came within the words of general conveyance, then such office was not adjudgable: *Wilson v. Falconer, M. 165*; and if it could not be conveyed by judicial transference, it could not be so voluntarily: *Davis v. Marlborough, 1 Swanst., 79. 49 Geo. III. c. 136.* As the office could not be transferred, so neither could the emoluments: *49 Geo. III. c. 134. Palmer v. Bate, 6 Moore, 28*, and cases there cited. 4. As to the other defenders, while the patent was unreduced, their title was clear.

The respondent *pleaded*—That the emoluments and office would have been carried by the deed, had the office itself been saleable, as the words of conveyance were so general. And it was not sufficient to say that the emoluments could not pass, because the office could not be attached. It did not follow that what was not attachable was not assignable. There was authority the other way: *Hunter v. Gardner, 5 W. and S., 616.* The intension was to convey every thing for behoof of creditors; and to attempt to limit the deed, was to frustrate the meaning of parties. Besides, the obligation to grant such deeds as the trustee considered necessary, implied an obligation to grant supplementary conveyances as particular estates came into view, because the object of the deed was a conveyance of every estate.

Lord Cottenham.—My Lords, I have considered this case with much anxiety, and am unable to concur in the judgment

of the Court of Session, upon the point which four out of five Judges decided in favour of the pursuer; and am also of opinion, that the judgment cannot be supported upon another ground, which does not appear to have been the subject of much consideration below. The decision having been taken upon the preliminary defences, the statement in the summons is to be strictly attended to. It states that Robert Hill was, at the date of the trust-deed, keeper of the Register of Sasines for the county of Renfrew, under a commission or appointment by the Crown, and that he drew and applied the whole fees and emoluments for his own behoof, at least since the death of his sister Helen, in 1835,—his brothers and sisters having and claiming, during their respective lifetime, some share or interest in the fees or emoluments arising from the said office. It also sets out a letter of the 22d July of 1836, in which the pursuer demands of the defender an account and payment of what he had received from the office from the period of the death of his sister, Helen Hill. The pursuer's title is under a trust-deed for creditors, dated the 26th of October 1826. It appears from this statement, that at the date of the trust-deed in 1826, Robert Hill was entitled for life to the office, but that the profits of it were, to a great extent, if not the whole of them, applicable to other purposes, and that his prospects of any considerable income from it were expectant upon the decease of his brothers and sisters in his lifetime. The first question, and that upon which the case was decided below, is, whether the trust-deed included the profits; and it is competent, in putting a construction upon that deed, to consider the circumstances in which the defender and his property were placed at the date of it. There is not in the deed any mention of the office; and it is matter of dispute, whether the pursuer and the creditors of Robert were aware that he held it. It is not very probable that the persons with whom he was so connected were ignorant of it, but still there is no proof that they knew it. Had their knowledge of it appeared, it would have been impossible for the pursuer to contend that there was any intention of affecting the future profits of the office by this deed. The peculiar circumstances of the property so intended to be affected, would necessarily have called for, and produced very special and peculiar provisions in the deed. But still, although the creditors might know nothing of this property, and therefore have entertained no intention respecting it, the terms of the deed might have been so general and so calculated to include it, as to have been binding upon the defender, if there were no objection in law to his so dealing with the future profits of his office. In that case, the general intention of passing all that the defender then had, or might at any time become entitled to, if expressed in the deed, would have supplied the want of any particular intention with respect to the office in question. Now, it is not in dispute that the office itself, being held under the Crown, and for public purposes, was not assignable; and the question is, whether the future profits are included in the terms of the deed; for whether the defender was entitled to any part of such profits in possession, or was, as to the whole, in expectancy only until the death of the survivor of his brothers and sisters, the whole which could have been the subject of assignment consisted of profits thereafter to arise, and not any property in possession. But the terms of the deed are,—“and in general, my whole means and estate, heritable and moveable, of whatever nature or denomination, or wherever situated, presently belonging to me.” If the office had been assignable, it might have been included in these terms,—it would have been “means and estate presently belonging” to the author of the deed, and of course, all future profits of the estate would have passed as part of it. But as the office did not pass, how can these words be made applicable to profits thereafter to arise from the office, which, it is admitted, continued with the original holder? Suppose there had been from this general description some particular property excepted, could it have been contended that future profits arising from such property were included? The office must be considered as excepted, because it was not by law assignable, which the parties must be supposed to have known. If it were necessary to resort to other parts of the deed to aid this construction of the terms used in describing the property intended to be included in it, the particular enumeration which follows may most properly be used for that purpose. In fact, all the trusts and pro-

visions of the deed are inapplicable to the future profits of the office. The trustees are to enter into "immediate possession and use of the whole estate and arrears above conveyed, and to sell the same;" and it contemplates the completion of the trust within two years; and in speaking of future "rents, prices and produce," it confines itself to "rents, prices and produce of my said estate and effects." Whereas the office, that is the estate which was to produce the profits in dispute, is admitted not to be included in the deed, and therefore formed no part of the truster's "said estate and effects." It seems, indeed, to have been felt that there was great difficulty in bringing the future profits within the terms used; but it was said that the deed contained a provision for the trustees to grant such further deeds as might be necessary; which obligation, it was said, "perfected the general one, although there was no specific conveyance of the emoluments of the office." It appears to me that the provision in question cannot have any such effect,—it is merely a clause for further assurance of what was intended to be included in the prior grant, and was not intended to affect any property not included in it. If the description included the profits in question, no further deed could carry it further; and if the former description did not include it, this provision has no reference to it. The further deed is "for the more effectually carrying into execution the purposes of the present trust." If the only question had been what I have hitherto considered, I must have adopted the opinion of Lord Medwyn, opposed as it is to the high authority of Lord Jeffrey (the Lord Ordinary), Lord Glenlee, Lord Justice-Clerk, and Lord Meadowbank; and finding upon this point sufficient ground for reversing the interlocutor appealed from, the point which I am about to observe upon, must not be considered as the ground of the judgment of this House, which I am the more anxious to have understood; because, as it does not appear to have been the subject of consideration below, I should regret that the decision of this case should, under those circumstances, preclude discussion in Scotland, if it should hereafter arise, upon a point as to which this House had not had the benefit of the judgment of the Court of Session. The point to which I allude, is the legality of assigning the future emoluments of this office. It is a public office granted by the Crown for the benefit of the subject, to which, or to some other for the same purposes, a large class of the subjects of Scotland must resort, and are compelled to pay certain sums for the duty performed, which constitute the profits of it. The parties resorting to this office not only have an interest in the due performance of those duties, but have a right of action against the holder of the office, if from any neglect of his they sustain damage. Whether the emoluments exceed what may be considered necessary for the due performance of those duties, and to meet this responsibility, cannot be matter of inquiry in this suit. It must be assumed that the public are not taxed higher than is necessary to secure to them the due performance of

the duties of the office, and his responsibility in case of any demand arising against him. What then would be the effect of this deed if it included the future profits of the office? Certainly to deprive him of all the profits of it, after discharging the necessary expenses; for the Court cannot have any right to restrict the generality of the terms used by an implied exception of what may be necessary for the officer's subsistence. That such an assignment would be held to be illegal and void in England, is not the subject of doubt. No two cases can be more similar than this case and that of *Palmer v. Bate*, in 2d Broderip and Bingham, 673. The cases there cited supersede the necessity of my referring to others, except that I may mention Lord Eldon's observations in *Davis v. Duke of Marlborough*, 79, as I do not find them referred to in the former case. Is there then any difference between the laws of the two countries upon this subject? The rule is established upon principles of public policy applicable equally to both,—but where is the decision that establishes that all the future profits of an office which cannot itself be assigned, may be transferred by the holder of the office to his creditors? Erskine, in B. II. t. 12, § 7, says, that offices of trust conferred during pleasure, or for life upon personal regards, cannot be appraised or adjudged; and in B. III. t. 6, § 7, he says,—the King's pensions are not arrestable, because they are alimentary; and indeed all salaries annexed to offices, in so far as they amount to no more than a reasonable allowance for the decent support of those who are named to them, ought, upon the same ground, to be accounted alimentary. The principle, therefore, upon which the English decisions have proceeded, is to be found in the law of Scotland, as might well be expected; but it happens that the very case now under consideration has received a judicial decision by the Court of Session. In *Wilson v. Falconer*, on 7th of December 1759, reported in *Morrison*, 165, it was decided, that the office in question was not adjudgable by creditors, and the effect of the decision was totally to repel the creditor's claim. Lord Kaimes indeed seems to have thought, that an adjudication of the emoluments would have been competent. The decision, however, did not recognise that declaration; and the principle upon which it was founded is as applicable to the emoluments as to the office itself. I will not pursue this subject further, because it is not the ground upon which I intend to propose to the House to reverse the judgment of the Court below. What I have said will, I hope, secure attention to the point, if it should thereafter arise for decision. I therefore move your Lordships to reverse the interlocutors appealed from,—to sustain the preliminary defences, and dismiss the action, and to find the appellant (the defender) entitled to the expenses of the suit below.

Interlocutors reversed.

Lord Jeffrey, *Ordinary*.—Archibald Grahame, *Appellants' Solicitor*.—[W.H.D.]

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—Indorsation—Designation—Alteration—Suspension.—A bill was indorsed by several parties, and when it passed out of the hands of the last indorser, no designation was attached to his own signature or to those of the prior obligants. A charge given by the holder to the last indorser was brought under suspension, on the ground that the designations subsequently given to some of the prior indorsers were erroneous.—The Court repelled the reasons of suspension, and found the letters orderly proceeded, p. 25.

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—Suspension.—At a roup of certain tolls of several lines of road, managed under different Acts of Parliament, a party took the lease of one of the bars, and granted his bill for the rent. On the averment that he had taken the lease on the supposition that the tolls on the different lines were managed together, and for joint behoof, and that nothing would be done by the trustees on the one line to affect the traffic on the other, but that the understanding had been broken through by the trustees, who had injured his bar by taking compositions and lower tolls on one of the lines,—he prayed for suspension of a charge on the bill, and for interdict against the trustees taking compositions or lower tolls.—Note refused, in respect the Road Acts were distinct and separate in their provisions, and that the one set of trustees had no control over the management of the others, p. 523.

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—A copartnership were found liable in a sum of money to X, a creditor, who had previously executed a trust-deed for behoof of creditors. Thereafter, one of the partners, when the firm was dissolved, acquired right by assignation to a debt due by X, and attached the same by arrestment in the hands of the company, and of the individuals who had constituted the firm. In a competition for the company debt between this partner and X's trustee—Circumstances in which held that the partner was preferable to the trustee: the main ground being, that the trust-deed merely conveyed the trustor's heritage as a fund of payment to his creditors, p. 403.

— See *Landlord and Tenant.*

COMPETENT AND OMITTED—Circumstances in which a party, who, as a residuary legatee, was decerned to pay a sum of money *nominatim* to the parties claiming it, against whose title a valid objection was said to exist, and the decree was allowed to go out and be extracted in their name, was held not entitled thereafter to urge the objection, to the effect

- of compelling them, or those through whom they claimed, to make up a title by confirmation, which, it was alleged, was necessary to cure the defect, p. 403.
- COMPETITION**—Diligence—Preference of Ancestor's Creditors—Statute 1661, c. 24—A creditor of a party deceased having constituted his debt by decree, and attached the estate of his debtor within three years from the period of his death—Held that a bond granted by the heir of the debtor within year and day of his death, was reducible under the Act 1661, c. 24, although averred to have been granted for the purpose of paying debts due by the ancestor, p. 284.
- Statute 1661—Inhibition—Agent and Client—Writer's Hypothec—Held, 1. That inhibition is not a sufficient diligence to establish a preference under the Act 1661: 2. That a writer's hypothec is not struck at by an inhibition, though used previous to it, p. 101.
- See *Bankrupt. Diligence. Husband and Wife. Process.*
- COMPOSITION**—See *Bankrupt. Superior and Vassal.*
- CONFIDENTIALITY**—See *Process.*
- CONSIGNATION**—See *Process.*
- CONSUETUDINE**—See *Process.*
- CONTRACT**—Arbitration—Submission—Railway Statute 6 and 7 Gul. IV.—Construction—A proprietor of land through which a railway passed, entered into an agreement and submission, by which he allowed the company to take possession of the ground prior to the ascertainment of its value, and stipulated that that point should be ascertained by arbiters, with power to name the time from which interest was to run on the price and damage when fixed. The company entered to possession under the agreement, but the submission fell from failure to prorogate. A jury having been summoned under the Statute to fix the value and damage, assessed the price of the land at a greater sum than the company offered both for value and damage, but found nothing for damage—Held that the claims of the parties fell to be regulated, not by the Statute, but by the original agreement; and that the company having entered to possession at Martinmas 1837, were bound in payment of interest on the sum in the verdict from that date, p. 622.
- See *Agent and Client. Agreement. Obligation. Partnership. Proof.*
- ANTENUPTIAL**—See *Husband and Wife. BREACH OF*
- See *Superior and Vassal. MUTUAL*—See *Obligation.*
- CORPORATION**—See *Exclusive Privilege. Title and Interest to Sue.*
- CULPA LATA**—See *Trust.*
- D**
- DAMAGES**—See *Agent and Client. Jury Cause. Process. Reparation. Sale. Suspension.*
- DEAN OF GUILD**—See *Jurisdiction.*
- DEBITUR NON PRÆSUMITUR DONARE**—See *Proof.*
- DEBTOR AND CREDITOR**—Account—Submission—Circumstances in which a clerk to a submission obtained full payment of his account out of a fund consigned by one only of the submitters, p. 533.
- Donation—Bankrupt—Bill of Exchange—A party, after being discharged on a composition-contract, granted to one of his creditors, who had not claimed in the sequestration, a bill for the full amount of his debt. Suspension of a charge on this bill refused, in the absence of any averment that it had been obtained from the granter through fraud or concussion, p. 455.
- DECREE**—See *Process. ARBITRAL*—See *Arbitration. IN ABSENCE*—See *Process.*
- DELECTUS PERSONÆ**—See *Obligation.*
- DEPOSIT**—Restitution—Bill of Exchange—A bill deposited in a bank having been inadvertently delivered to a third party who had a partial interest in it—Held that the bank were bound to restore the bill to the depositor, or pay the full amount of the proceeds, without deducting the partial interest of the third party, p. 514.
- DILIGENCE**—Arrestment—Title and Interest to Object—Circumstances in which held, that the manager of a public company, in whose hands an arrestment had been used, which was alleged to be *ex facie* unwarranted and informal, was found entitled to resist the delivery of certain goods thereby attached, until the issue of a process which would determine the question as to the competency and validity of the diligence, p. 398.
- DILIGENCE**—Charge—Caution—Relief—Cash-Credit—A cash-credit bond was signed by three co-obligants, to be operated upon by two of them as a company. Under a previous arrangement, the first sums drawn under the bond were employed in paying a private debt due by one of the partners to his father, the third co-obligant—In these circumstances, held that the third co-obligant, who had paid up the bond and obtained an assignation to it, was not entitled to give a charge upon it to the other partner, p. 564.
- Charge—Process—A warrant to charge in name of a company, and the individual partners, is not sufficient to sustain a charge in name of the individuals only, without any mention of the company, p. 22.
- Execution—Charge—The charge given bearing to be by virtue "of an extract-registered protested note or bill of exchange," Question, Whether the inaccuracy was such as to make the charge inept? p. 12.
- Legal—Partnership—Foreign—A bill drawn by a foreign firm upon a firm in London, consisting of the same individuals, was dishonoured—A charge given upon the bill to one of the partners who had been found in Scotland, held to be competent; and a note of suspension, presented without caution or consignation, refused, p. 107.
- Mandate, Implied—Competition—The agents of a proprietor who had become insolvent continued, after arrestment of the rents by certain creditors, to make disbursements on the property, including payments of feu-duty, poor's-rates and insurance, and took the receipts as for behoof of the proprietor. In a competition between the agents, claiming the amount of these disbursements, and the arresters—the arresters were preferred, p. 98.
- Reparation—Guarantee—Agent and Principal—Liability—A creditor having obtained decree and diligence against his debtor for the sum of £102. 6. 9½, the agents of the debtor wrote saying—"We have now received authority to offer you, for an assignment of the debt and diligence, the sum of £85," which was accepted of. Eighteen days thereafter, the agents wrote, stating that the party expected to make the advance had found it impossible to give the money—Held that the agents were personally liable to implement the offer which they had made, p. 265.
- See *Bankrupt. Competition. Process. Public Officer.*
- DISCHARGE**—See *Competent and Omitted.*
- DISPOSITION**—See *Property.*
- DIVORCE**—ADULTERY, p. 233.
- See *Husband and Wife.*
- DOMICILE**—See *Process.*
- DONATIO**—See *Husband and Wife. Debtor and Creditor.*
- E**
- ENTAIL**—Act of Parliament, Sale of Entailed Lands, and Application of the Price, under—Clauses in a private Act of Parliament held to import, that the heir of entail in possession was not entitled to receive the interest of the money arising from the sale of certain parts of the entailed estate as a *surrogatum* for the rents, until the prices of the lands purchased equalled those of the lands sold, exclusive of the expenses, p. 193.
- A clause irritating "all the debts and deeds" of the heirs of entail, and also "all adjudications or other legal diligence" used upon the same, found to be an effectual irritancy, p. 527.
- Construction—The maker of an entail called to the succession a number of substitutes, reserving to himself the power to alter the succession, except as to the first five substitutions; as to which the said order of succession was declared unalterable by himself, or his son the institute, or by the heirs of tailzie above mentioned—Held that "the heirs above mentioned" denoted not merely the first five substitutions, but the heirs generally; and that the prohibition against altering the succession was binding upon the sixth and succeeding substitutes, p. 91.

ENTAIL—Factor *loco tutoris*—Lease—Authority granted to the factor *loco tutoris* of a minor in possession of an entailed estate to grant leases to endure for nineteen years—the next heir being abroad, and his agents declining to interfere, p. 192.

Fetters—At the conclusion of a general resolutive clause there followed a directory clause as to the way in which the heirs succeeding upon a contravention may make up titles to the estate,—the direction to the next heir being to establish his right without respect to “any innovation, alteration or change, by the person contravening, or any acts of commission or omission, or any acts or deeds whatsoever, which may import any contravention of the above-written clause irritant.”—Held that this directory clause formed no part of the resolutive clause, and that the omission to enumerate therein sales or debts, did not exempt those acts from the prohibitions of the entail, p. 91.

Fetters—An entail prohibited selling, disposing, contracting debt, “or to do any other fact or deed in prejudice of the said tailzie, or the persons above named,”—resolved the right of any heir who should “failzie herein, or do any thing contrair to this my destination and appointment,”—and irritated “all dispositions and other deeds whatsoever, made or done contrair to the said provision and destination”—Held that these fetters were effectual, p. 525.

Fetters—An entail prohibited, *inter alia*, “to sell, alienate, ignorate or dispone,”—resolved the right of the party contravening “the before-written provisions, conditions, restrictions, limitations, and others herein contained,” and further declared, that “in case any adjudication, apprising, or other legal diligence” shall be used against the estate “upon any debts or deeds” of the institute or substitutes, “not only shall such debts or deeds, with the adjudications, apprising, or other legal diligence, be void and null,” but the contravener “shall *ipso facto* forfeit his or her right” to the estate—Held that the entail effectually excluded sales, p. 301.

Fetters—By the prohibitory clause in a deed of entail it was declared, that it shall not be lawful to “contract debts, nor give bond or obligation, nor do any other fact or deed whatsoever, whereby the said estate may be apprised.” By the irritant and resolutive clauses it was declared, that if the heirs shall contravene by the “contracting of debts,” then the said “bonds and obligements” shall be null and void—Held that the irritant and resolutive clauses were not effectual against the contracting of personal debts, or the diligence of adjudication proceeding thereon, p. 206.

Fetters—Title to Sue—The prohibitory and irritant clauses mentioned in the immediately preceding rubric, found to be an effectual bar against the trustees of the heir of entail pursuing a declarator with conclusions to have it found that the estate was liable for the debts of the heir, and consequently to be adjudged; and that they were entitled to give bonds and obligations for the debts whereby the estate might be adjudged, p. 206.

Fetters—A prohibition to “burden or affect” the estate, in whole or in part, with debts or sums of money,” &c., held sufficient to prohibit the contraction of debt, p. 314.

Fetters—Held that a power of sale was effectually excluded by an entail, which, after prohibiting “to sell, alienate or dispone,” resolved the right of the party doing any thing “in the contrary of the said provisions, either by alienating or disposing,” without mentioning selling,—and irritated “the debts, deeds, crimes, and delicts” of the party doing any thing “in the contrary of the said provisions, either by alienating or disposing,” “or contracting debts,” “or by committing the crime of treason, or any species thereof, or any other crime or delict, or doing any other deed, civil or criminal,” p. 296.

Heirs—Portioners—Representation—Service—An entail having been rendered ineffectual by the succession of heirs-portioners, while the destination in favour of a series of substitutes remained unexhausted—Held that the heir in possession previous to the succession of the heirs-portioners, was subject to the fetters of the entail,—that the estate was not affectable by his debts,—and that the heirs-portioners (his sisters) had not incurred representation to him by serving to him as heirs of tailzie and provision, p. 242.

Precept of Sasine—In the precept of sasine there was

no express mention of the resolutive clause—the mandate being merely to give sasine “with and under the burdens, provisions, and irritant clauses above mentioned”—Held that these words comprehend both the irritant and resolutive clauses, pp. 91, 206.

ENTAIL—Registration—A supplementary deed of entail referring in general terms to the fetters of the original deed, but not mentioning them specifically, held not to be duly recorded, in terms of the Statute, in the Register of Tailzies, p. 314.

—Statute 10 Geo. III. c. 51—Repairs, though made at once, if not more than sufficient for ordinary tear and wear, are not chargeable against the succeeding heir of entail, p. 104.

—Unrecorded, Powers of the Heir possessing under—A party possessing under an entail of lands situated in two different counties, obtained an Act of Parliament authorising a sale of those in the one county for the purchase of lands in the other, to be settled on the heirs of entail “in the same order and course of succession,” and subject to the same “restrictions and limitations, clauses irritant and resolutive.” Under the authority of this Act the lands were sold, and others purchased and entailed, and the entail recorded. Thereafter, the party who had obtained the Act, on the marriage of her son executed a deed, in which, reserving her own life-rent, she disposed to him, her “heir of tailzie,” and the other substitutes, as before, the whole of the lands of the original entail not sold, and those purchased under the Act, under the same fetters, but providing that he, his heirs and successors, should be bound to possess “by virtue of these presents.” On this deed infeftment was taken, and possession followed for more than forty years—Held, 1. That this deed must be considered as an original substantive entail; and not having been recorded in the Register of Tailzies, that it was ineffectual against creditors or purchasers; and, 2. That the heir in possession had full power to sell and use the price at pleasure, free from all claims whatever at the instance of the substitute heirs of entail, p. 177.

—See *Parent and Child. Resting-Owing. Superior and Vassal. Testament.*

ERROR—See *Process.*

EVIDENCE—See *Process. Proof.*

EXCISE LAWS—5 Geo. IV. c. 74; 5 and 6 Gul. IV. c. 63—

Agreement—Where a party agreed to supply another with one puncheon of whisky per week, the same to be delivered in puncheons, hogsheads, and half-hogsheads, and it was pleaded, that the agreement was null under the Excise laws, in respect the agreement should have been made by the imperial gallon, or by some multiple or aliquot part thereof—Held that the plea was not applicable, p. 419.

EXCLUSIVE PRIVILEGE—Corporation—Powers—The charter incorporating the Solicitors to the Supreme Courts proceeds on the narrative, that the society had collected a sum of money for a library and for the relief of poor members, widows and children, and gives full power to make by-laws, and do other proper and necessary acts for conducting the affairs, and administering the funds of the incorporation, provided always that these were not contrary to the laws of the country, and were reviewable by the Court of Session on the summary application of any party having interest—Held that the society were not entitled, under their powers, to vote away a sum from their accumulated funds, and a proportion of the annual contributions of members, and money paid by new entrants, to a widows' scheme—the benefits of which were restricted to the widows of those members who chose to become annual contributors, p. 134.

—Process—Issues—Patent—Reparation—In an action of damages for the violation of a patent granted for “an invention for the improved application of air to produce heat in fires, forges and furnaces, where bellows or other blowing apparatus are required”—Found that the pursuer was entitled to an issue, whether the invention described in the letters-patent and specification is not his original invention?—and that he was not bound to limit his issue to the question, whether he is the true and first inventor of the machinery and apparatus for which the letters-patent were granted? p. 174.

EXECUTION—See *Diligence. Process.*

EXECUTRY—See *Parent and Child. Title to Sue.*

EXPENSES—Auditor's Report—Fee, p. 86.

—Honorarium to Counsel—Process—Circumstances in which the fees of three counsel were allowed against a party found liable in expenses, p. 25.

—Process—A party who ultimately obtained a verdict in his favour, found liable in the expenses of a litigation, in which he endeavoured, but unsuccessfully, to show that the cause was unfit for trial by jury, p. 104.

—Process—Record—Circumstances in which the Court, on cause shown, allowed the expense of a condescendence which the Lord Ordinary held to be unnecessary, p. 16.

—Superior and Vassal—Agent and Client—A vassal found liable to the agent of the superior for the expense of preparing a charter of confirmation and precept of *clare constat*, though, from the vassal's having afterwards resolved to enter in a different form, the deeds prepared were cancelled p. 96.

—See *Inhibition, Recal of. Lis Alibi. Mandate. Parent and Child. Process. Statute. Trust, Latent.*

EXTRACTOR—See *Process.*

F

FACTOR, JUDICIAL—See *Process.*

—LOCO TUTORIS—See *Entail.*

FILIATION—See *Aliment. Parent and Child.*

FOOT-ROAD, PUBLIC—See *Servitude.*

FOREIGN—Testament—Construction—A party who died domiciled in Grenada, where the bulk of his estate and effects were situated, executed a will there, having reference in its provisions to certain funds of the testator situated in Scotland—Held that the true import and effect of the will must be determined by the law of England, p. 576.

—See *Diligence, Legal. Jurisdiction. Mandate. Process. Testament.*

FRIENDLY SOCIETY—Forfeiture—Acquiescence—Proof—*Mora*—Under a regulation of a friendly society saving from forfeiture those members who could prove to the satisfaction of the society that they had been "prevented from paying up, either by imprisonment in a foreign country, or some other urgent necessity"—Held competent for a member, eight years after his forfeiture had been declared, to prove that he had been so prevented, p. 149.

H

HEIR-APPARENT—See *Process.*

HEIRS-PORTIONERS—See *Entail.*

HERITABLE—See *Jurisdiction. CREDITOR*—See *Property. AND MOVEABLE*—See *Parent and Child. Proof. Trust-Settlement.*

HUSBAND AND WIFE—Antenuptial Contract—*Jus Mariti*—In an antenuptial contract in which the wife reserved right to the whole property coming to her from her father and mother, and the husband's *jus mariti*, &c., was excluded, as also the rights of his creditors—Held, on the terms of the deed, that the *jus mariti* was excluded as to the annual profits thereof; but question raised, whether the wife was bound to contribute, out of the profits accruing *ante matrimonio*, to the current expenses of the family? p. 466.

—*Donatio*—Revocation—A husband, a number of years after marriage, executed a bond of annuity, in which, for the alleged purpose of supplying the want of a marriage-contract, he bound himself to pay to his wife, in satisfaction of her legal claims, an annuity of £200 during his life, and of £500 after his death, in the event of her survivance—Held that the annuity of £200 was revocable, as a *donatio inter virum et uxorem*, p. 229.

—Fee and Liferent—Provision—A husband having purchased certain heritable subjects exclusively with his own funds, took the conveyance to and in favour of himself and spouse "in conjunct fee and liferent, and to the survivor, and their heirs, assignees, or disponees whomsoever, heritably and irredeemably"—Held, after the death of the husband, that the widow, as survivor, was the unlimited fiar of the property thereby conveyed, p. 567.

—*Jus Mariti*—A sum of money, identified as the amount of a bequest to a wife, independent of her husband, not charge-

able with his debts or engagements, and payable on her receipt alone, and lying in bank on a receipt in her name—Held to be her sole property, exclusive of the *jus mariti*, p. 528.

HUSBAND AND WIFE—Liferent and Fee—Destination—Sale—Implement—Title—A feu-right of certain property was conveyed to and in favour of a husband and wife, and "to the longest liver of them two in conjunct fee and liferent, and to the heirs of the marriage," "whom failing, to his and her own nearest and lawful heirs or assignees whomsoever, equally between them in fee, heritably and irredeemably." The husband having died leaving no issue of the marriage, the widow sold the whole property—Held that she could not give a valid title to the purchasers, p. 277.

—Marriage-Contract—Annuity—Competition—Trust-Deed—A wife, who was secured in an annuity by antenuptial-contract, followed by infestment in her husband's lands, which were sold by his trustee, held entitled to have her annuity fully secured to her out of the balance of the price, after payment of the preferable securities, p. 556.

—Parent and Child—Divorce—Circumstances in which the Court refused to remove a child from the custody of a stranger, on an application presented after the father's death in name of the mother, who had been divorced for adultery, and of her brother, p. 4.

—Parent and Child—Testament—Clause—Construction—Circumstances in which held, in reference to the whole clauses of a marriage-contract, that the deed formed a general conveyance of the whole heritage of the husband, for the purpose of division among the children in a certain way, and was not to be construed as limited to a conveyance merely of certain special heritable subjects separately enumerated in one of the clauses.

—*Obiter* by the Lord Ordinary, that the meaning to be put by law on a marriage-contract could not be affected by any statement as to its meaning or import by one of the spouses in a subsequent testamentary deed, nor could a declaration, even by them both, impair or alter the previously fixed rights of the children, p. 620.

—Proof—Statute 6 and 7 Will. IV.—In Consistorial causes, the proof must be led before a Commissary-Sheriff, p. 516.

—Surrogatum—Circumstances in which a wife was preferred to her husband's creditor for a sum of money which had been lodged by him in the hands of a third party for a special purpose, but which was held to be clearly traceable as part of the price of her heritable estate, p. 231.

—See *Jury Cause. Process.*

HYPOTHEC—See *Landlord and Tenant. Process.*

—WRITER'S—See *Competition. Process.*

I

INHIBITION, RECAL OF—Expenses—Circumstances in which an inhibition was recalled, with expenses, except those applicable to a correspondence on the subject, which was deemed unnecessary, p. 192.

—See *Competition.*

INTERDICT—Suspension—Competency—10 Geo. II. c. 28; 43 Geo. III. c. 142—Theatrical Entertainment—Construction—The lessee of the Glasgow Theatre, established by letters-patent, held entitled to an interdict, to the effect of preventing another party enacting within the city of Glasgow or suburbs, all tragedies, comedies, operas, plays, farces, interludes, melo-dramas, burlettas, and all other entertainments of the stage of any description whatever, whether the same were licensed by the Lord Chamberlain or not, or any part or parts thereof, p. 591.

—See *Church. Lis Alibi. Process.*

ISSUES—See *Exclusive Privilege. Process.*

J

JUDGMENT, POSSESSORY—See *Property.*

JURISDICTION—Burgh—Dean of Guild—A party pulled down, and proceeded to rebuild in a certain form, a gable between his own premises and those of his neighbour, both situated within burgh. The neighbour instituted a process against him before the Baillie Court, and obtained a decret

ordaining him to restore the gable, as far as practicable, to its original state—Held that the Court of the Magistrates was competent to entertain the action, and that the jurisdiction of the Dean of Guild was not privative, p. 48.

JURISDICTION—Foreign—Question. Whether the Scots Courts have jurisdiction over a foreigner, where the *forum originis*, *locus contractus*, and *locus solutionis* are Scotch? p. 129.

—**Sheriff-Court—Heritable—Superior and Vassal.**—A superior feued out certain stances for street building in Edinburgh, according to a plan which delineated the size and position of the feus with reference to one another, and to the street and other buildings, but owing to some error, the line of street, as delineated on the plan, came afterwards to be shifted eight or ten feet backwards from the line drawn thereon; the consequence of which was, that if the feuar was obliged to build according to his agreement, his buildings would now encroach on, and stand eight or ten feet within the line of street as laid out and completed subsequent to the date of agreement, and before these particular feus had been built on. The superior brought an action in the Sheriff Court, under the penalty clause in the agreement for neglecting to build, to have the feuar ordained forthwith to erect his buildings, and he made offer to give the feuar the exact superficial area he had bargained for, by substituting an additional piece of ground behind—Held that the circumstances of the case raised a question of *heritable right and title*, which could not be competently discussed in the Sheriff-Court, p. 493.

—*See Church. Process.*

JURY CAUSE—Damages—Patent, Infringement of.—Jury question, in an action of damages, as to the infringement of a patent for an improved application of air to produce heat in fires, forges and furnaces, where bellows or other blowing apparatus are required, p. 626.

—**New Trial—Husband and Wife—Expenses—Circumstances** in which a new trial granted on the motion of the defender, generally, on the ground that the verdict was not sufficiently warranted by the evidence, but on condition of the defender paying the pursuer the expenses he had incurred in the first trial, p. 503.

—*See Agreement. Exclusive Privilege. Process. Proof.*

JUS MARITI—See Husband and Wife.

JUSTICES OF PEACE CLERK—See Reparation.

L

LANDLORD AND TENANT—Compensation—Claim, Liquid and Illiquid.—A landlord who, on the expiry of the lease, took delivery of his tenant's stock at a price fixed by mutual valuers, held not entitled to withhold payment, on the allegation that the tenant was liable to him in certain illiquid claims, p. 423.

—**Hypothec—Miscropping—Penal Rent.**—A lease prescribed a certain system of cropping, and stipulated for payment "of £5 Sterling of additional rent yearly for each acre or part of an acre" that should be cropped differently—Held that a claim by the landlord for this additional rent fell under the right of hypothec, in the same way as a claim for the ordinary rent, p. 443.

—**Lease.**—A tenant in an agricultural subject, held not entitled, without the landlord's consent, to erect upon it a shed for public stabling, and that at a short distance from an inn belonging to the landlord, p. 685.

—**Lease—Assignment—Retraction.**—A lease, not assignable without the landlord's consent, was assigned, and the landlord consented by a writing to that effect indorsed on the assignment—Held that the assignee (a bank), though alleging that the assignment was only in security, was substituted for the original tenant, and could not retract him without a new consent from the landlord, p. 152.

—**Lease—Missive.**—A tenant entered into possession on a letter, which gave him liberty "to alter the buildings on the ground at his own expense, to suit his own convenience, but bound him" at the expiry of the lease, "either to leave the subjects as altered, or restore them to the state in which they were when his possession commenced"—Held that the tenant was not entitled to insist, where a regular

lease was drawn out between the parties, that it should contain a clause entitling him to take down and carry away any erection which he has or may put up on the premises, with the option, at the expiry of the lease, of leaving them as altered, or restoring them to their original state, p. 424.

LANDLORD AND TENANT—Lease—Police Statute—Construction—Tenement of Land.—Held that the words "tenement of land," occurring in certain clauses of the Dundee Police Act, 1837, mean, and are applicable only to, a single or individual building, although containing several dwelling-houses, with, it may be, separate means of access, but under the same roof, and enclosed by the same gables or walls, and that they do not extend to, or comprehend any square, range, or angle of buildings consisting of several houses completely divided from each other by party-walls and separate roofs, whether the same belong to one individual or body of individuals, or to many, p. 121.

—**Lease—Partnership—Proof.**—A joint lease of a farm is not *per se* a proof that the tenants are joint proprietors of the crop and stocking, p. 46.

—**Lease—Proof—Condition.**—A landlord having intimated to a tenant possessing a croft on a verbal lease, the particular terms on which he was willing the tenant should remain, and these terms not having been rejected by the tenant within the period allowed for that purpose by the landlord—Held that the tenant must, by continuing in the farm for another year, be held to have remained on the terms stipulated by the landlord, p. 518.

—**Rent, Consignation of—Process—Circumstances** in which, after defences were lodged, but before the record was closed, consignation was ordered, to a modified amount, of arrears of rent alleged to be due, p. 419.

—**Sequestration—Assignment—Process.**—A landlord is not bound to assign his right under a sequestration to a third party, on offer of payment of the rent due by the tenant. A bill of exceptions sustained, on the ground that the presiding Judge had declined so to direct the jury, p. 325.

—**Sequestration—Pro indiviso Proprietors.**—Circumstances in which sequestration of the whole crop and stocking on certain lands, at the instance of a proprietor, *pro indiviso*, of two-thirds, with the concurrence of a party holding right by decree of mails and duties to the rent of the other third, held not incompetent, p. 245.

—*See Bankrupt. Personal Exception. Process.*

LEASE—See Bankrupt. Burgh, Managers of. Entail. Landlord and Tenant. Obligation. Settlement.

LEGACY—See Proof. Testament.

LEGITIM—Parent and Child—Personal Exception.—A parent executed a general settlement in favour of his son, of all his personal and heritable property, under burden of an annuity to his daughter. The deed contained no exclusion of the legitim, and the daughter was in consequence found entitled to draw it—Held, in a separate action to recover the annuity, that though the right to legitim was not excluded by the settlement, the deed necessarily imported an intention to exclude it; that this intention was thwarted, and the settlement itself in so far frustrated by drawing the legitim; and that the daughter having thereby impugned and repudiated the settlement, could not maintain any claim under it for the annuity or otherwise, p. 395.

LIEN—See Process.

LIFERENT AND FEE—See Expenses. Husband and Wife. Provision to Children.

LIQUID AND ILLIQUID—See Landlord and Tenant. Process.

LIS ALIBI—Process—Expenses—Interdict.—A party presented an application to the Sheriff for interdict, and the Sheriff, after hearing parties, refused interim interdict, but ordered service and answers in fourteen days. The complainer then applied to the Court of Session for an interdict nearly in the same terms; and thereafter, by a note on the Inferior Court process, stated that he had abandoned that process, reserving all other remedies, but tendered no expenses—Held that this was no bar, as a *lis alibi*, to the application for interdict in the Court of Session, p. 591.

M

MAGISTRATES—See *Process*.

MANDATE—*Process*—A mandatory held sufficient, because in station and circumstances equal to those of the party, p. 95.

—See *Bankrupt. Diligence. Process*.

MANSE—See *Church*.

MARRIAGE-CONTRACT—See *Husband and Wife*.

MASTER AND SERVANT—Wages—Where services are rendered, the presumption of law, in the absence of circumstances sufficient to exclude it, is, that wages are due, p. 240.

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MORTIFICATION—Bursaries—Prescription—A contract between a patron of bursaries and the university where they were to be enjoyed, agreeing to create a new bursary for every £20 additional obtained from the mortified lands, reduced, after subsisting above forty years, on the ground of its being a violation of the original deed of mortification, which limited the number of bursaries to three, p. 457.

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OATH—DE FIDELI—See *Proof. FORM OF*—See *Reparation. IN REFERENCE*—See *Proof, Presumption. IN SUPPLEMENT*—See *Parent and Child*.

OBLIGATION—Contract—Condition—Life-Policy—In security of a loan the debtor conveyed to the lender certain policies of insurance on his life, and bound himself to advance the premiums to the lender, who was to keep up the policies, and to pay the premiums as they fell due. The debtor having become bankrupt, and fallen into arrear of the premiums—Held that the lender was entitled to sell the policies, and to apply the price in extinction of the premiums in arrear, and towards payment of the principal; and that the arrangement was at an end, p. 456.

—Contract—Proof—Parole—A party having made an offer for a lease of certain subjects, and given a reference as to his responsibility—Held that this was not a concluded agreement, and that parole evidence was inadmissible to prove that it was, p. 100.

—Contract, Mutual—Sale—Title, Delivery of—Price, Payment of—Statute 11 Geo. IV. c. 119—The magistrates of a burgh having, by virtue of an Act of Parliament, transferred their rights of harbour to certain statutory trustees, and accepted, in consideration thereof, certain bonds payable ten years thereafter; and that period having arrived—Held that the magistrates were entitled to withhold delivery of the disposition and conveyance until the trustees should pay up the sums contained in the bonds, p. 274.

—*Delectus Personæ*—Burgh—Privilege—A neighbouring proprietor granted to the magistrates of a royal burgh the liberty of certain quarries, not only for winning of stones to build a new pier, but also in all time coming for winning of stones to all the public works belonging to the said burgh,—they in consideration thereof granting to him, his heirs and assignees, the liberty of exporting the victual of the growth of all his lands free from the payment of shore-dues, imposed or to be imposed at the harbour. The harbour and its dues having been sold to parliamentary trustees for the purpose of being greatly enlarged and improved—Held that the privilege of quarrying stones was personal to the town-council; that the harbour trustees could not claim the privilege; and that the magistrates themselves having ceased to have any patrimonial interest in the harbour, could not exercise the privilege in regard to it, p. 203.

—See *Bill of Exchange. Caution. Process. Sale. Superior and Vassal*.

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PARENT AND CHILD—Aliment, p. 191.

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—Filiation—Proof—*Semiplena*, p. 516.

—Judicial Declaration, p. 146.

—Legitim—Annuity—Heritable and Moveable—Trustees, Duties of—Executry—Entail—Meliorations—Probate—Expenses—Multiplepoinding—*Process*—Question as to the charges which form proper burdens on the personal property of a parent, in estimating the amount of legitim, p. 439.

—Paternity—Illegitimate Child—Oath in Supplement, pp. 17 and 146.

—See *Aliment. Husband and Wife. Legitim. Prescription. Provision to Children. Trust*.

PARISH—Commonry—Aliment—Usage—Proof—In a question as to the settlement of a pauper—Held that the different portions of a common, allotted in a process of division, do not accresce to, and form part of, the parishes in which the different dominant tenements are situated, p. 271.

—Commonry—Title—Usage, p. 271.

PAROLE—See *Obligation. Process*.

PARTNERSHIP—Adventure—Contract—Clause—A manufacturer engaged to give the shipper one-fourth of the profit or loss on his goods, it being understood that he was to invoice them at the fair market price of the day; but in the event of loss on that price, to reduce it to prime cost. A trifling loss having been sustained—Held that the manufacturer was not bound to reduce the market price further than necessary to cover that loss, p. 583.

—Statute 6 Will. IV.—Railway Company—Proprietorship, p. 307.

—See *Diligence, Legal. Landlord and Tenant*.

PATENT—See *Exclusive Privilege. Jury Cause. Process*.

PATRONAGE—See *Church*.

PERSONAL EXCEPTION—Acquiescence—Reduction, p. 567.

—Landlord and Tenant—Circumstances in which a landlord held precluded, *personalis exceptione*, from claiming a fixture, p. 583.

—See *Legitim. Process*.

PERSONAL AND REAL—See *Succesſion*.

POLICE ACT, 7 WILL. IV. c. 32—See *Burgh. Landlord and Tenant*.

POOR—Settlement—Statutes, 1579, c. 74; 1672, c. 18—Aliment—Bastard—In a question between several parishes as to which was bound to support a pauper lunatic, it was proved or admitted, as to one of them, that the lunatic had come within the bounds fourteen days after Martinmas 1823, and resided there till Martinmas 1826, being three solar years, less fourteen days—Held (1.) That this did not constitute a settlement in law, so as to subject that particular parish in support of the pauper: (2.) That the parish in which the mother of the pauper lunatic had acquired a settlement, was liable in the aliment and support of the pauper lunatic, in a question between that parish and the parish of the birth of the child, p. 610.

—See *Process*.

POORS' ROLL—Certificate under A. S., 16th June 1819—1. Circumstances in which a certificate was sustained, though signed by the minister and elders on different papers. 2. The certificate does not require to be given in kirk-session, p. 148.

—See *Process*.

POSSESSION—See *Process*.

POWERS—See *Exclusive Privilege. Trust*.

PRESCRIPTION—Act 1579—Parent and Child—Aliment of Bastard Child—Found that the claim for aliment of a bastard child does not fall under the triennial prescription, p. 286.

—Bill—Reference to Oath, p. 43.

* Note—Error in 2d portion of rubric, p. 610, for "bastard" read "pauper lunatic."

PRESCRIPTION, TRIENNIAL, p. 570.

— See *Bankrupt Statute. Caution. Mortification. Process.*

PRESENTATION, BOND OF—See *Process.*

PRESUMPTION—See *Proof.*

PROCESS—ACCOUNTING, p. 335.

— **ADVOCATION**—Bill-Chamber—Statutes 6 Geo. IV. c. 120, § 40, and 1 and 2 Vict. c. 86, § 1-6—A. S., 11th July 1828, and 24th December 1838—Held that, in advocating against an interlocutory judgment of a Sheriff allowing a proof, the proper course is to present the note of advocacy to the Lord Ordinary in the Bill-Chamber, p. 582.

— **Competency**—A. S., 1825 and 1828—An advocacy of an interlocutory judgment, presented after the lapse of fifteen days, found competent, in respect the Act of Sederunt 1828, did not provide that advocations should be presented within a period of fifteen days, as prescribed by the previous Act of Sederunt, 1825, p. 622.

— **ARBITRATION**—Judicial Reference—Review—Landlord and Tenant—Held that certain objections to an award were irrelevant; that the Regulations, 1695, applied equally to a judicial reference as to a decree-arbitral; and that the notes issued by the referee could not be looked into in order to support objections not relevant to set aside the award, p. 109.

— **BANKRUPT**—Judicial Factor—Bond of Caution—Statute 2 and 3 Vict. c. 41, § 14—The Lord Ordinary on the bills held entitled, where there was no balance due by a judicial factor appointed *ad interim*, in terms of the Bankrupt Act, on the estate of a deceased debtor, to declare the factor exonerated, and to order his bond of caution to be delivered up—the application being presented with concurrence of the trustee in the sequestration, p. 491.

— **Sequestration**—Statute 48 Geo. III. c. 151, § 16—Reponing, p. 107.

— **Trustee**—Bond of Caution, p. 491.

— **BILL-CHAMBER**—Extractor—It is incompetent for the Inner-House to decern for expenses in a case in the Bill-Chamber, p. 216.

— **CALLING**—Decree in Absence—Statute 1 and 2 Vict. c. 86, § 5—Circumstances in which a decree held to be in absence, and a charge upon it suspended *simpliciter*, without consignation of the expenses decerned for, in terms of the 1st and 2d Vict. c. 86, § 5, p. 47.

— **CESSIO**—Examination, p. 25.

— **CITATION**—Burgh—Magistrates—Where a summons, directed not against the provost, magistrates and councillors of a burgh generally, but framed on the principle of enumerating the members of council, omitted the name of one of the members, and citation was effected by executions against the parties named in the summons. The defect allowed to be remedied by a supplementary action against the members omitted, p. 423.

— **Joint Obligation**—Liquid and Illiquid, p. 310.

— **Res Judicata**—1. An edictal citation of "heritors, feuars, and others liable in the expense of a manse and offices," in a parish partly burghal and partly landward, is sufficient to include the magistrates and town-council of the burgh. 2. A suspension, by individual heritors, of a charge for their proportion of the expense of building a manse, does not form a *res judicata* as to the whole body of heritors, though the suspenders pleaded the general question of liability, and obtained a judgment finding that the minister's claim of a manse could not be sustained.—*Question*, What would the effect have been if these individual heritors had proceeded by declarator? p. 7.

— **COMPETENCY**—Parties not called—The commissioners of police of a royal burgh having let the fulzie of the burgh and suburbs vested in them by Statute, passed a resolution, declaring that they had no right to a part of the suburban fulzie—Held that the tenant was entitled to pursue an action of declarator of the extent of the subject let to him, without calling the suburban inhabitants, p. 122.

— **CONJUNCTION OF ACTIONS**—A patron and presentee raised, 1st, a declarator directed against the presbytery of the bounds, concluding to have it found that, on the refusal of the majority, a minority of the presbytery were entitled to **SCOTTISH JURIST.**

induct the presentee; and 2d, a suspension and interdict directed both against the Presbytery and a Special Commission of the General Assembly, to prevent the induction of any other party than the presentee—Circumstances in which held that the processes ought not to be conjoined, p. 550.

PROCESS—DECREE IN ABSENCE—Suspension, p. 72.

— **DECREET**—Reduction—Suspension—Advocation—

A party presented an application for interdict to the Magistrates of a burgh, which was granted, and afterwards made perpetual, accompanied with certain findings, reserving to either party to take any competent course to have the judgment applied, and allowing extract as of an interim decret—Held that, after extract and payment of the expenses, a reduction of the interlocutor was competent, p. 328.

— **EXECUTION**—Statute 1672, c. 6—An execution, two lines of which only were written upon the summons, and bearing simply that the messenger had cited the therein designed A, defender, sustained; but expenses refused in relation to an objection to it, p. 310.

— **EXPENSES**—Petition to apply Judgment—Appeal—The expense of an application to the Court to apply a judgment of the House of Lords reversing an interlocutor of the Court of Session, allowed to the petitioner, p. 625.

— **Poors' Roll**—Husband and Wife—Separation and Aliment—Adherence—A husband on the poors' roll, defender in an action of separation and aliment, and pursuer in an action of adherence, moved for absolvitor in the one, and decret in the other, in respect that the wife had failed to lodge her revised condescendence,—the motion was refused, in respect that he had failed to obtemper an order for payment of £10 towards her expenses. The Court admitted her to the poors' roll, and remitted to the Lord Ordinary to receive the condescendence, and to proceed in the cause, p. 289.

— **Suspension and Interdict**—Church—Implied Condition—Where a party, duly cited in a process of suspension and interdict, allowed the interdict obtained therein in absence against him to become final, and the suspender did not ask expenses, but the respondent afterwards brought a reduction of the process and whole procedure—Held that the defender in the reduction (the suspender) was not bound to go into the merits of the reduction till the pursuer paid him, in the first place, the expenses he had incurred in the process of suspension, p. 532.

— **INTERLOCUTOR**—Error—Suspension and Interdict, p. 83.

— **JURISDICTION**—Burgh—Small-Debt Act—Public Officer—Found that the proceedings in the Small-Debt Court, held by the magistrates of a burgh as Justices of the Peace, must be regulated by the provisions of the Statute, 6 Geo. IV. c. 48, p. 39.

— **Domicile**—*Lis Alibi Pendens*—Foreign—*Res Judicata*—A testator, living in England, left a will in the English form, by which his trustees were directed to invest the residue in landed estate in England or Scotland, under the fetters of entail, on the same series of heirs as contained in a previous Scots entail of his property executed by him. The trustees invested part of the fund in land in Scotland as directed; but after their decease, A, an heir of entail, took measures in the English Court of Chancery to bar the English will, by orders from which Court he obtained possession of the balance, and thereafter bought land in Scotland, the titles of which he took in fee-simple to himself, without including the heirs of entail; and on his death, B, a domiciled Englishman, succeeded by settlement of A thereto, and was infeft. A challenge was then brought by an heir of entail succeeding to A, in the Court of Chancery in England, of the previous procedure had there by A, which was directed against A's executor, B; and concurrently therewith an action was raised against B in the Court of Session, with the view, by using diligence on the dependence, of attaching the Scots estate, alleged to have been purchased by the trust-funds, and to which B had now made up titles, and thereby acquiring a security which could not be obtained in England, intermediate to, and awaiting the issue of the challenge there—decree in the Scots action being craved conform to the order to be pronounced in the Court of Chancery—Plea in

defence of *lis alibi pendens* repelled, and action sustained, in the circumstances, as relevant, and consequently the diligence used on the dependence. But *observed*, that the Court had the right to prevent the remedy being abused, by calling on the party to show the nature of the progress of the English suit; and that the diligence might be modified, altered or recalled, as the Court in the circumstances should see fit, p. 447.

PROCESS—JURISDICTION—Heir-Apparent—Foreign—A foreigner having right, as heir-apparent, to an heritable estate in Scotland, is subject to the jurisdiction of the Court of Session, though he has neither taken possession nor made up any title, p. 129.

JURY TRIAL—Appeal, Leave to—Agent and Client—Reparation—Relief—An action of relief having been raised by a party to obtain from a law-agent repetition of a sum of damages, in which the pursuer had been subjected in respect of the use of an illegal border warrant, which had been obtained, as alleged, on the advice and employment of the defender as agent, the summons was found relevant. Thereafter an issue was approved of to try the case, but the defender applied for leave to appeal against the judgment finding the summons relevant. Leave granted, provided the petition of appeal should be presented on or before a (week) limited time, p. 653.

Application of Verdict—Salmon-Fishing, p. 54.

Application of Verdict—Servitude—Road—It being found that A had "possessed or used a cart-road" through the lands of B, to a certain point—Held, in respect of the special terms of the verdict, that A's right was sufficiently secured by a new turnpike-road, and a road from thence to the termination of the original road,—the new line being not more than twenty-two yards round, p. 54.

Issue—Salmon-Fishing—Statutes, 1318, c. 12; Robert I.; James I., 1424, c. 12; 1427, c. 6 or 116; 1429, c. 22 or 131; James II., 1457, c. 34 or 66; James III., 1469, c. 13 or 87; 1478, c. 6 or 73; James IV., 1488, c. 16; 1489, c. 16; 1503, c. 17 or 72; James V., 1535, c. 16; Mary, 1563, c. 3; James VI., 1579, c. 27; 1581, c. 3; 1685, c. 20; 1696, c. 35; 1696, c. 3; 1705, c. 12—A party having presented an application for interdict against a certain salmon-fishing, an issue was prepared in the usual terms, whether the defender has wrongfully fished for salmon by means of stake-nets or other fixed machinery placed in a situation or situations prohibited by law. The Court refused a motion for the defender to hear parties, prior to any jury trial, on the question of law as to the situation prohibited by the Statutes in reference to salmon-fishing—the averments of fact as to the situation of the machinery complained of being denied by the defender, p. 578.

Issue—Servitude—Possession—Burgh, Inhabitant of—The proprietor of a tenement situated in a certain part of a royal burgh set forth, that he and his predecessors, as well as the inhabitants generally residing in that neighbourhood, had had right of access to a mill-dam from time immemorial, for the purpose of drawing water therefrom. In pursuing a declarator of his right, he was held entitled to an issue embracing not only his own possession, but also that of the other inhabitants of the neighbourhood, p. 65.

Motion for New Trial—Held incompetent, when moving for a new trial, to found upon misdirection or omission in point of law on the part of the Judge, no exception to the charge having been taken at the trial, p. 233.

Property, Right of Common—Possession—Competing Title—New Trial, Motion for, on the Ground of Surprise—The pursuer took an issue,—whether, as proprietor of certain lands, he possessed, as common proprietor along with the defenders, a portion of land called the Ness of Chanonry? Held that the pursuer was bound to establish that he had possessed the land in dispute in the character of proprietor of his lands, and not merely as a burges or inhabitant of the community, p. 385.

Statute—Verdict—A verdict by a jury, summoned under a Statute which required them to fix both "price and damages" payable to parties having an interest in the lands and heritages dealt with under the Act, quashed,

on the ground that the jury had only fixed the price, and "declined" to estimate the damages, p. 331.

PROCESS—LIBEL—Citation—Agent and Principal—Company—Objection to an action, that it was libelled against a party alone, as manager or agent of the Highland Distillery, and that it was so insisted in after the proprietor was named in the defences, without calling the proprietor—sustained, and the action dismissed, p. 208.

LISPENDENS—Foreign—Diligence—A party having instituted a suit in the Court of Chancery, thereafter brought an action on the same claims, and against the same defendants, in the Court of Session, for the purpose of suing out diligence on the dependence against their property situated in Scotland—The Court repelled a preliminary defence founded on *lis pendens*, but appointed the pursuer to lodge a minute stating the progress made, and orders issued in the Court of Chancery, p. 336.

MANDATE—A foreigner, against whom judgment by default had been pronounced for having failed to find a mandatory, was reponed on making personal appearance. Having again failed to find a sufficient mandatory, he offered to find security to the amount of £50 for his presence at all diets of the Court—Held that, in the circumstances, the amount was sufficient, p. 313.

NOBILE OFFICIUM—Bill-Chamber—Competency—A petition for the removal of children from a mother's custody, on the ground of misconduct, accompanied with an allegation that she intended to remove them beyond the jurisdiction of the Court, having been presented during vacation to the Lord Ordinary on the bills—Held competent for his Lordship to entertain the petition, so far as to interdict the removal of the children, and after it had taken place, to grant warrant for bringing them back, p. 415.

PETITION, PRAYER OF—Decree—Waiver—Hypothec—A party presented a petition, praying the Sheriff to decern and ordain the respondent to produce in process an account for which, he alleged, certain title-deeds were hypothecated, and failing his doing so, to ordain him instantly to deliver up the title-deeds. The respondent produced his account, with answers to the petition, and pleaded retention of the titles till payment. The application having resolved into an action of count and reckoning between the parties; and the Sheriff having decerned in terms of the original petition, after a condescendence and proof, it was objected, that under the prayer of the petition, the proceedings subsequent to the production of the account were incompetent—Held under the circumstances, that the objection, if competent, had been waived, p. 285.

POOR—Assessment—Consuetude—Suspension—According to use and wont for a length of time, poors' assessment had been levied on certain lands, as situated within the parish of St Ninians, but in an action for payment of the assessment of a particular year, the proprietor of the subjects pleaded that the action ought to be dismissed, on the ground that the subjects were situated within the parish of Stirling, and so not liable for the assessment. After a proof as to the *situs* of the lands, the Sheriff-substitute dismissed the action, but the Sheriff, proceeding on the usage as to the mode of assessment, the proof of which he held to be complete and decisive, reversed that finding, and decerned for the assessment and expenses of process—Held that suspension was a competent mode of review of the Sheriff's judgment; but *opinion* indicated, that the main question as to the *situs* of the lands, and consequent liability to a particular parish, could only be raised by declarator, p. 595.

PROOF—The copy of a lease confessedly genuine, is admissible in evidence in the absence of the principal, p. 325.

Commission and Diligence, p. 146.

Diligence for Recovery of Writings—Agent and Client—Confidentiality, p. 115.

Parole—Bond of Presentation—Held incompetent to prove by parole, or to remit to trial by jury, an alleged promise by a party to present a debtor on a certain day, or pay the debt, p. 250.

Reference to Oath—Production of Documents—A party having brought an action against his client, ninety

years of age, for recovery of certain business-accounts which had prescribed, the record was closed without any productions being made, and a reference was made to the oath of the defender. In the reference a summons was produced, and the defender was asked if he recollected of the action relative thereto—Held that the document might be shown to refresh the memory of the deponent, but could not be used in evidence to contradict his oath, or be produced in process, p. 265.

PROCESS—PROOF—Witness—Competency—Commission to examine a witness abroad, granted, notwithstanding of his appearing to have such an interest in the cause as might render his evidence incompetent, p. 16.

PURSUER—Bankrupt—Cessio—Caution for Expenses—Circumstances in which a bankrupt pursuer was found not entitled to insist in an action without finding caution for the expenses of process, p. 190.

RANKING AND SALE—Writer's Hypothec—Lien—Circumstances in which, in a process of ranking and sale of an estate, the Court dispensed with the production of the title-deeds of the lands under sale, p. 660.

RECLAIMING NOTE—Competency, p. 610.

RECORD, Authentication of, by Lord Ordinary—Personal Exception—Where the counsel for the parties had authenticated the record by their signatures, and signed a minute agreeing to close the record on the interlocutor sheet, which was followed by a minute signed by the Lord Ordinary closing the record in terms of the minute of counsel, but the revised papers did not bear the signature of the Lord Ordinary—Held in the circumstances, that this was a sufficient compliance with the Judicature Act, p. 575.

Opening of, p. 51.

Opening up—Production of Writs, p. 318.

Proof—Evidence—Witness—Statute 5 and 6 Gul. IV. c. 83—Patent, Infringement of—Circumstances in which, in an action of damages brought for the infringement of a patent, where the defender proposed to call witnesses to prove that the principle of the patent had been in public use prior thereto in Scotland—Held that the proposed line of evidence was inadmissible, as no sufficient notice of such course had been given to the pursuer on the record;—and *opinion*, (1.) That in regard to an allegation of prior use of the principle of a patent, it is not enough to aver so, generally, but it is necessary that the prior use at particular places, and by particular persons, shall be set forth in such a way that the pursuer may be able distinctly to meet such averment; and, (2.) That the Statute 5 and 6 Gul. IV. c. 83, § 5, in regard to a defender in such an action giving certain notice of what he intended to found on at the trial, did not extend to Scotland, but merely referred to the mode of pleading to be adopted in English actions brought for the infringement of patents, p. 626.

REDUCTION—Review—*Lis Pendens*—An action of reduction dismissed as incompetent, in respect that the process was unexhausted in the Inferior Court, p. 561.

RELEVANCY—Agent and Client—A summons at the instance of a client, to render a law-agent liable for certain law expenses and damages occasioned to the client from the use of a border warrant, which had been obtained, as alleged, on the proper usual employment of the agent, and which the Court found to be illegal, held relevant, though not averring ignorance, or want of professional skill, or gross neglect in the proceedings, p. 417.

Summons—Malice—Diligence, Illegal use of—Damages—Reparation, p. 580.

REMIT, JUDICIAL, TO A PERSON OF SKILL—*Observed*, That where the Court, on a general motion by the parties for a remit, appoints a particular individual who is not expressly objected to, the appointment must be held to have been made with consent, p. 141.

REMIT OB CONTINGENTIAM, p. 72.

STATUTE 1579, c. 83—Prescription, Triennial, p. 36.

SUMMONS, AMENDMENT OF, p. 177.

Conjoined Action—Competency—An original and a supplementary process being conjoined—Held that a declaratory conclusion, contained only in the former, was, in

consequence of the conjunction, competently directed against the defenders in the latter, p. 24.

PROCESS—SUSPENSION—Bill of Exchange—Accounting—Caution, p. 392.

Caution, p. 310.

Interdict—Where a presbytery was proceeding with a libel against a minister, interdict granted before answer, on the ground that the minister of a parliamentary church and his elder had seats in the presbytery, and were taking part in the proceedings, p. 556.

SUSPENSION AND INTERDICT—Caution—Consignation—Expenses—A party having executed a pawning of furniture, the property of the daughter of his debtor, she presented a suspension and interdict, whereupon the pawning creditor abandoned his diligence—Held that, with the view of trying the question of expenses, the complainer was entitled to have the bill passed without caution or consignation, p. 100.

SUSPENSION AND LIBERATION—Statute 1 and 2 Vict. c. 86, § 5—Held incompetent to introduce a prayer for liberation in a note of suspension of a decree in absence, presented under the 5th section of 1 and 2 Victoria, c. 86, p. 172.

TITLE TO INSIST—Trust—An action at the instance of two trustees and the beneficiaries under the trust was raised against a third trustee, to compel him to execute the trust; pending the action the trustees, pursuers, died—Held that the beneficiaries had a proper title to pursue the action without sisting the representatives of the deceased, p. 19.

WAKENING AND TRANSFERENCE—Diligence—Arrestment—Statute 1 and 2 Vict. c. 114—It is incompetent, under Statute 1 and 2 Vict. c. 114, to insert a warrant of arrestment in a summons of wakening and transference, p. 499.

See Arbitration. Bill of Exchange. Church. Diligence. Exclusive Privilege. Expenses. Landlord and Tenant. Lis Alibi. Mandate. Parent and Child. Proof. Property. Declarator of. Public Informer. Public Officer. Ranking and Sale. Reference to Oath. Reparation. Service. Suspension. Testament. Title to Sue. Trust-Deed. Trust, Latent.

PROOF—Contract—Advocation, p. 437.

Evidence—Heritable and Personal Creditors—Question of evidence, whether particular portions of land were comprehended under the securities of heritable creditors? p. 553.

Evidence—Jury Trial, p. 584.

Oath in Reference—Construction—Process—It is not competent, in construing an oath on reference, to look beyond its contents, p. 616.

Presumption—Death—Heritable and Moveable—1. Circumstances in which a sailor, after an absence of thirty-seven years without being heard of, was presumed to be dead. 2. A sum of money, with interest, arising from a compulsory sale under a Statute which expressly provided against any innovation of existing interests, found to be heritable, p. 1.

Presumption—*Debitor non presumitur donare*—Testament—Legacy—A party under an obligation to pay to A, or to the heirs succeeding him in the lands of B, a sum of £3000 on her own death or marriage, bequeathed to him, his heirs, executors, and assignees, a legacy of £20,000, payable the first term after her death—Held that the debt was not extinguished by the legacy, p. 329.

Process—Clerk, Subscription of—Oath *de fide*, p. 62.

Witness—A builder, proposed to be examined as a valuator, having been informed by the agent of the party adducing him, of the valuations of previous witnesses, held to be disqualified, p. 104.

Witness—Disqualification, p. 146.

Witness—Objection to Credibility—Malice—Extra-judicial Statement, p. 27.

See Agent and Client. Aliment. Bill of Exchange. Friendly Society. Husband and Wife. Landlord and Tenant. Obligation. Parent and Child. Parish. Process. Reparation. Sale. Teinds, Valuation of.

PROPERTY—Common—Declarator, p. 515.

Declarator of—Title and Interest—Servitude—Road—

- Process**—Circumstances in which held, that one of two proprietors of houses adjoining a close which was used as a common passage by both, was not entitled to substitute another passage, alleged to be equally convenient, for the existing one, p. 563.
- PROPERTY**—Disposition—Heritable Creditor—Records—A father, infeft in the *plenum dominium* of certain lands, executed a disposition and settlement, by which he conveyed, subject to revocation, the *dominium utile* to his eldest son, and the superiority to his second son. Some years after he disposed the lands, as they stood in himself, to the eldest son, recalling the previous conveyance to the second son, without mentioning the favour of the eldest son, but declaring that the disposition-settlement should be effectual in so far as not revoked or altered. The eldest son having predeceased his father without issue, after granting an heritable security over the lands—Held, in a competition between the heritable creditor and the second son claiming as his father's heir, that the security extended over the *plenum dominium* of the lands—the eldest son's right extending to it, and not being limited to the superiority, p. 459.
- Marches**—Superior and Vassal—Warrandice, p. 86.
- Possessory Judgment**—Road—A party having, at his own hand, enclosed a piece of ground which a public body had kept for more than seven years under their charge, as part of a street, for the use of the public, on the allegation that that body, and the public through them, had no title, and that he was the true proprietor—Held that the public body were entitled to retain possession until dispossessed by the order of a court of law, p. 281.
- Water**—Servitude—Conterminous Proprietor—A party having right, in common with the inhabitants of a village, to lift water from a well for domestic purposes, laid a pipe for the purpose of supplying certain houses with water from the surplus which escaped from the well—Interdict against this operation granted at the instance of an owner of property bounded by a stream which was partly fed by the water escaping from the well, p. 396.
- See Suspension.**
- RIGHT OF COMMON**—**See Process.**
- PROVISION**—**See Husband and Wife.**
- PROVISION TO CHILDREN**—Parent and Child—Liferent and Fee—A father, in contemplation of the marriage of his natural daughter, bound himself, for love and favour, to make payment to her of a sum of money, and that to her in liferent during all the days of her lifetime, secluding the *jus mariti* of her intended husband, and to the children of the marriage in fee, whom failing to the husband—Held that the wife was fieri, p. 73.
- See Trust—Settlement.**
- PUBLIC INFORMER**—Statute 50 Geo. III. c. 48—**Process**—A party who had been appointed by the Sheriff of Edinburgh as an officer of Court, was employed in that capacity under the Middle District Road Acts, to supply information to the Procurator-fiscal of the county, to enable him to prosecute for offences committed under the Road Acts. On the occasion of these prosecutions, the officer acted as principal witness, and was paid weekly wages for his duties and trouble, and, libelling on the 50th Geo. III., he brought an action against the Procurator-fiscal, in which he insisted he was entitled to a half of the fines recovered from offenders, on the ground of being informer—Plea in defence sustained, that the Procurator-fiscal, who pursued for the penalties, was, in the sense of the Act, the informer, p. 504.
- PUBLIC OFFICER**—Messenger—Reparation—Diligence—Statute 1 and 2 Vict. c. 114—A messenger instructed to charge a debtor immediately, gave a charge on six days on the 13th, but did not transmit the charge, so as to be in the hands of his employer, till the 21st, and on the 22d, before ultimate diligence could be used, the debtor escaped—Held that the messenger was liable for the debt, p. 12.
- Messenger**—Reparation—Negligence—**Process**—Statute 1672, c. 6—A messenger having returned an execution of a summons in which a number of the defenders were neither named nor designed, and the action having in consequence been dismissed, and the pursuer found liable in expenses—Held, in an action by the pursuer, that the messenger was liable, p. 270.
- PUBLIC OFFICER**—Schoolmaster—The master of a private charity, incorporated by royal charter, had the office conferred upon him only from year to year, or during pleasure—Held that the governors might dispense with his services at the annual election of office-bearers, p. 62.
- See Process. Reparation.**
- PUPIL** **See Aliment.**

R

RANKING—**See Trust.**

RANKING AND SALE—Catholic Creditor—Where a daughter's provision was heritably secured on two subjects, and her husband afterwards became the purchaser of one of them—Held, in a ranking and sale of the other subject, that if the provision were ranked wholly on it, the creditors in that subject were entitled to an assignation of the security held over that which the husband had purchased, p. 620.

—**Decree of Certification**—**Process**—A petition to open up a decree of certification in a ranking and sale, presented after the lands were sold and vested in a purchaser, but while the price was still *in manibus curiae*, for the purpose of rearing up a burden on the lands, through a title which did not exist at the time the petitioner and other creditors had joined issue on a closed record in the process in regard to their claims and interests, refused as incompetent.—**Observe**, that the object of the petition (if at all competent) could be discussed only in the ranking and sale, or in a reduction of the decree of certification, p. 579.

—**See Process.**

RECORD—**See Expenses. Process. Property. Service.**

REDUCTION—**See Arbitration. Bankrupt. Personal Exception. Process. Suspension.**

REFERENCE, JUDICIAL—**See Arbitration. Process.**

REFERENCE TO OATH—Suspension and Interdict—**Process**, p. 516.

—**See Process. Trust, Latent.**

REI INTERVENTUS—**See Caution.**

RELEVANCY—**See Process. Reparation.**

RELIEF—Warrandice—Sale—Held that a purchaser, against whom the Crown was proceeding with a suit in Exchequer for bygone teind-duties, was not obliged to wait the issue of that process, but was entitled to proceed with an action of relief for the purpose of determining the seller's liability under the clause of warrandice, in the event of the Crown's claim being sustained, p. 141.

—**See Caution. Diligence. Process. Superior and Vassal.**

REMIT, JUDICIAL—**See Process.**

—**TO PERSON OF SKILL**—**See Suspension.**

RENT—**See Bankrupt. Landlord and Tenant.**

REPARATION—Damages—Collision, p. 285.

—**Damages**—Trustees, Statutory—Liability for the Misconduct of their Officers and Servants—Held that trustees under a public Act, declaring that the trust-funds are to be appropriated solely for the purposes of the Act, are not liable for the negligence or misconduct of their officers, p. 586.

—**Damages**—Wrongous Imprisonment—Public Officer—**Process**—Summons—Justices—Relevancy—Proof—Oath, Form of—Roman Catholic—In an action of damages against Justices and the Procurator-fiscal, averring malice and want of probable cause—Circumstances in which held, that the facts set forth in the summons were not relevant, p. 289.

—**Wrongous Apprehension**—Public Officer—Justice of Peace—Clerk—Statute 43 Geo. III. c. 141—An action of damages against a Justice of Peace dismissed, on the ground that he had tendered twopence of damages, and the acts complained of were not libelled to have been done "maliciously, and without any probable cause," p. 113.

—**See Agent and Client. Diligence. Exclusive Privilege.**

Process. Public Officer. Sale. Trust.

REPONING—**See Process.**

RES JUDICATA—**See Process.**

RESPONSIBILITY—**See Agent and Client.**

RESTING-OWING—Mellorations—Entail, p. 496.

RETENTION—See *Compensation. Superior and Vassal.*
 RETROCESSION—See *Landlord and Tenant.*
 REVIEW—See *Bankrupt Act, 2 and 3 Vict. c. 41, § 54. Process. Service.*
 REVOCATION—See *Husband and Wife. Trust. Trust-Deed.*
 ROAD—See *Burgh. Process. Property. Servitude. Statute.*

S

SALE—Misrepresentation—Sub-Lease—Reparation—Damages—The seller of a lease found liable in damages to the purchaser for concealing the existence of a written sub-lease which he had previously granted of part of the lands, though that sub-lease was defeasible at the pleasure of the landlord, p. 31.
 —Stoppage *in transitu*—Cautionary Obligation—Bankrupt—Goods having been delivered by mistake to the cautioner instead of the principal, and the principal having been sequestrated—Held, in a question with the trustee, that the cautioner was not entitled to retain possession of the goods till freed of his cautionary obligation, p. 520.
 —Title—Reservations and Restrictions—The proprietor of several feus disposed of them by a missive of sale, without specifying that his title contained a reservation of mines and minerals in favour of the superior, and also certain restrictions as to the kind of buildings to be erected on part of the ground—Held that the purchaser was not bound to take the subjects with these restrictions, p. 51.
 —Warranty—Proof, p. 513.
 —See *Bankrupt. Husband and Wife. Obligation. Superior and Vassal.*
 SALMON-FISHING—See *Process.*
 SCHOOLMASTER—See *Public Officer.*
 SEMIPLENA—See *Aliment. Parent and Child.*
 SEPARATION AND ALIMENT—See *Process.*
 SEQUESTRATION—See *Bankrupt. Bankrupt Act, 2 and 3 Vict. c. 41, § 54. Landlord and Tenant. Process.*
 SERVICE—Brieves, Advocation of—Commission and Dilligence—Review, p. 115.
 —Brieve, Advocation of—Process—Record—Review, p. 107.
 —Brieve, Advocation of—Statute 1 and 2 Vict. c. 86, § 2—Process—A note of advocacion of a brieve was presented to, and marked by the depute-clerk of Session, and was thereafter, without being published in the calling lists, and then enrolled in the printed rolls for the week, laid before the Lord Ordinary named in the note—Held that the procedure was correct, and that the next step was for the Lord Ordinary to advocate the brieve, p. 20.
 —Brieves, Competing—Succession—A father having settled his property on his daughter in liferent, exclusive of the *jus mariti*, and his children in fee; "whom failing before majority or marriage, to the nearest lawful heir or heirs of my said daughter"—Held, on the failure of the children, that the cousin-german of the daughter was preferable to a brother of her husband, p. 327.
 —See *Entail.*
 SERVITUDE—Road—Foot-Road, Public, p. 54.
 —See *Process. Property.*
 SETTLEMENT—Lease—Assignment, p. 437.
 —See *Poor. Trust.*
 SHERIFF COURT—See *Jurisdiction.*
 SMALL-DEBT ACT—Arrestment on Dependence—Fees—Declared irregular and illegal, 1st, to issue and charge a fee for precepts of arrestment on the dependence of small-debt actions; and, 2d, to give discount on fees to pursuers, especially without providing that the full fees should not afterwards be charged as expenses against the defenders, p. 454.
 —See *Process.*
 SOCIETY—See *Title and Interest to Sue.*
 STAMP—See *Bill of Exchange.*
 STAMP ACT, 55 Geo. III. c. 184, Part 1st, p. 66—Bank—Banker's Draft—Found, 1. That drafts upon a banker in the form of a mere order, without any mention either of the bearer or of a particular payee, are to be considered as drafts payable

to the bearer, in the sense, and within the benefit of the Act 55 Geo. III. c. 184: 2. That drafts in that form do not lose their privilege from their bearing, after and apart from the signature of the drawer, a memorandum in his hand-writing, such as "per A B." But that an order having such addition in the body of it, and before the signature, is payable only to the party mentioned, and is not entitled to the statutory privilege as payable to the bearer: 3. That drafts payable to A B, E F, "or to the bearer," are to be considered as drafts payable to the bearer, p. 82.
 STIPEND—See *Teinds. Church.*
 STOPPAGE IN TRANSITU—See *Sale.*
 STATUTE—Road—Act 1 and 2 Will. IV. c. 43, § 65—Entailed Proprietor—Expenses—Road trustees, with a view to acquire a right of ferry belonging to an entailed proprietor, made offer of £567 as the value, which was refused; the proprietor, however, made no tender of it for any specific sum, and a jury was summoned to ascertain the value. The verdict was for £625, and the proprietor, in applying to the Court to regulate the investment of the fund for the benefit of the succeeding heirs of entail, craved that the expense of realising and investing the fund should be deducted from it—Held that he must pay his own expenses in realising the fund, but that he might deduct the expense of investing it, p. 7.
 —1318, c. 12; Robert I.; James I., 1424, c. 12; 1427, c. 6 or 116; 1429, c. 22 or 131; James II., 1457, c. 34 or 66; James III., 1469, c. 13 or 87; 1478, c. 6 or 73; James IV., 1488, c. 16; 1489, c. 16; 1503, c. 17 or 72; James V., 1535, c. 16; Mary, 1563, c. 3; James VI., 1579, c. 27; 1581, c. 3; 1685, c. 20; 1696, c. 35; 1698, c. 3; 1705, c. 12—See *Process*; 1579—See *Prescription*; 1579, c. 83—See *Process*; 1579, c. 74; 1672, c. 18—See *Poor*; 1592, c. 117, and 54 Geo. III. c. 169 (Ministers' Widows' Fund)—See *Church*; 1661—See *Competition*; 1663, c. 21—See *Church*; 1672, c. 6—See *Process. Public Officer*; 1685—See *Entail*; 1696, c. 5—See *Bankrupt. Caution*; 10 Geo. II. c. 28, and 43 Geo. III. c. 142—See *Interdict*; 10 Geo. III. c. 51—See *Entail*; 43 Geo. III. c. 141—See *Reparation*; 48 Geo. III. c. 151, § 16—See *Process*; 50 Geo. III. c. 48—See *Public Informer*; 3 Geo. IV. c. 91—See *Burgh. Managers of*; 5 Geo. IV. c. 74, and 5 and 6 Gul. IV. c. 63—See *Excise Laws*; 6 Geo. IV. c. 120, § 40, and 1 and 2 Vict. c. 86, § 1-6—See *Process*; 11 Geo. IV. c. 119—See *Obligation*; 5 and 6 Will. IV. c. 83—See *Process*; 6 Will. IV.—See *Partnership*; 6 and 7 Will. IV.—See *Contract. Husband and Wife*; 1 and 2 Vict. c. 41—See *Bankrupt*; 1 and 2 Vict. c. 86, § 2—See *Service*; 1 and 2 Vict. c. 86, § 5—See *Process*; 1 and 2 Vict. c. 110—See *Bankrupt*; 1 and 2 Vict. c. 114—See *Process. Public Officer*; 2 and 3 Vict. c. 41—See *Bankrupt*; 2 and 3 Vict. c. 41, § 14—See *Process.*
 SUB-LEASE—See *Sale.*
 SUBMISSION—See *Contract. Debtor and Creditor.*
 SUCCESSION—Testament—Trust—Burden—Personal and Real—A testator directed his trustees to convey certain lands to A, whom failing to B, but declared, that in the event of A or his issue succeeding to a certain other estate, he or they should be bound to denude of the estate now conveyed in favour of B or his issue,—it being the testator's meaning and intention that the two estates should never be united during the lifetime of B, or any of his issue—Held that the trustees would discharge their duty under the settlement, by inserting the testator's declaration *in terminis* in the conveyance to A; that the declaration amounted only to a personal obligation on A, and could not be made to affect the lands as a real burden or species of entail, p. 501.
 —See *Service. Superior and Vassal. Testament. Trust.*
 SUMMONS—See *Process. Reparation.*
 SUPERIOR AND VASSAL—Agreement—Joint and Several Obligation—Intromission—Liability—A prime superior feued out certain subjects to A, who subfeued part of them to X and Y; Y subfeued his out to C; C never completed any title to his feu, but possessed under the personal obligation derived from Y. A, the mid-superior, to whom the several subfeuars had regularly paid their feu-duties, fell into

several years' arrear of feu-duty to the prime superior, and he having threatened eviction thereof of all the subfeus, X paid the amount, and brought an action of relief against C for a proportion of the arrears corresponding to his feu-duty—Held that X was entitled to demand relief from C of a proportion corresponding to the amount of his feu-duty, p. 463.

SUPERIOR AND VASSAL—Burgh—Retention—Relief—In a feu-charter granted by the magistrates of a royal burgh, the subjects were to be held free of all public burdens. The affairs of the burgh having been put under trust in terms of a Statute, by which the magistrates were authorised and required to compound for all and every debt due, and obligation contracted by them, by granting bonds of annuity at the rate of £3 Sterling for every hundred pounds of such debts—Held, 1. That the vassal was entitled to retain all feu-duties and casualties, whether payable on account of the property in question, or on account of any other property held in feu of the magistrates, until he shall be relieved of all the taxes within the obligation of exemption, which he may have been compelled to pay since the constitution of the statutory trust: 2. That for the whole sums on account of taxes or other burdens as aforesaid, which the vassal may have paid before the constitution of the trust, the magistrates are bound to deliver an annuity-bond corresponding to the amount, in terms of the Statute: 3. That the vassal is not bound to accept of annuity-bonds at the rate and in the terms of the Statute, for the sums paid, as above expressed, since the constitution of the trust; but that, as to such sums, the magistrates, as superiors, are liable in full exemption and relief to the vassal, both for what he has paid and for what may be exigible from him in all time coming, p. 252.

Casualties of Superiority—Entry of Heirs and Singular Successors—Relief—Composition—Succession—Entail—Construction—Charter of Resignation—A fee-simple proprietor entailed his estate on A, B, and C, neither of whom were heirs of line to the entail, nor were they related by blood in any degree to one another. A, the institute, made up titles, and received from the superior a charter of resignation, whereby the lands were conveyed to the same series of heirs, as specially set forth in the entail, and a clause was inserted in the charter, declaring that the granting thereof was not to exclude the superior and his successors from any claim they had at law to a full year's rent of the subjects, "whenever the heirs of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered and infeft." On his entry the institute paid a composition to the superior of a full year's rent as a singular successor. After his death, and also that of B, who had entered with the superior in the lands, the succession opened to C, who was not the heir of line of B, the vassal last infeft—Held by a majority of the whole Court, that the superior was bound to enter C as an heir of the investiture, on payment of the ordinary casualty of relief exigible from an heir, p. 468.

Feu-Duties—Interest—Interest on feu-duties is not exigible previous to a judicial demand, p. 307.

Investiture—Parts and Pertinents—Reservation—Precept of *Clare*—Coal and Limestone, Reservation of—In certain lands the *dominium utile*, together with the parts and pertinents thereof, were acquired free of any reservation in favour of the superior. A reservation of the coal and limestone began to be inserted in the titles about sixty years back, for the first time, in a precept of *clare constat*, and subsequently in successive charters; but the minerals were never wrought—Held that the property of the coal and limestone was in the vassal, p. 198.

Obligation—Feu-Contract—Implement—By certain articles of roup two lots of ground were feued in 1813, and in 1825 a formal contract of feu was entered into by the superior and vassal, varying essentially from the articles of roup. The contract provided, that "when the stances shall be built upon, the buildings shall be in a line pointed out by A B, and be constructed conform to a plan approved by an architect to be appointed by the superior: Further, that the vassal shall be at one-half of the expense of making the common sewers opposite to the stances, and also of one-half of making the streets, lighting and cleaning the same, &c.; and in so far

as the said drains, &c. are already finished, the vassal becomes bound to pay the expense thereof." The stances remained unoccupied, and in 1840 the trustees of the vassal raised an action to have the superior ordained to furnish an elevation plan, to make streets, &c., the vassal being willing to pay one-half of the expense of making the same opposite the two stances feued; and in the event of the superior failing so to do, to have the feu-right declared at an end; and in any event, to have repayment of the feu-duties already paid, or at least relief from the payment thereof in future—Held, 1. That the demands made upon the superior could not be maintained either as conditions of the feu-contract or as independent rights: 2. That the feu-contract could not be controlled by the articles of roup, p. 259.

SUPERIOR AND VASSAL—Reddendo—Circumstances in which the word *hordeum*, in the reddendo of a charter of the sixteenth century, held to mean not *bear* or *bigg*, but *barley*, p. 83.

Sale—Retention of Title in Security of Price—A party sold a property, and executed a disposition in favour of the purchaser, in virtue of which he obtained possession of the subjects; but the deed remained in the custody of the seller, as a security for a balance of the price—Held, in a question between the heir of the seller, who had died unintest, and the disponees of the purchaser, that the heir had the only good and undoubted right to obtain a charter from the superior, p. 279.

Sasine—Register—Where lands originally burgage were held in feu under magistrates, who were specially empowered to grant such feus—Held that the sasines taken in them could be validly recorded only in the General Register of Sasines or Particular Register of the county in which they were situated, and not in the Burgh Register, p. 400.

See Expenses. Jurisdiction. Property.

SURROGATUM—See Husband and Wife.

SUSPENSION—Reduction—Remit to Person of Skill—Process—Property—Damage, p. 452.

See Bill of Exchange. Interdict. Process. Reference to Oath.

AND LIBERATION—See Process.

T

TEINDS—Stipend—Augmentation—An heritor holding a feu-right to his teinds for payment of a certain quantity of meal annually to the titular, or, in his option, to the minister of the parish, had an amount of stipend laid upon his lands equal to the value of the teind-duty—Held, in providing for a subsequent augmentation, that it must be laid proportionally upon the teinds of the lands of the titular and the heritor, after deducting from the gross amount of those of the heritor the teind-duty payable by him as old stipend, p. 3.

Titularity—Completing Titles—Augmentation and Locality—Church, p. 654.

VALUATION OF—Proof—Evidence held insufficient to prove that the teinds of certain lands were included in the valuation of other lands of a different name, belonging to the same proprietor, p. 45.

TERCE—See Agent and Client.

TESTAMENT—Legacy—Vesting—Condition—A sum was bequeathed to A, the interest being payable from six months after the testator's death to A's legal guardians, and the principal on A's majority. A survived the testator, but died in pupillarity—Held that the legacy had vested, p. 573.

Process—Title—Foreign—A Scotsman who died domiciled in India bequeathed "to D. F. and his family," by a will executed there, a sum lodged in the hands of his bankers at Calcutta. The executors under the will having died or declined to act, the children of D. F., under a decree-dative from the Commissary of Edinburgh as executors *qua* legatees, brought an action in the Court of Session for payment of the legacy against one of the partners of the bank who was residing in Scotland, and obtained decree, subject to the condition of "producing a sufficient title in their persons before extract"—Held that that title must be a confirmation of the decree-dative which they had previously obtained, p. 569.

Succession—Destination—Entail—A father bequeathed

to his two natural daughters two separate sums, to be accumulated for their behoof till they were twenty years of age. Failing either of them without lawful male heirs, the other was to take her fortune; and failing both without lawful male heirs, the whole was to go to one, and failing him to another brother of the testator's, and his lawful male heirs, and failing them to a nephew. On the marriage of the daughters, provided it was after twenty years of age, and with the consent of the trustees under the settlement, they were "to have the whole of the sums heretofore bequeathed to them," which sums, however, were to be invested in land, and entailed on the male heirs of the two daughters. A multiplepointing having been raised for the purpose of determining the rights of the parties, and one of the daughters having died leaving a daughter, an interlocutor was pronounced, finding that the lands to be purchased with the sums bequeathed to the daughters were to be settled on the surviving daughter and her heirs-male, under the fetters of a strict entail, but that it was "unnecessary, *hoc statu*, to give any direction as to the extent of the destination to be inserted in the said deed"—Held that the collateral heirs-male of the testator ought not to be included in the entail which he had directed to be made, and that the trustees under the marriage-contract of the daughter surviving at the date of the above interlocutor, were entitled, to the exclusion of those of the daughter who had died, to have the lands and estate purchased with the accumulated amount of the bequests transferred to them in fee-simple, for behoof of the parties interested in the marriage-contract, p. 343.

TESTAMENT—See *Foreign. Husband and Wife. Proof. Succession. Trust.*

TITLE—See *Husband and Wife. Obligation. Parish. Process. Sale. Testament.*

—AND INTEREST TO SUE—Trust—Society—Corporation—*Pactum Illicitum—Nobile Officium*—A public society, denominated the "Prime Gilt," existed in Kirkcaldy for upwards of two centuries, and the funds, which arose from rates levied on masters and mariners, were dedicated to the support of the contributors in necessity, and their widows, &c. Owing to alleged difficulties in levying the rates, and other causes, it was resolved to realise the property of the society, and to divide it equally among the existing members, providing for any widows on the fund, but refusing to recognise the right of the mariners, or thereafter to receive their rates. In a conjoined process of suspension, reduction and declarator, brought in regard to these proceedings at the instance of certain widows on the fund, and common mariners who had long contributed their rates—the title of these parties to sue was sustained, and interdict granted against the resolutions and proceedings of the managers; and found that the property was held in trust for the Prime Gilt, and the persons or members entitled to be members thereof, and such parties as may hereafter become members, or as are or may be entitled to derive support or assistance from its funds, and that the managers are bound to denude of, and convey the property of the society in trust to such person or persons as the Court may name, and in such terms, and under such conditions as the Court may hereafter direct, p. 529.

—TO SUE—Executor—Process—One of three executors brought an action in her own name against one of the co-executors, for her share of a debt due by him to the defunct—Held, in the circumstances, that she was entitled to pursue the action, p. 30.

—See *Entail. Property. Declarator of.*

—TO OBJECT—See *Diligence.*

TRUST—Catholic Creditor—Ranking—A trust-settlement for family purposes, by a party who died insolvent, having been taken up by the trustees, and administered by them on a general understanding with the creditors, and for their behoof, a creditor holding a personal and heritable security for the same debt, claimed on the personal security for the whole amount. A multiplepointing was afterwards raised by certain creditors in name of the trustees, and the same creditor again lodged his claim to rank for the full amount of the debt, without deducting a payment which he had in the

meantime received from the heritable security—Held that the ranking was good, p. 78.

TRUST, LATENT—Reference to Oath—Construction—Process—Circumstances in which an assignation, alleged to have been granted in trust, was found to be onerous and valid by the deposition of the assignee, to whose oath it had been referred, p. 191.

—Succession—Testament—A testator conveyed his property to trustees, with an injunction to pay over the annual free proceeds to his daughter during her lifetime, or failing her to her children, till they attained majority, when the fee was to be paid over to them, and the trust was to cease, but expressly provided that the accounts of the trustees "shall be annually produced to, and examined by, an accountant of character and experience, to be chosen by the said trustees or trustee, and after being examined and passed by him, shall be fitted and docqueted by the said trustees or trustee, and which shall operate as a complete exoneration to them or him accordingly, it being hereby provided, that neither the said" daughter, "nor any other party, or person or persons whatsoever, shall have any right or title to inquire into, or interfere with the management, nor to quarrel or impugn the accounts of the said trustees or trustee, or their cashier or manager, or others acting under his or their authority, nor to object to any article for which they or he shall take credit, after the same has been examined and passed by the said accountant, as aforesaid"—Held that the daughter and her husband had no right to see the trustees' accounts and vouchers annually, before being audited and reported on by an accountant, and to have an opportunity of stating objections thereto, if necessary, and of being heard thereon, p. 406.

—Testament—Succession—Parent and Child—Revocation, p. 618.

—Trustees—Liability—Reparation—*Culpa lata*—Circumstances which were held to amount to gross negligence on the part of trustees, so as to render them personally liable for moneys lost to the trust-estate, notwithstanding of the protecting clause in the trust-deed, p. 115.

—Trustees—Powers—Liability—*Bona fides*—A party executed a trust-deed, in which he directed his trustees to invest the whole residue of his funds "in the purchase of lands in Orkney, or any other place they should judge expedient," and to convey them to his heir of entail. The trustees purchased the superior-duties affecting the entailed estate. It having been found that this was an improper application of the trust-funds, and that they must account to the heir of entail for the capital sum of money applied in the purchase—Held that they must also account for interest on the capital sum, according to the rate which had been payable on heritable bonds, p. 90.

—See *Process. Settlement. Succession. Title and Interest to Sue.*

TRUST-DEED—Revocation—Intention—An heritable property having been ineffectually conveyed by a trust-disposition and settlement, which revoked a previous settlement, only "in so far as inconsistent with these presents"—Held that the heir-at-law was excluded, and that the residuary legatee under the previous settlement was to be preferred, p. 209.

—Trustees, Discretionary Powers of—Process—

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—See *Husband and Wife.*

TRUST-SETTLEMENT—Heritable and Moveable—Provisions to Children—A party by his trust-settlement directed his trustees, "if it shall not have been done previously, to lend out on good heritable security the sum of £10,000, as soon after my death as possible, for securing payment of the yearly interest and produce to my widow;" 2d, "As soon as possible after the death of the longest liver of me and my said wife, if not previously done, to lend out the sum of £9000 for the security of provisions to my daughters." Lastly, "As soon after the death of the longest liver of me and my said wife as may be convenient, to convey and make over, in equal portions, to my sons A and B, the free residue of my estate, heritable and moveable." The wife survived the trustor. He himself left heritable securities to the amount of £7400; and the trustees, over and above, took heritable securities to themselves, amounting to £10,184. After the death of the widow, but before the division of the residue, A, the son, died intestate. In a competition between his heir and executors for the half of the residue—Held, 1. That the heritable securities left by the trustor himself were to be imputed *pro tanto* in making up the investment of £10,000 for the widow: 2. That after her death the said £10,000 was to be kept up to the amount of £9000, for the security of the

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Sequestration—Reparation—Damages—Process—Jury Trial.—A tenant under a lease, which contained an obligation on the part of the landlord to put the houses and buildings in good repair, and to make the fences on the farm fencible "betwixt and the term of Whitsunday next," fell into arrear of rent, and was sequestered, on which the tenant's agent, on 18th May, made the following tender in a letter to the landlord's agent: "Stop the roup in Gordon v. Grahams: and since we can't do better, I will advance the arrears and expenses myself, on your client granting an assignation, or giving me an obligation to grant one at my expense. My assignation not to compete with the landlord's right for the balance of the year's rent of which the above arrears form a part." And on the 24th May he repeated the tender in another letter. The offer was at last accepted, and the sequestration withdrawn on the 28th May. The tenant then brought an action of damages, and obtained a verdict against the landlord for not duly implementing the obligation in the lease relative to buildings and fences, and also for having failed, after the aforesaid tenders of rent, timeously to withdraw the sequestration. Exceptions were taken to the charge of the presiding Judge, *inter alia*, because he directed the jury, that after the tenders of 18th and 24th May, the landlord was "in law responsible to the pursuer for not withdrawing the sequestration *quoad* the sums contained in these tenders." The Court of Session, without deciding the question of law as to the landlord's liability involved in the direction, disallowed the bill of exceptions, holding that there were sufficient grounds to support the direction, in the whole circumstances of the case—Held (*reversing the judgment of the Court of Session*), that the direction was erroneous, in respect there was nothing in these tenders to raise a liability on the part of the landlord.—*Observed by the Lord Chancellor*, that the direction on the legal question of liability behaved to be judged of on the grounds on which it was put by the presiding Judge, and not in relation to the other circumstances of the case, p. 321.

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LOAN—Interest—Foreign—Accumulations.—A party, who was insane, died in India in 1810, leaving a sum of money in rupees in the hands of a house of agency there. His relations in this country, who were aware of the insanity, had, about the time of the death, of which they were not aware till long after, some correspondence with one of the partners of the company when in this country, in consequence of which, in 1812, they were put in possession of an account or doquet, signed by the firm, ascertaining the balance in their hands, as in April 1810, to amount to a certain sum, and specifying "to bear interest at 9 per cent. per annum,"—the figure "9" being written on an erasure. This doquet was admitted to be a valid probative document—Held (*affirming the judgment of the Court of Session*), 1. That the defender was bound by the account so rendered in 1812, and was liable for the sums

therein charged; and 2. That interest was due on these sums from 30th April 1810, at the rate of 9 per cent., to the date of final decree; but 3. (*reversing the judgment of the Court of Session*), That in calculating interest on the said amount, compound interest or annual rests ought not to be allowed, p. 427.

MANDATE—Expenses—Process—Foreign—A foreigner brought an action in this Court, and sisted a mandatory; and while the record was in the course of preparation, the mandatory lodged in process a minute of withdrawal as mandatory, which was not objected to, and a new mandatory was ordered to be sisted, but it afterwards appeared that at the date of lodging this minute the mandant had died, or was believed to have died abroad; his representatives failing to appear and sist themselves as parties—Held (*affirming the judgment of the Court of Session*) that the mandatory, though not entitled to carry on the action for the purpose of showing that no expenses would in the issue have been found due to the defender, was nevertheless liable to the defender in the expenses incurred by him in the process during the subsistence of the mandate. 2. That the mandatory was not entitled to be reponed against the judgment of the Court of Session finding him liable in these expenses, on the allegation that it had since been discovered that the mandant was still alive, p. 162.

MARRIAGE, CONSTITUTION OF—Husband and Wife.—A gentleman addressed the following letter to his house-keeper: "You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born, in consequence of the present connexion betwixt us." The letter was dated 1828, but not delivered till 1828, at which period a child had been born—the gentleman's averment being that he had antedated and delivered the letter for the purpose of making a third party, to whom he had promised marriage, believe that he could not fulfil his promise—Held (*affirming the judgment of the Court of Session*) that the letter was not sufficient, either *per se* or with reference to the facts proved, to constitute a marriage, p. 674.

Husband and Wife—Proof—Parole—Held (*affirming the judgment of the Court of Session*) competent for the defender in a declarator of marriage to prove the purpose for which, and the circumstances under which, a written declaration of marriage was given by him to the pursuer, p. 674.

OBLIGATION—See *Succession*.

PACTUM ILLICITUM—Public Officer—*Question*, Whether, where an office under the Crown is not itself assignable, the emoluments may legally be assigned or conveyed for behoof of creditors? p. 676.

PARENT AND CHILD—See *Testament*.

PASSIVE TITLES—Where three sisters were served as heiress-portioners of their father, for the purpose of conveying Scotch estate to the trustees of the marriage-settlement of one of them, in which settlement the father provided the heiress in one-third of his estate (subject to his power of disposal, legacies, &c.)—Held (*affirming the judgment of the Court of Session*) that the service inferred a legal representation of the father by all the sisters, and liability for his debts—the other sisters having joined in the service, and in conveying the Scotch estate in implement of a direction in the father's general settlement, from which they took benefit, p. 666.

PAYMENT, BONA FIDE—See *Diligence*.

POWERS AND LIABILITY—See *Public Officer*.

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PROCESS—A. S., 11th July 1828.—In an action of damages by a schoolmaster for alleged illegal dismissal, the cause, after being sent to the jury roll, was retransmitted, previously to trial, to the Court of Session, for the determination of certain points of law, and the Lord Ordinary having, in terms of the 65th section of the Act of Sederunt 1828, reported the cause on cases, the record being unclosed—Held competent for the Court, at that stage of the cause, to dismiss the action *de plano* as groundless, p. 431.

PARTIES CALLED—Held to be no objection to a process against heiress-portioners, for making them liable on

the passive titles for the ancestor's debts, that the trustees under the ancestor's settlement, who were resident in England, and vested by the settlement with a right to take up and administer the ancestor's whole estate, real and personal, had not been called, p. 667.

PROCESS—See *Landlord and Tenant. Mandate. Reparation.*
PROOF—Adminicle—A memorandum, made by and found in the repositories of a deceased country gentleman, of a conversation with a female about the real purpose of a letter intended to be used by her in a declarator of marriage, about which she had come to consult him—Held competent evidence, p. 674.

—See *Marriage.*

PROPERTY—See *Accretion.*

PROVISIONS—See *Husband and Wife. Testament.*

POORS' RATES—Liability—Statute 7 Geo. III. c. 27—Construction—Annexation—Held (*affirming the judgment of the Court of Session*) that by the Statute 7 Geo. III. c. 27, for extending the royalty of the city of Edinburgh, the lands of Hillside, thereby disjoined from the parish of South Leith and annexed to the parish of Saint Giles, in the city of Edinburgh, remain liable in payment of poors' rates to the parish of South Leith, and that not only on account of the *solum*, but also for the buildings erected thereon, p. 672.

PUBLIC OFFICER—Schoolmaster—Trustees—Powers and Liability—A testator left in trust a sum of money to certain parties "for the benefit of a charity or school for the poor" of the testator's native parish, but no conditions were inserted in the deed of bequest as to the way and manner in which these trustees were to execute the bequest. The trustees founded an institution for teaching, and appointed masters to continue at pleasure—Held, in an action of damages brought by one of the masters who had been dismissed (*affirming the judgment of the Court of Session*), that there was no obligation in law on the trustees to appoint *ad vitam aut culpam* only—that the pursuer's appointment was not *ad vitam aut culpam*, and action therefore dismissed, p. 431.

—See *Pactum Illicitum.*

REDUCTION—See *Husband and Wife. Trust, Latent.*

REPARATION—Damages—Wrongous Imprisonment—Process—Caption—Advocation—Amendment of Libel—Expenses—In an action of damages for wrongful imprisonment, on the ground that the pursuer had been apprehended under a process-caption issued by the Sheriff of Roxburghshire for recovering a process which had been advocated to the Court of Session, and was therefore under the control and jurisdiction of that Court,—the circumstances being, that a bill of advocation had been passed, but the letters had not been expedited within the ten days allowed by the Act of Sederunt, so that the bill fell, and a certificate to that effect was given out to the defenders,—and the Sheriff-Court process stood borrowed on a receipt by the pursuer, as a procurator there, in common form, to return it when called upon,—he not having complied with the regulation of the Act of Sederunt in case of an advocation, viz., to return the process to the Sheriff-clerk, that it might be transmitted to the Court of Session on an obligation by the complainer's agent for its redelivery when the advocation should be finally disposed of; and the pursuer having unwarrantably expedite his letters of advocation after the certificate that the bill had fallen had been issued—Held (*affirming the judgment of the Court of Session*), 1. That there was no relevancy to sustain a claim of damages; and, 2. That the pursuer was not entitled to state, after the record was made up, but not closed, a new objection which went to the nullity of the caption altogether, otherwise than by an amendment of the libel on payment of the whole previous expenses, p. 505.

RIVER—See *Accretion.*

SCHOOLMASTER—See *Public Officer.*

SECURITY—See *Trust, Latent.*

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STATUTES, 1581, c. 118—See *Diligence*; 1661, c. 24—See *Trust, Latent*; 7 Geo. III. c. 27—See *Poors' Rates.*

SUCCESSION—Vesting—Faculty—Obligation—Husband and Wife—Held (*reversing the judgment of the Court of Session*) that a clause in a postnuptial contract of marriage, by

which the husband bound himself to make payment to "his wife, or to any person or persons she shall appoint by a writing under her hand at any time in her lifetime, or without the consent of her husband, and that whether she survive or predecease him, and whether she have issue or not, of the sum of £3000 Sterling money, or such other lesser sum as she shall direct," vested the sum absolutely in her; and that, although she had not uplifted it during her life, nor disposed of it by any writing under her hand, it transmitted after her death to her next of kin, p. 433.

SUCCESSION—See *Trust-Settlement.*

SUPERIOR AND VASSAL—Circumstances in which the title of a vassal was sustained, who had entered with a superior whose title was defective, but had subsisted on record, unimpeached, for nearly forty years—had been twice declared by the Court of Session to be valid, and acquiesced in as such by parties having an adverse claim to it, p. 684.

—**Liferent and Fee**—Held competent for a superior, uninfert, to dispose the fee of the superiority to one party, and the liferent to another, *with power to the latter to enter vassals*; and the entry of a vassal by the liferenter in the exercise of this power, held to be effectual, p. 664.

TESTAMENT—Parent and Child—Provision to Children—Legacy—Lapsing—*Conditio si sine liberis*—Trust—Where a father, in a family trust-settlement, left special legacies to his younger children and *their heirs*, and the residue of his means and estate to his eldest son, but *without mentioning his heirs*, although it was provided in his favour that his share of the succession should amount to a sum greater than the largest provision of any of the younger children; the eldest son having predeceased his father some hours, leaving children—Held (*affirming the judgment of the Court of Session*) that his share of his father's succession did not lapse, but went to his children, notwithstanding the distinction made in the terms of the settlement between him and the younger children of the testator, and the fact that his children were alive at its date, p. 158.

—See *Husband and Wife. Trust.*

TRUST—Construction—Title to Sue—Assignment of Patent Office—Alimentary office—A party executed a trust-deed, by which he conveyed, for behoof of creditors, his whole estate, heritable and moveable, and without prejudice to the generality, certain heritable and other subjects specified in the deed, and he bound himself to grant such deeds thereafter as the trustee should think necessary for the more effectual execution of the trust. The truster, at the date of the trust, held the office of keeper of a local register of seisins by patent under the Crown, but no mention was made in the trust-conveyance of the emoluments or right to the office. The trustee having brought an action to compel the truster to account for the emoluments—Held (*reversing the judgment of the Court of Session*), on a construction of the trust-deed, that neither the office nor emoluments were carried by the deed, and consequently, that the trustee had no title to pursue.—*Opinion*, That the clause as to granting other deeds was merely to render the trust more effective in its execution, so far only as the subjects actually conveyed by the principal deed were concerned, p. 676.

—**LATENT**—Bankrupt—Statute, 1661, c. 24—Reduction—Completing Titles—Ancestor—Heir—Guarantee—Security—Cash-Credit—Thomas Allan, partner of the firm of Robert Allan and Son, bankers in Edinburgh, was infert as absolute proprietor of two estates which were purchased by him with funds belonging to the firm, and in the books of the firm, accounts were kept relative to, and in the name of these estates, in which the disbursements by the firm, in the purchase-money, improvements, &c., were put to the debit, and the rents drawn were carried to the credit of the accounts. Robert Allan and Son got a cash-credit from the Royal Bank, and in security and repayment of their operations thereon, gave their joint bond as a company and as individuals—Thomas Allan at the same time disposing one of the foresaid estates in further security. In less than a year after Thomas Allan's death, his son and heir, also a partner of the firm, which was continued under the same name after Thomas's death, granted to the Royal Bank a second bond and disposition in security

over the two foresaid estates, in consideration of an additional loan to the firm—Held (*affirming the judgment of the Court of Session*), 1. That these estates were the private property of the deceased partner, and not held in trust by him for the company: 2. That being so, the conveyance by his son, within a year after his death, was null and void, under the second branch of Statute 1661, c. 24, prohibiting dispositions by apparent heirs to the prejudice of their ancestor's creditors: 3. That the company was dissolved by the death of the partner, and that without any notification to the public or to customers, although the articles of copartnership provided specially, "that in the event of the death of any partner, his heirs shall not be entitled to examine the books of the company; but the survivors shall make up a statement of the deceased's account, counting up to the first balance after the decease, and attest the same by their signatures or oath, if required; and such statement, signed and attested, shall be held as sufficient, and shall preclude any right to further examination by the heirs or others:" 4. That the first bond and disposition in security was not a continuing guarantee, but became inoperative on the death of the partner by the change in the company which then took place; and, 5. That the cash-credit having been operated upon subsequently to the death of the partner, in the same manner and under the same firm as before, and the account being kept by the bank as a continuous account, a balance standing against the company at the date of the partner's death was cleared off by payments afterwards made by the surviving partners. 6. Observed by the Lord Chancellor, that the principle recognised in the case of *Devaynes v. Noble*, 1 Merivale, 530, is applicable in its full extent to the present case, p. 216.

TRUST—SETTLEMENT—Succession—Construction—Annuity—A party having left a trust-settlement, with directions to lay out capital sums to answer annuities of £200, £400 and £400, for his three sisters, and if the residue of his estate should not be sufficient for yielding the annuities, to pay the interest arising on the whole residue to the sisters, in proportion to the annuities provided to them; and also with directions to pay the capital sums laid out for producing the annuities to certain residuary legatees, as and when the sums became tangible by the death of the said annuitants respectively; and one of the annuitants having predeceased the truster, and another having died during the subsistence of the trust; and it not being ascertained before the accounting was completed, whether the annual income arising from the estate while both the annuitants surviving the testator were alive, would be sufficient to satisfy their annuities for that period in full—Held (*altering the judgment of the Court of Session*) that during the continuance of the trust, the annuitants could only divide among themselves the income of the estate as far as it would go, and that upon the death of one of them, the share or capital which was invested to secure the payment of that annuity became tangible and payable to the residuary legatees; and cause remitted to the Court of Session with a declaration to that effect, p. 222.

Testament—Entail—Jurisdiction—Foreign—Executry—Administration, Right of—A testator left a general trust-deed of his heritable and moveable property, wherever situated, in favour of trustees, for certain purposes,—the trust to be subject to any entail of the heritage which he might execute, and which, it was declared, should be held and taken to be a part of the trust. The testator subsequently executed an entail. On his decease, the trustees named in the trust-

deed declined to act. The heiress of entail first entitled to succeed made up titles under the entail and was infeft, and likewise confirmed to the moveables in Scotland, and administered to the personalty in England. With consent of all concerned, including the said heiress of entail, new trustees were appointed by the Court in place of those who declined to act. These new trustees then brought two actions against the said heiress of entail; the first, to have it declared that the whole property, funds and effects belonging to the testator in Scotland, England, and elsewhere, *including the funds and effects held by the said heiress of entail under the letters of administration*, pertain to, and are vested in the pursuers in trust; and the second, to have it declared that the pursuers are entitled to all the powers given to the trustees named in the trust-deed, and as such, to make up titles to the lands in which the said heiress of entail was infeft, and to obtain themselves seized therein, so as to carry into effect the purposes of the trust—Held (*reversing the judgment of the Court of Session*) that the power of appointing persons to recover and administer property situated in England is vested exclusively in the ecclesiastical courts of that country, and therefore, that the administration of the testator's property in England must remain with the said heiress of entail, by virtue of the letters of administration held by her; but, 2. (*affirming the judgment of the Court of Session*), that notwithstanding the infeftment of the heiress of entail under the entail, it was feudally competent for the trustees to obtain themselves seized in the whole lands, *qua* trustees, in order to effect the objects of the trust, p. 164.

TRUST—Trustees, Liability of—Factor—Principal and Agent—A trust-deed of a very extensive property, and involving very considerable trouble, provided the three trustees named in £100, to be divided among them annually, as a gratification for trouble. The deed contained a clause of the following nature: The trustees "shall noways be obliged to do diligence, otherwise than as he or they shall think fit, nor shall he or they be liable for omissions, but only each of them for himself, and his own actual and personal intromissions, nor shall they be farther liable for their factors than that they shall be habit and repute responsible at the time of entering upon their office." The trustees named in the deed appointed one of their own number to be factor, another to be cashier, and a third to be country agent; and they appointed an accountant, with a salary, to audit the accounts annually. The factor and cashier, by authority of the trustees, were to get an annual salary for these offices; that of the cashier amounted to £50. The trust-deed gave no authority for the creation of these offices in the persons of the trustees themselves. Considerable balances were allowed to accumulate in the factor's hands from year to year, with which circumstance the trustees were acquainted. Ultimately the factor became bankrupt, with a large balance in his hands—Circumstances in which held (*affirming the judgment of the Court of Session*), 1. That the trustees were not liable to make up the deficiency; and, 2. That the fact of one of the trustees being cashier, with a salary, and thereby having a special superintendence over the factor, did of itself, without proof of wilful misconduct, infer liability against him, p. 535.

TRUST—See Testament.

TRUSTEES—See Public Officer. Trust.

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